

January 1965

Right of a Foreign Corporation to Sue upon Contracts in Montana Courts - Doing Business - Failure to Qualify - Subsequent Qualification

David N. Niklas

Follow this and additional works at: <https://scholarship.law.umt.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

David N. Niklas, *Right of a Foreign Corporation to Sue upon Contracts in Montana Courts - Doing Business - Failure to Qualify - Subsequent Qualification*, 26 Mont. L. Rev. (1964).

Available at: <https://scholarship.law.umt.edu/mlr/vol26/iss2/5>

This Note is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Montana Law Review by an authorized editor of The Scholarly Forum @ Montana Law.

**RIGHT OF A FOREIGN CORPORATION TO SUE UPON CONTRACTS
IN MONTANA COURTS—DOING BUSINESS—FAILURE TO
QUALIFY—SUBSEQUENT QUALIFICATION.**

INTRODUCTION

Anyone who is at all familiar with corporation law is probably aware of the maxim that corporations are "creatures of statute," and as such, their rights, duties, and powers are limited by the statutory provisions of the particular state under which it is chartered. Perhaps less well known is the duty of a corporation to comply with certain "qualification" statutes when it does business in a jurisdiction other than the state of incorporation. The recent Montana case of *Greene Plumbing & Heating Co. v. Morris*¹ provides a good illustration of the severe consequences which can, and often do result from a failure to meet these qualification requirements. That case held that an Idaho corporation which had built a motel in Montana without qualifying to do business, was not entitled to enforce mechanics liens against the motel. This decision was one step beyond the general rule of merely treating contracts made by non-qualifying foreign corporations as unenforceable. The Montana Supreme Court concluded that an enforceable lien must be based on a valid contract; and since the contracts here were not enforceable, neither were the liens.²

Generally speaking, the effect of non-compliance leads to a variety of results, depending upon the statutes of the different states. At least forty-five states and the District of Columbia regard a failure to qualify as a bar to recovery in a suit by the foreign corporation upon a contract with a resident of that state.³ The majority of these jurisdictions, however, allow removal of the bar by subsequent qualification.⁴ Montana law in this regard is unsettled, there never having been a state decision on the effect of subsequent compliance with the statutes. However, in

¹395 P.2d 252 (Mont. 1964). See in this regard, the Michigan case of *Bilt-More Homes, Inc. v. French*, 130 N.W. 2d 907 (1964), which denied a foreign corporation the right to foreclose a construction lien because it had failed to (1) qualify to do business, and (2) had failed to obtain a valid builder's license. The court denied relief in spite of the fact that the corporation had been mistakenly issued a license by the Michigan Corporation and Securities Commission; since the corporation had failed to qualify, no valid license could have been issued, and thus the one issued by mistake was null and void.

²*Green Plumbing & Heating Co.*, *supra* note 1, at 259.

³*Statutory Restrictions on Enforcement of Contracts*, 23 CORP. J. 323, (1963). It should be noted that suits on other causes of action may be permitted, such as to protest a tax levy, or to protect its property from other threats. *Powder River Cattle Co. v. Custer County*, 9 Mont. 145, 22 Pac. 383, 384 (1889). See also a federal district court case where the plaintiff was allowed to make a rescission of the contract, and seek restitution on equitable grounds. *Pellerin Laundry Machinery Sales Co. v. Hogue*, 219 F. Supp. 629 (D. Ark. 1963).

⁴Thirty six states and the District of Columbia allow the corporation to bring suit upon subsequent filing. These states are: Alaska, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. 23 CORP. J., *supra* note 3, at 323-24.

1953, a federal district court, in the case of *Hutterian Brethern v. Haas*, interpreted the Montana statute to mean that qualification subsequent to doing business in the state will not validate contracts made prior to the "doing of business."⁵ In the *Greene* case, there was never an attempt to qualify, so the court was not required to rule on the question of late filing. The *Hutterian* case was cited, however, indicating that Montana might accept the federal court's interpretation of the statute involved. This discussion will examine some of the preliminary matters in this area, and will attempt to explain why the *Hutterian* decision should not be followed by Montana courts.

DOING BUSINESS

In arriving at the decision in the *Greene* case, the Montana court first had to conclude that the plaintiff corporation was "doing business" within the state. Although no actual definition of the term was given in *Greene*, an earlier case, *State ex rel. American Laundry v. District Court*, explained "doing business" in these terms:

In a general way it may be said that the business must be such in character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served, and in which it is bound to appear when a proper agent has been served with process. * * * * It has been said that 'doing business' implies . . . such as might be evinced by the investment of capital in the state, with the maintenance of an office for the transaction of business and these identical circumstances which attest the corporate intent to avail itself of the privilege to carry on a business.⁶

⁵*Hutterian Brethern of Wolf Creek v. Haas*, 116 F. Supp. 37 (D. Mont. 1953).

⁶*State ex rel. American Laundry Machinery Co. v. Second Judicial District Court*, 98 Mont. 278, 41 P.2d 26, 29 (1934). Here the court, in determining whether the corporation was doing such business in the state as to require qualification, adopted the same test as used to determine if a corporation is sufficiently present in the state to effectuate service of process. This position was reaffirmed by a recent Montana federal district court decision, which stated, "In Montana the meaning of the term 'doing business in the state' is the same for regulation of corporations as for service of process, and the same tests are applied in determining whether a corporation is doing business in the state." *Minnehoma Financial Co. v. Van Oosten*, 198 F. Supp. 200, 203 (D. Mont. 1961), citing *State ex rel. American Laundry Co., supra*.

Montana is clearly in a minority in this respect; normally, different tests are applied to determine whether a state may (1) levy a tax on the corporation, (2) subject it to service of process, or (3) require it to qualify before doing business in the state. *Three Kinds of Doing Business*, 23 CORP. J. 163, (1962). This article said at 163:

The greatest amount of business activity is required to subject a corporation to the qualification requirements. Where a corporation's activities in a state are sufficient to require qualification, it follows that the corporation will also be amenable to service of process in the state and to the taxing jurisdiction of the state.

The tests applied by the courts to decide these questions vary. In a very general way it can be stated that the question of service of process on an unlicensed foreign corporation turns on 'traditional notions of fair play and substantial justice', and that jurisdiction of the state to tax an unlicensed foreign corporation engaged exclusively in interstate commerce depends on the corporation's "nexus" with the state.

See also, *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

From a reading of the *Greene* decision, one is left with the conclusion that the term refers to any activity by a foreign corporation which is not classified as interstate commerce, or which fails to qualify under the "single transaction" rule. Early federal cases have established that the states may not regulate the activities of corporations engaged strictly in interstate commerce. The United States Court of Appeals in 1906 stated:

[A] corporation not created under the laws of a state, or not doing business in that state under conditions that subject it to process from the courts of that state, is within the meaning of the provision of the fourteenth constitutional amendment, declaring that no state shall "deny to any person within its jurisdiction the equal protection of the laws". . . . Nor will such state statutes be permitted to interfere with the Constitutional rights of Congress "to regulate commerce with foreign nations and among the several states."⁷

The court in the *Greene* case gave full recognition to the interstate commerce exception, when it stated: "for this court to find that Lindsey and plaintiff, . . . violated sections 15-1701 and 15-1703, *supra*, it is necessary to find that (1) Lindsey and plaintiff were 'doing business' within Montana . . . and (2) that they were not excluded from complying with the above statutes due to the fact of their activities being interstate commerce. . . ."⁸ Further, it was said that: "A state is without power to exact conditions or place burdens upon the exercise of interstate commerce."⁹ It is also important to note that the mere fact a corporation is engaged in interstate commerce will not excuse it from qualifying if it also conducts activities that are purely local in character.¹⁰

If a corporation is engaged in both interstate and intrastate business, it must meet the qualification requirements to protect the validity of its local contracts. However, Montana does recognize that if the activity is "incidental" to interstate commerce, it remains within the protection of the commerce clause of the Constitution.¹¹ Quite obviously, a fine line exists between purely local activity, and that which is incidental to interstate commerce. Since the question of "doing business," at least in Montana, is left to the court to determine,¹² this is an area where foreign corporations will be at the mercy of the trial judge's discretion.

⁷*Kirven v. Virginia-Carolina Chemical Co.*, 145 Fed. 288, 292 (4th Cir. 1906). See also *Blake v. McClung*, 172 U.S. 239 (1898). However, this does not prevent the states from requiring the corporation to appoint an agent, upon whom service of process can be served. The corporation is not immune from service of process even if it is engaged only in interstate commerce. *International Harvester Co. v. Kentucky*, 234 U.S. 579 (1914).

⁸*Supra* note 1, at 257.

⁹*Id.* at 259.

¹⁰*Ibid.*

¹¹*Ibid.*

¹²"The determination whether plaintiff was doing business in the state of Montana within the purview of section 15-1701 . . . were questions of law" *Union Interchange Inc. v. Parker*, 138 Mont. 348, 357 P.2d 339, 343 (1960). It should be noted that this rule is not in accord with a United States Court of Appeals decision which said, "It should have been left for the jury to find whether or not these activities constituted the carrying on of business in Michigan." *Brown v. Farmer and*

As is true with the interstate commerce exception, when a foreign corporation is performing an isolated transaction in a state, it is not normally required to qualify.¹³ Montana follows this general rule, as was indicated in the *American Laundry Case*,¹⁴ and again in the *Greene* decision. In the former case, the court stated very simply that "Isolated transactions do not constitute a doing of business within the meaning of the statute; it contemplates a more or less continuing course of business."¹⁵ In *Greene*, the court acknowledged the existence of this rule, but said it would not apply in that case, "since the general rule is that corporations performing construction contracts are 'doing business' even though they perform but a single contract, and therefore are subject to compliance with state laws regulating the doing of business by foreign corporations."¹⁶ Thus, whenever a foreign corporation comes into Montana to perform even a single construction contract, it will clearly be proceeding at its own risk if it fails to qualify.

Depending on the wording of their particular statutes, states have barred recovery on the basis that the contract entered into before qualification was either completely void, or merely unenforceable.¹⁷ Treating the contract void, although the simpler penalty, is of course, also the more severe. Once the contract is declared void, subsequent qualification will not validate it. On the other hand, if a contract is merely treated as unenforceable, it can often be validated by meeting certain conditions. Where the court declares the contract to be merely unenforceable, several situations can arise: (1) The corporation may never file the proper information. This situation is disposed of uniformly by all states; since the contract is unenforceable without qualification, the corporation can never expect to obtain relief. (2) The corporation may file after entering into the contract, but before suit; thirty-seven jurisdictions will remove

¹³*Isolated Transactions*, 23 CORP. J. 243, (1962).

¹⁴*Supra* note 6, at 29.

¹⁵*Ibid.* See *Dover Lumber v. Whitcomb*, 54 Mont. 141, 168 Pac. 947 (1917), and also the case of *Gen. Fire Extinguisher Co. v. Northwestern Auto Supply Co.*, 65 Mont. 371, 211 Pac. 308, 310 (1922), where the court gave the explanation that "isolated transactions, whereby a foreign corporation sells goods or other manufactured products on sample or specifications, the same being fabricated in another state and shipped into this state by such corporation for use or installation, does not constitute the doing of business in this state, within the contemplation of the statute."

¹⁶*Supra* note 1, at 258. This is an understandable exception to the "isolated transaction" rule since normally the performance of construction contracts involves a considerable length of time, and numerous activities are necessary to complete the project.

¹⁷It often happens that the case law, and even some statutes do not recognize the different meaning of these two terms. To avoid confusion in this discussion, the term "void" will mean absolutely nugatory and ineffectual. The word "unenforceable" will denote situations where the contract is not entirely nugatory, but where the courts simply will not enforce the contract until certain conditions are met.

It is interesting to note that Alabama, Hawaii, Idaho, Maryland, Nevada, and Wisconsin, in addition to refusing to enforce a contract of this type, also place restrictions on a non-qualifying corporation to *defend* a suit. The statutes of Nevada and Wisconsin state that such corporations shall not be allowed to defend any action until it shall have fully complied. The restrictions imposed by Hawaii, Maryland, and Idaho deny the corporations the benefits of a statute of limitations. In Alabama the corporation is not entitled to set up the defense that the contract was made in violation of law. *Right to Defend Suits*, 23 CORP. J., (1963).

the bar by qualification anytime before suit.¹⁸ (3) Most courts hold that filing after suit has commenced is too late; however, a small number of states will remove the bar, even upon qualification during the suit.¹⁹

Until recent years, it was important whether the contract was treated as "void" or "unenforceable" when the suit reached federal courts on the basis of diversity of citizenship. For a number of years, if the contract were treated as void by the state court, the federal court also recognized it as void for all purposes. However, if it were merely unenforceable in state court, the federal court would grant relief. This is no longer the rule. Now if the state court refuses to enforce a contract, the federal court will likewise deny relief, regardless of whether the state treats the contract as "void" or "unenforceable."²⁰

QUALIFICATION IN MONTANA

In examining the Montana law in this area, the logical point of departure is the principal Montana statute involved, which states:

Contracts void if made before compliance with the act. If any foreign corporation shall attempt or commence to do business in this state without having filed said statement, certificate,

¹⁸23 CORP. J., *supra* note 3, at 323-24.

¹⁹*Ibid.*

²⁰A 1905 Supreme Court case stated, in regard to a New York statute requiring a foreign corporation to obtain a certificate to do business: "[T]he purpose of the act was not to avoid contracts, but to provide effective supervision and control of the business carried on by foreign corporations . . . no penalty for non-compliance was provided, except the suspension of civil remedies in that State, and none others would be implied." *Allen v. Alleghany Co.*, 196 U.S. 458, 465 (1905). This same view was again set forth a few years later, when the Court said in *David Lupton's Sons Co. v. Auto. Club of America*, 225 U.S. 489, 499-500 (1912):

It must follow, upon the similar construction of sec. 15 as it read at the time of the transaction in question, that the Lupton Company, whether or not it was doing a local business in New York, had the right to bring this suit in the Federal Court. The State could not prescribe the qualifications of suitors in the courts of the United States, and could not deprive of their privileges those who were entitled under the Constitution and laws of the United States to resort to the Federal courts for the enforcement of a valid contract.

This line of thinking came to an end with *Erie v. Tompkins*, 304 U.S. 64 (1938), which held that in federal diversity suits the substantive law of the states was to be followed. Federal courts treated the "right to sue" as a substantive right, and denied the foreign corporation the right to sue whenever that right had been denied in the state court. As stated in *Angel v. Bullington*, 330 U.S. 183, 192 (1946):

Cases like *Lupton* are obsolete insofar as they are based on a view of diversity jurisdiction which came to an end with *Erie* . . . That decision drastically limited the power of federal district courts to entertain suits in diversity cases that could not be brought in the respective State courts or were barred by defenses controlling in the State courts.

The case of *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945), said that for purposes of diversity jurisdiction a federal court is actually only another court of the state. And in *Woods v. Interstate Realty Co.*, 337 U.S. 535, 538 (1949), the Court said that:

[W]here in such cases one is barred from recovery in the state court, he should likewise be barred in the federal court. The contrary result would create discriminations against citizens of the State in favor of those authorized to invoke the diversity jurisdiction of the federal courts. It was that element of discrimination that *Erie R. Co. v. Tompkins* was designed to eliminate.

and consent, required by this act, or without complying with any or all of the laws of Montana relating to the payment of fees or licenses, no contract made by such corporation, or any agent or agents thereof, during said time, shall be enforceable by the corporation until the foregoing provisions have been complied with.²¹

In attempting to establish the correct interpretation of the statute, three questions must be answered: First, what is meant by the terms "void" and not "enforceable"? Second, what effect does the heading of a statute have on its over-all meaning? Third, what is meant by the phrase, "until the foregoing provisions have been complied with"?

In answer to the first question, the term "void," in its strict sense, "can only be applied to those contracts that are of no effect whatsoever, such as are a mere nullity, and incapable of confirmation or ratification."²² A contract which is not "enforceable," on the other hand, means something less than a complete nullity, as is evident from those states which treat a contract as unenforceable before qualification, but which recognize it as valid and enforceable upon subsequent qualification.²³ In a sense, an unenforceable contract is one that is dormant, but which, by the fulfillment of certain conditions, can be converted into an agreement which will support a suit to enforce rights arising under it.²⁴

Turning to a consideration of the second question, it is apparent that contradictory terms appear in the above statute; the word "void" is used in the headnote, while the body says the contract is not "enforceable." The law is well settled that the *body* of the statute controls its meaning. Although Montana apparently has no cases dealing with the effect of statute headings, this state has several decisions holding that *titles* of statutes may be used as an aid in interpreting statutes only if its plain meaning cannot be determined from the *body*.²⁵ Moreover, federal cases hold that headings of statutes, like their titles, are not permitted to gov-

²¹REVISED CODES OF MONTANA, 1947, § 15-1703. See also R.C.M. 1947, § 15-1701 and § 15-1702 for an explanation of the documents and information that must be filed by the corporation to properly qualify. (Hereinafter REVISED CODES OF MONTANA will be cited R.C.M.)

²²BLACK, LAW DICTIONARY (4th ed. 1951).

²³*Supra* note 4.

²⁴*Schluter v. Sell*, 194 S.W.2d 125, 128-29 (Tex. 1946). There is a dearth of authority as to the precise meaning of "enforceable," when used to describe the force and effect of contracts. Normally contracts are distinguished as either being "void" or "voidable". However, by the way of analogy, the *Schluter* case deals with the enforceability of judgments of one state in a different state; this case speaks of "unenforceable" judgments as dormant, which could be revived by performing certain conditions.

²⁵"We concede the rule to be that, if the language of the statute needs construction, resort may be had to its title as an aid. If the legislative intention can be determined from the plain meaning of the words of the statute, the court may not apply other means of interpretation." *State ex rel. Bd. of Comm'rs. v. Bruce*, 106 Mont. 322, 77 P.2d 403, 408 (1938). "While the title to the measure might be said to be more comprehensive than the body thereof, it is the wording of the body and not that of the title which controls . . ." *State ex rel. Jones v. Erickson*, 75 Mont. 429, 244 Pac. 287, 296 (1926). See also *State ex rel. Palagi v. Regan*, 113 Mont. 343, 126 P.2d 1818 (1942).

ern the meaning of the statute. The United States Supreme Court has held that:

[H]eadings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis. Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner; to attempt to refer to each specific provision would often be ungainly as well as useless. . . . Factors of this type have led to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text.²⁶

One reason for such a rule is that often the headings are not drawn up by the legislature, but are added in the process of publication. The California court recognized this fact when it said, concerning one of its statutes: "The headings to this section are indicated as enclosed in brackets, and are not to be regarded as official * * * * Evidently they are inserted in the code by the publisher and as such they are not binding upon the courts."²⁷

Even more significant, however, was the statement of the court as it continued to say that, "Even if the heading of this section were contained in its official enactment, it would not govern, limit or modify nor in any manner affect the scope, meaning or intent of said section."²⁸

In spite of this general rule that the headings are not controlling, in the *Hutterian* case, the federal court interpreted the Montana statute to mean that contracts made by foreign corporations before qualification were void.²⁹ It is clear that in arriving at this conclusion, a great deal of weight was given the heading of the statute. In distinguishing the Montana statute from those of other states, the court said, "the latter [Montana] statute say that contracts are void if made before compliance with the act. . . ."³⁰ Further, the court continued with the language, "The Montana statute is even stronger because it in express terms declares the contract void."³¹ Again, it is imperative to remember that the term "void"

²⁶Bhd. of R.R. Trainmen v. Baltimore & O. R.R., 331 U.S. 519, 528-29 (1947).

²⁷*In re Halcomb*, 21 Cal. 2d 126, 130 P.2d 384, 386-87 (1942). The heading of the Montana statute evidently originated through publication of the statute. In the 1901 session law, there is no heading to the bill. Laws of Montana 1901, S.46, § 3, at 151. This session law later became section 4415 of the 1907 Codes of Montana. However, this Code section appeared with the heading. There are no session laws between the 1901 bill and the 1907 Code which adopts the heading as part of the statute. In 1921, however, the heading was formally incorporated into the statute by a session law. Laws of Montana 1921, ch. 264, § 2, at 600. Nevertheless, as stated in the *Halcomb* case, the *body* is the controlling part of the statute, even if the heading was contained in the official enactment of the statute.

²⁸*In re Halcomb*, *supra* note 27.

²⁹*Supra* note 5. Although the term "void" was not used, because subsequent qualification is not effective, the practical result of the case is to render such contracts completely ineffectual, and thus "void."

³⁰*Id.* at 41.

appears only in the statute's heading, which does not control the meaning of that statute.

It is also interesting to note that in arriving at this conclusion, the court began with the proposition that there is "good authority to the effect that when a foreign corporation deliberately and wilfully violates a statute of this nature that a compliance with the act years later is not sufficient and of no avail to the corporate offender."³² It is significant that only one Montana case was cited as authority for this rule. That case was *McManus v. Fulton*, which contains the comment that "A contract expressly prohibited by a valid statute is void. This proposition has no exception, for the law cannot at the same time prohibit a contract and enforce it."³³ As admitted by the court in *Hutterian*, the *McManus* case does not deal with a foreign corporation. Thus the rights and powers of the corporation in *McManus* were in no way determined by the statute dealing with foreign corporations. On the other hand, the decision in *Hutterian* had to be reached by interpreting this statute, which definitely calls for a different result than the one arrived at in *McManus*.

Although not cited by the court in the *Hutterian* case, the early decision of *Powder River Cattle Co. v. Custer County*, said in regard to a similar matter: "That which is prohibited is the conducting of business; and, when the law is violated, then all 'acts and contracts' in the conduct of business are void."³⁴ Once again, however, this case is not directly in point, for two reasons: (1) There was never an attempt to qualify; (2) Since the foreign corporation was bringing suit to recover taxes paid under protest the suit was allowed because the corporation was not attempting to sue on a contract. Thus, the above quotation was mere dictum. However, it was undoubtedly a correct interpretation of the law at that time, since it was based on a statute which stated: "and all acts and contracts made by such incorporation . . . during the time it shall so fail and neglect to file said statements and certificates, shall be void and invalid as to such incorporation."³⁵ In 1901 the wording of this statute was changed to read, "no contract made by such corporation . . . shall be enforceable by the corporation until the foregoing provisions have been complied with."³⁶ This statute, as amended, was re-enacted in 1907,³⁷ 1921,³⁸ 1935,³⁹ and again in 1947.⁴⁰ In each of these re-enactments, the body of the statute continued to refer to the contracts as not "enforceable." In addition to omitting the word "void," the phrase "until the foregoing provisions have been complied with," was added for the first time

³²*Id.* at 40.

³³85 Mont. 170, 278 Pac. 126, 130 (1929).

³⁴*Powder River Cattle Co. v. Custer County*, *supra* note 3, at 384.

³⁵Laws of Montana 1877, 5th div., ch. 24, § 444, at 722.

³⁶Laws of Montana 1901, S. 46, § 3, at 151.

³⁷*Ibid.*

³⁸Laws of Montana 1921, ch. 264, § 2, at 600.

³⁹*Ibid.*

⁴⁰R.C.M. 1947, § 15-1703. See also sections 15-1701 to -1702 for an explanation of the documents and information that must be filed by the corporation to properly qualify.

in the 1901 session law. These two changes which were included in the 1907 Code, and which continue in the present statute, certainly should be treated as indicating a change in legislative intent. Nevertheless, the *Hutterian* case followed the broad, general language set forth in the earlier decisions and declared that such contracts are void.⁴¹

In addition to the different terms used in the headnote and the body of the Montana statute, it is significant that, as mentioned above, it contains the words, "no contracts made by such corporation during said time, shall be enforceable by the corporation *until the foregoing provisions have been complied with.*"⁴² (Emphasis added.) The plain meaning of this phrase would seem to permit qualification at any time after the contract was formed. This interpretation was suggested in *Hutterian*, but was rejected, the court saying that, "'during said time' . . . means during the time it was required to comply, and during such time such contracts will not be enforceable, until such foreign corporation does comply, and *compliance must be made before any attempt to do business.* * * * * This seems to be a plain and sensible interpretation of the language of that section."⁴³ (Emphasis added.)

According to this explanation, a contract can be entered into without qualifying, and if, before the corporation "does business" in the state, it does so qualify, the contract is then enforceable. Once the corporation begins doing business, qualification will no longer be effective to render a prior contract enforceable. The court in the *Hutterian* case does not explain just how it arrived at the conclusion that "compliance must be made before any attempt to do business." The wording of the statute does not require such a conclusion, on the contrary, there is no terminology whatsoever in the statute limiting this opportunity to a time prior to the doing of business. A sensible and meaningful interpretation of these words is that qualification is permitted any time after the contract is formed.⁴⁴

PURPOSES OF THE STATUTE

Aside from the wording of the statute itself, a more liberal interpretation of R. C. M. 1947, section 15-1703 can also be justified by examining the goals or purposes which it is designed to accomplish. Probably the primary function of the statute is to place a degree of state control on foreign corporations in an attempt to protect the state's residents from fraudulent or unduly hazardous corporate activities. Refusing a corpora-

⁴¹*Supra* note 5. There is also authority to the effect that contracts which are not wrong in themselves nor against public policy, yet which have been declared "void" by statute for the protection of a certain class of persons, are not actually void, but merely voidable. BLACK, LAW DICTIONARY (4th ed. 1951); *United States v. New York & Puerto Rico S. S. Co.*, 239 U.S. 88, 93 (1915).

⁴²*Supra* note 21.

⁴³*Supra* note 5, at 40-41.

⁴⁴For the reasons developed in the remaining portion of this discussion, permitting the corporation to qualify even during a suit on the contract would not be an unreasonable rule.

tion the right to sue on a contract is no doubt an effective control, and should serve as a warning to other corporations which may do business in Montana in the future. It would seem that the desired control could be provided merely by charging the corporation with a misdemeanor, as provided for in R. C. M. 1947, section 15-1705. This of course would result in a fine levied against the corporation. The same result could possibly be accomplished even more easily by a late filing fee, assuming the corporation desired to conduct future business in the state, and would so qualify. Under either of the latter two remedies, the deterrence factor would still exist, and at the same time, a secondary function of the statute, that of raising revenue, would be promoted.

Because the same punitive element of that statute is applied to all situations, the *Hutterian* rule imposes an unduly harsh penalty where the failure to comply was the result of a mistake or oversight. Confining the penalty to a fine and allowing subsequent qualification, would provide a moderate penalty, and at the same time allow the corporation a method of correcting its mistake. Also, a rule which encourages the performance of contracts should have value in attracting foreign corporations into this state. At least it should improve the state's image in its dealings with out-of-state firms; and it goes without saying that this "image" is important to any state desiring to attract new industry.

Under the rule established in the *Hutterian* case, the party who has breached the contract, and who may have received all the advantages and benefits of that contract, is allowed to escape without making any compensation whatsoever to the foreign corporation. Perhaps the most desirable aspect of limiting the penalty to a fine, would be the equity accomplished by holding accountable the person who has breached the contract. As between the corporation which has finally qualified to do business, and the second party to the contract, the equities are clearly in favor of the corporation, since the failure to qualify works no fraud or hardships on this other party. Also, under the federal court's explanation of the statute, there is always the danger that the second party may refuse to perform the contract simply because he has learned of the corporation's failure to comply. This is not only an inequitable situation, but is promotive of an unhealthy business climate.

For the above reasons, it is suggested that when the occasion arises for Montana to interpret its present qualification statute, it should adopt a rule permitting foreign corporations to enforce their contracts upon qualification subsequent to the doing of business, and limiting the penalty to a reasonable fine, rather than one based on the harsh and incorrect interpretation given this statute by the federal court.

DAVID N. NIKLAS.

