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of the contract," or to select some other rule determining that question if it feels that there are sufficiently persuasive reasons therefore.

—Shelton R. Williams.

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**CORPORATIONS: WHEN MAY A MONTANA  
CORPORATION COLLECT ON ITS SUB-  
SCRIPTION CONTRACTS?\***

By a well established business practice in Montana a corporation generally commences business immediately upon receipt of the certificate of incorporation from the secretary of state. It is generally recognized that a corporation may sue on its pre-incorporation subscriptions as soon as it may begin business. Yet, the case of *Enterprise Sheet Metal Works v. Schendel*,<sup>1</sup> decided by the Montana Supreme Court in 1918, held that a stock subscriber was not obligated on his subscription until

<sup>2</sup>As has been noted previously the Supreme Court of Montana has never conclusively answered this question. However at least two Montana cases, *Bank of Commerce v. Fuqua* (1891) 11 Mont. 258, 28 P. 291; *U. S. Fidelity and Guaranty Co. v. Bordeau* (1922) 64 Mont. 60, 208 P. 947, contain *dicta* to the effect that validity of a contract will be determined by the law of the place of execution. In *McManus v. Fulton* (1929) 85 Mont. 170, 278 P. 126, the place of making and of performance were the same. But the court applies the law of that place as the law of the place of making rather than as of the place of performance; thus justifying the presumption that a Montana Court will look to the law of the place of contracting to govern essential validity. *Capital Finance Corp. v. Met. Life Ins. Co.* (1926) 75 Mont. 460, 243 P. 1061, does not shed much light either way, both Beale and Cormack claiming it as authority for their respective arguments. While not conclusive these cases would seem to justify Professor Beale's contention that Montana may tentatively be placed among the state's applying to the law of the place of contracting. *McDonald et al. v. McNinch* (1922) 63 Mont. 308, 206 P. 1096 applies §7935 to a strictly domestic case to determine the meaning of the parties, which supports the conclusion that the section does not necessarily state a choice of law rule. *Story v. Stanfield* (C. C. A. 9th, 1921) 275 Fed. 401, cites this Section in enforcing a contract which apparently it assumes was completed in Montana. But the exact ground upon which the court includes this Section in its reference to Montana law is not clear.

\*The writer wishes to acknowledge that Henry I. Grant, Jr., of the graduating class of 1940 made a helpful study of this problem during the Fall and Winter of 1939 and 1940.

<sup>1</sup>(1918) 55 Mont. 42, 173 P. 1059. The case simply gives effect to a frequently recognized common law defense against calls on either pre-incorporation or post incorporation subscriptions to an *original* issue (but apparently not to a subsequent increase in capitalization), and concludes that there was nothing in Montana law either requiring or justifying a change in the rule admitting that defense. *Dodd & Baker, Cases on Corporations* (1940) p. 848. This "implied con-

all of the original issue of the capital stock was subscribed. In support of this decision, the Court apparently agreed that it was necessary also to conclude that a Montana corporation cannot begin doing business until all of its capital stock has been subscribed.<sup>8</sup> It will be the purpose of this comment to show that the Court erred as to the liability of a stock subscriber on his subscription. This purpose will be accomplished by showing: (1) that a Montana corporation has a right to commence business upon receipt of the certificate of the secretary of state showing that articles of incorporation have been filed in his office; and (2) that certain statutory rights against the stockholders, given the corporation creditors, strongly indicate a corporate right to recover as soon as it creates legal creditors.

Unlike many states,<sup>9</sup> Montana has no statute expressly stating that the corporation must have either any particular amount of its stock subscribed or capital paid in before it may commence business. The problem, therefore, is one of determining the presumption to be drawn from this legislative silence.<sup>10</sup>

dition precedent" in the subscription was evolved by courts which assumed that, at the time, the general law uniformly required that all stock be subscribed for before the corporation could begin doing business and was predicated upon such supposed requirement. As noted more fully later, neither of the two leading cases relied on by the Court as best stating this common law defense, questions the interrelationship of these two rules. *Stoneham Railroad Company v. Gould* (1854) 2 Gray (Mass.) 211; and *Livsey v. Omaha Hotel Company* (1876) 5 Neb. 50. Further, the grounds originally put forth in the *Gould* case, justifying raising this condition precedent in the first place, would not be very persuasive on the courts today. See, note 21, *infra*.

<sup>8</sup>See *Enterprise Sheet Metal Works v. Schendel* (1918) 55 Mont. 42, 52, 173 P. 1059, 1062. In a comprehensive note on the present status of our implied conditions precedent in the subscription contract, the *Schendel* case is cited as declaring that a "mere statutory privilege of carrying on such activity as may be necessary or appropriate to acquire additional subscriptions is not enough" (to entitle it to collect on its subscriptions) saying in effect that the case stands for the propositions that even today a corporation in Montana cannot begin doing business until all its capital stock is subscribed for. *Dodd & Baker, Cases on Corporations* (1940) p. 847.

<sup>9</sup>TENN. CODE ANN. (1934) §3714 (5); New Jersey, 1 REV. STAT. (1937) §14:2-3; DELAWARE REV. CODE (1935) C. 65, §5 (4).

<sup>10</sup>The conclusion of the *Schendel* case that the corporation cannot commence doing business until all of the original capital stock is subscribed, seems to have been based on a finding that, by a "common law" rule, a corporation could not begin doing business until all of its original issue of stock was subscribed for, and that there was not enough evidence in our statutes that our Legislature had intended to change that rule to justify the Court in finding otherwise. It may be doubted, however, whether any such rule has ever existed generally in the United States. Although some decisions have purported to state such requirement (notably those first asserting the doctrine that a subscriber is not liable on his subscriptions until all of the original issue is subscribed for) other equally strong early decisions have

It is submitted that a proper construction of our pertinent statutes gives rise to a presumption that a Montana corporation may commence business without subscription of any particular portion of its capital stock. In interpreting the legislative intentment of these statutes, one must bear in mind the existence of the prevalent business practice of allowing a corporation to commence business upon the receipt of the certificate of the secretary of state. The reason advanced in support of this practice is that many corporations are organized under a plan which envisages expansion in the future and so the capital stock is calculated accordingly, to the end that only the portion needed for present purposes is put up for subscription. R. C. M. 1935, Section 5908 provides that upon the issuance of the certificate of the secretary of state showing that articles of incorporation have been filed, the associates and their successors shall be a body politic and corporate by the name stated in the certificate. Of an identical statutory provision, the Supreme Court of South Dakota has said:

“When the certificate specified in this section is issued, the corporation would seem to be perfected and possess all the powers of a corporation.” And further “The fact that our statute does not require of corporations the subscription to or payment of a certain portion of its capital stock before the corporation can transact business imposes upon persons dealing with the corporation organized under the laws of this state greater caution and vigilance, but this court cannot impose upon corporations a greater liability than is imposed upon them by law.”

Likewise, the Supreme Court of Iowa has said of such a statute:

ruled to the contrary. For the first position see: *People v. National Savings Bank* (1889) 129 Ill. 618, 22 N. E. 238; *Stoneham Railroad Company v. Gould* (1854) 2 Gray (Mass.) 211; *Livsey v. Omaha Hotel Company* (1876) 5 Neb. 50; *Eastern Products Corporation v. Tennessee Coal, Iron & RR. Corporation* (1925) 151 Tenn. 239, 269 S. W. 4, 40 A. L. R. 1485. For the second, see: *Thorton v. Balsom* (1892) 85 Iowa 198, 52 N. W. 190; *Johnson v. Kessler* (1898) 76 Iowa 411, 41 N. W. 57; *Moe v. Harris* (1919) 142 Minn. 442, 172 N. W. 494; *Bank v. Hall* (1878) 35 Ohio St. Rep. 159; *Singer Manufacturing Co. v. Peck* (1896) 9 S. D. 929, 67 N. W. 947; 2 FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS (1917) §892, p. 1561; RESTATEMENT OF BUSINESS ASSOCIATIONS, TENTATIVE DRAFT No. 3 (1932) §109, comment a. Modern textual authorities in treating the requirements of incorporation as being purely statutory seem to assume that there is no common law requirement that any particular amount of the capital stock be subscribed before commencement of business. BALANTINE, PRIVATE CORPORATIONS (1927) §15, p. 59. STEVENS, CORPORATIONS (1936) §22, p. 99.

\**Singer Manufacturing Co. v. Peck* (1896) 9 S. D. 929, 67 N. W. 948.

“The corporation may then lawfully commence business,—that is, exercise its corporate authority and power,—when its articles of incorporation are filed. Nowhere, is there an intimation in the statute that the authority and power cannot be exercised until all of its stock has been subscribed.’”

A leading Minnesota case<sup>1</sup> even more trenchantly declares that a corporation is entitled to begin doing business as soon as it files with the secretary of state proof of the publication of its articles of incorporation—Minnesota’s incorporation step equivalent to receiving the certificate of incorporation in Montana. It concludes that there is a resulting *de jure* corporation, necessarily with the right to do business.

Most persuasive, however, has been the comment of the Montana Supreme Court on the intendment of these statutes. The court both prior to and since the *dictum* of the *Schendel* case has given support to the interpretation contended for by this comment. Thus, in *Daily v. Marshall*, decided five years before the *Schendel* case, the court said:

“When these requirements (i. e. those stated in Section 5908, R. C. M. 1935) have been completed, the corporation becomes as to those who deal with it, *a living, active and responsible entity*”; and then said, “When a corporation has regularly been brought into existence it is not deprived of the right to exercise corporate functions by the failure of the directors, designated by the statutes to perfect the organization, to issue stock, or to *obtain subscriptions for its stock*, or to elect directors even though the taking of these various steps is necessary to the proper use of the franchise.’”

<sup>1</sup>Johnson v. Kessler (1898) 76 Iowa 411, 41 N. W. 57.

<sup>2</sup>Moe v. Harris (1919) 142 Minn. 442, 172 N. W. 494. It is true that some cases have insisted that the mere fact that a statute says unequivocally that from a certain moment the incorporators shall become a body politic and corporate, does not establish that such legal entity has all of the attributes of a fully incorporated group. Beck v. Stimmel (1931) 39 Ohio App. 510, 177 N. E. 920. But evidently the Minnesota Court could not conceive of a *de jure* corporation without attributing to it the normal incidents of corporateness. It says, “We are of the opinion that the statute referred to controls, and that a corporation *de jure* was organized. . . . The statute does not make it a condition precedent to the right of a corporation to transact business that all or any of its authorized capital stock shall be subscribed or paid in.” Moe v. Harris, *supra*, at p. 443 of 142 Minn., p. 495 of 172 N. W. In support of its position, the Minnesota Court might ask, “What goes to make up the legal entity of *de jure* corporateness if it is not composed of the bundle of legal incidents ordinarily attributable to such entity?”

<sup>3</sup>Daily v. Marshall (1913) 47 Mont. 377, 395; 133 P. 681, 685.

Ten years after the *Schendel* case, the Court reaffirmed its position taken in *Daily v. Marshall* and said in *Sun River Stock and Land Company v. Montana Trust and Savings Banks*

“The action of the secretary of state upon the conditions here presented was a determination of the corporation’s right to do business.”<sup>9</sup>

While the foregoing statute and the judicial construction of it would seem sufficient to support the contention of this comment, it is believed that still other sections of our CODE give evidence of the same legislative intent.<sup>10</sup> Thus, R. C. M. 1935, Section 5914, providing that the issuance of the certificate of the secretary of state shall be treated as prima facie evidence of the corporate character and capacity of the corporation and of its *right to transact business*, when read in connection with Section 6000, providing that neither the due incorporation of the corporation nor *its right to exercise corporate powers* shall be collaterally attacked in any private suit to which such de facto corporation may be a party, would reasonably lead one to conclude that the legislature intended that once the articles of incorporation have been filed and one has extended credit to the corporation in reliance on the prima facie evidence of its due incorporation and its right to transact business, the power of the corporation to continue the transaction of business can be inquired into only by the state and not by a private person (such as a subscriber to the capital stock in a private suit by a corporation to collect on his subscription contract). Here, also, the construction of the statute presented finds support in the decisions of the Montana Supreme Court. Thus, the Court has said in the *Sun River* case:

“ . . . One has a right to rely on the public records, and if the records in the office of the secretary of state show that

<sup>9</sup>*Sun River Land and Stock Co. v. Montana Trust and Savings Bank* (1928) 81 Mont. 222, 234, 262 P. 1039, 1044.

<sup>10</sup>R. C. M. 1935, §5936 provides that directors shall be elected at the meeting at which the by laws are adopted and §5930 provides that every corporation formed under this title must *within one month after filing articles of incorporation* adopt a code of by laws for its government. It may be argued that such provisions are persuasive in determining that the Legislature intended that the corporation may commence business before all of the capital stock has been subscribed. In *New Haven and Derby Railroad Co. v. Chapman* (1871) 38 Conn. 56, 67, the Court said that statutes providing for the election of directors soon after the filing of the articles of incorporation are intended as an aid to the corporation in commencing business for there could be no need for directors if their only function was to secure subscriptions to the capital stock, a function ordinarily performed by the incorporators.

a company is carrying on a business as a corporation, it must be considered at least a corporation de facto. The action of the secretary of state upon the conditions here presented was a determination of the corporation's right to do business. The state alone, by a direct proceeding for that purpose, can challenge the corporation's existence or its *right to do business in this state.*"<sup>11</sup>

Thus, the two leading Montana cases on the "right to do business,"<sup>12</sup> declare that, to determine the legal incidents arising from the doing of business by a corporation in Montana, it is a matter of indifference whether the corporation is a de jure or a de facto corporation. They both equally have the *right* at the same moment, so as to prevent any private person from attacking the corporate action.<sup>13</sup>

Once it is determined that a corporation may commence business without subscription to all of its capital stock, it would seem to follow that the corporation has *also* the right to call upon subscribers for payment of their subscriptions in order to obtain money for the prosecution of that business. This doctrine must have been recognized by the Court in the *Schendel*

<sup>11</sup>(1928) 81 Mont. 222, 234, 262 P. 1039, 1044.

<sup>12</sup>*Daily v. Marshall* (1913) 47 Mont. 377, 133 P. 681; *Sun River Stock and Land Company v. Montana Trust and Savings Bank* (1928) 81 Mont. 222, 234, 262 P. 1039, 1044.

<sup>13</sup>Perhaps, the most significant conclusion of these two Montana cases is that under our statutes there flows from the defacto doctrine a clear cut alternative method for incorporating so far as both the powers and the rights of a corporation to deal with a private individual are concerned. Indeed, the proposition of these cases seems to contribute considerably to the question of when a pre-incorporation subscriber is liable on his subscription. Whether defacto corporateness should make the subscriber immediately liable because the corporation can commence business has not been considered by the authorities. *DODD AND BAKER, CASES ON CORPORATIONS* (1940) pp. 847 to 849. If the de facto doctrine still rested on pure estoppel, of course, the established rights of a third party subscriber should not be changed by an estoppel operating against an individual person dealing with the corporation. But it is submitted that in Montana and all other states where the de facto doctrine results in an alternative method for incorporating, this should be such right to do business as to subject the subscriber to immediate liability. Only thus can the public be adequately protected in dealing with a de facto corporation. *STEVENS, CORPORATIONS* (1936) §31, p. 151. (Of course there is the complication that, in many states, it likewise has been said that a condition precedent to the subscriber's liability is that he be given a de jure corporation. But the view of substantial authority today, that this condition must stand or fall along with the condition that all of the stock be subscribed for according to whether the de facto doctrine be treated as essentially a mere estoppel or as an alternative method of incorporation, seems to be essentially sound. *McCarter v. Ketchum* (1905) 72 N. J. L. 247, 62 Atl. 693; *STEVENS, CORPORATIONS* (1936) §89, p. 352; *RESTATEMENT OF BUSINESS ASSOCIATIONS, TENTATIVE DRAFT No. 2* (1932) §107, comment 2.)

case for the Court, after holding that a stock subscriber is not obligated on his subscription contract until all of the capital stock has been subscribed, felt itself obliged to conclude that all stock must be subscribed before the corporation could commence business. The correlation of these two rules was most clearly and forcibly stated by the Supreme Court of Kansas when that Court said:

"To say that the company is authorized to carry out the purposes of its organization, and yet that it cannot call for a dollar of its subscriptions to the capital stock, seems to us absurd in the extreme. The most reasonable view is that the legislature had in view the actual situation and wants of a young and growing state and recognized the fact that almost every corporation in this state commenced its enterprise with but part of its stock subscribed, and relied on obtaining further subscriptions as the enterprise should be forwarded."<sup>14</sup>

This doctrine has been frequently reiterated by many courts and has the support of text writers.<sup>15</sup> Even the two principal cases relied on by the Montana decision to justify its conclusion that there is a well established "condition precedent" in all pre-incorporation subscriptions that all the stock be subscribed for before any subscriber is liable thereon, cannot be cited to deny this proposition.<sup>16</sup> In *Stoneham Railroad Company v. Gould*,<sup>17</sup> the Massachusetts Court was confronted with statutes<sup>18</sup> under which the corporation was expressly forbidden to com-

<sup>14</sup>Hunt v. Kansas and Missouri Bridge Co. (1873) 11 Kan. 311, 334;

<sup>15</sup>Arkadelphia Cotton Mills v. Trimbel (1891) 54 Ark. 316, 15 S. W. 776; Norton v. Lamb (1936) 144 Kan. 665, 62 P. (2d) 1311; Lincoln Shoe Manufacturing Co. v. Sheldon (1895) 44 Neb. 279, 62 N. W. 480; Val verde Hotel Co. v. Hubbell (1921) 27 N. Mex. 545, 202 P. 982; Utah Hotel Co. v. Madsen (1913) 43 Utah 285, 134 P. 577; BAL-LANTINE, PRIVATE CORPORATIONS (1927) §40, p. 130. DODD & BAKER, CASES ON CORPORATIONS (1940) pp. 847 to 849.

Hunt v. Kansas and Missouri Bridge Co. (1873) 11 Kan. 311, 334, bases its decision on what the reasonable expectancy of a subscriber should be in the light of the right of the corporation to commence business when only a portion of its capital stock has been subscribed. It correctly interprets the law and practice today. The old cases establishing the implied condition precedent as a defense assumed that the subscriber was justified in expecting all of the stock to be first subscribed—a presumption altogether inconsistent with the modern law and practice. Hence, there seems to be nothing inherently unjust in denying such defense today, as thought by Chief Justice Brantly in the Schendel case. Indeed justice seems to be with the corporate creditors—supporting the subscriber's liability.

<sup>16</sup>Stoneham Railroad Company v. Gould (1854) 2 Gray (Mass.) 211; Livsey v. Omaha Hotel Co. (1876) 5 Neb. 50.

<sup>17</sup>Supra, note 16.

<sup>18</sup>Ch. 139, §7 STATUTES OF MASS. (1851).

mence business until all of the capital stock was subscribed. There the Court had no opportunity to apply the thesis of this comment. The statutes forbade its application. The other case arose in Nebraska." It was decided along with a number of other similar cases arising out of the same transaction." From a close reading of these related cases, it appears that the subscription contracts involved in each contained clauses providing that when \$150,000 of a capital stock of \$200,000 should be subscribed (exclusive of the value of a location amounting to an estimated \$50,000, which was given to the Hotel Company) the stockholders should arrange for the construction of the hotel. Clearly, such a provision in the subscription contract would prevent a court from denying to the defendant his defense. But neither the statutes nor the subscription provisions prevented the court in the Montana case from overruling the defendant's demurrer. It would seem that both the business practice and other Montana decisions should have lead the Court in this case to rule that a pre-incorporation subscriber's liability is not contingent on a showing that any particular percentage of the original issue of stock has been subscribed for."

<sup>19</sup>*Supra*, note 16.

<sup>20</sup>*Sweeny v. Omaha Hotel Co.* (1876) 5 Neb. 75; *Estabrook v. Omaha Hotel Co.* (1876) 5 Neb. 76; *Boehme v. Omaha Hotel Co.* (1876) 5 Neb. 80; *Frost v. Omaha Hotel Co.* (1876) 5 Neb. 83.

<sup>21</sup>Courts generally recognize far too little the fact that many rules of corporation law are interdependent so that if one changes all other interdependent ones should likewise be adjusted. Though Judge Brantly purports to recognize this fact in admitting the necessity of finding that a Montana corporation cannot commence business immediately upon incorporation, it seems evident that he assumes the inherent desirability of the defense given the subscriber by the implied condition precedent in his subscription. He declares that, "The fact that several provisions of the code, . . . imply that organization may be effected prior to subscription for all the stock, does not require the conclusion that the legislature intended to set aside, annul, or modify a settled rule of law founded upon a 'plain dictate of justice and the strict principles regulating the obligations of contracts.' In our opinion, nothing short of an express provision on the subject would suffice to accomplish this." On the contrary, it would seem that the speciousness of the argument quoted upon which was originally predicated this defense, should rule it out of the law without further inquiry: "When a man subscribes a share to a stock, to consist of 1,000 shares in order to carry on some designated enterprise, he binds himself to pay a thousandth part of the cost of such enterprise. If only 500 are subscribed for, and he can have no assurance which he is bound to accept that the remainder will be taken, he would be held if liable to assessment to pay a five-hundredth part of the cost of the enterprise, besides incurring the risk of entire failure of the enterprise itself, and the loss of the amount advanced towards it." *Stoneham Railroad Co. v. Gould* (1854) 2 Gray (Mass.) 211. Surely, this is a grossly inaccurate description both of what a stock

We have found that there are very persuasive arguments supporting the conclusion that because a corporation has a right to commence business at once a subscriber should be liable on his subscription as soon as his subscription is accepted after incorporation. If the Court had been inclined to refer to it, there is at least one other statute<sup>23</sup> which could easily be considered as absolutely controlling our case, making the defendant immediately liable on his contract. It provides:

“The stockholders of every corporation shall be severally and individually liable to the creditors of the corporation, until the whole amount of unpaid stock held by them respectively, for all acts and contracts made by such corporation, until the whole amount of capital stock subscribed for shall have been paid in.”

If the right created by the Section should be interpreted as being contingent upon the corporation having a right to sue, it would have little significance for us. However, assuming that the Court would apply the generally established rule that the rights given by a statute, clear and explicit on its face, must not be added to nor taken from,<sup>24</sup> under this Section creditors should have an unqualified right<sup>25</sup> to recover from all stockholders for any amount legally due on their subscriptions.

subscriber contracts for and of his measure of liability in case only part of the authorized capitalization is subscribed.

For an example of a court acting at its best in correlating interdependent rules, see *Robertson v. Nicholes Co., Inc. et al.* (1931) 141 Misc. 660, 253 N. Y. Supp. 76. It ruled that the established right of the stock purchaser to sue the corporation in conversion for its failure to register him as owner, must be abrogated in view of a recently enacted statutory prohibition against the corporation buying its own stock except out of surplus.

<sup>23</sup>R. C. M. 1935, §5966.

<sup>24</sup>R. C. M. 1935, §10519 provides: “In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.” The statute would seem to be a statutory declaration of the rule of construction contended for. The following Montana cases also recognize the rule. *Smith v. Iron Mountain Tunnel Co.* (1912) 46 Mont. 13, 125 P. 649, Ann. Cas. 1914B, 551; *State v. Moody* (1924) 71 Mont. 473, 230 P. 575; *Sullivan v. Anselmo Mining Corporation*, (1928) 82 Mont. 543, 268 P. 495; *State ex rel. DuFresne v. Leslie* (1935) 100 Mont. 449, 50 P. (2d) 959, 101 A. L. R. 1329; *Vaughn and Ragsdale Co., Inc. v. State Board of Equalization* (1939) 109 Mont. 52, 96 P. (2d) 420.

<sup>25</sup>*Kelly v. Clark* (1898) 21 Mont. 291, 53 P. 959; and *King v. Pony Gold Mining Co.* (1903) 28 Mont. 74, 72 P. 309, hold that the right secured under this Section was secondary in that it did not accrue until the remedy of the creditor against the corporation had been exhausted. *Cf. Rohr v. Stanton* (1927) 78 Mont. 494, 254 P. 869.

It seems extremely unlikely that the legislature would recognize an enforceable right to collect inhering directly in the creditors, with no right at all in the corporation at the time. Hence this Section seems to assume an already existing liability to the corporation, as also is indicated in its language, "until the . . . capital stock, . . . shall have been paid in," which clearly refers to payment to the corporation. Very possibly Judge Brantly's decision would have been the same had this Section been argued before him, since he stated that he would bow only before a positive provision repealing the subscriber's defense. However, to a mind not already made up, this Section seems extremely persuasive, particularly when considered cumulatively with the evidence that a corporation has a right to commence business as soon as its certificate of incorporation is issued.<sup>2</sup>

—Ben Berg, Jr.

### CORPORATIONS: VALIDITY OF A CONTRACT TO ISSUE\* STOCK FOR FUTURE SERVICES

The MONTANA CONSTITUTION Article XV, Section 10, contains a clause similar to that found in the constitutions or statutes of many other states. It provides:

"No corporation shall issue stock or bonds, except for labor done, services performed, or money and property actually received; and all fictitious increase of stock or indebtedness shall be void. . . ."

In *Kirkup v. Anaconda Amusement Co.*<sup>1</sup> the Montana Supreme Court was called upon to construe the phrase "labor

<sup>2</sup>As always is true where presumptions are to be indulged in, they may point in both directions at once. It would be possible to say that though this Section's language is unqualified, there still is room for the operation of the implied conditions; ie., that the operation of the Section is contingent upon a liability by the defendant to the corporation so that the implied condition precedent would protect the subscriber against both the corporation and the creditor under this Section. Again, it would be possible to consider this statute as being an extremely enlightened provision seeking to more adequately protect the interests of all persons entitled to such protection, giving the corporate creditor the amount of relief that he absolutely needs, even though the stockholder may have a defense against the corporation under the imposed condition precedent. Both rationalizations are highly improbable in view of both the history of our Code, and of the wording of the Section itself.

\*The term "issue" is used herein to mean the *allotment* of stock as *fully-paid* shares—not the mere formal issuance of a share certificate.  
<sup>1</sup>(1921) 59 Mont. 469, 197 P. 1005, 17 A. L. R. 441.