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DE FACTO INCORPORATION AND ESTOPPEL TO DENY CORPORATE EXISTENCE IN LOUISIANA

Using de facto incorporation and estoppel to deny corporate existence, courts have long bestowed corporate privileges despite failure substantially to comply with requisites for legal creation of a corporation. While many jurisdictions were repudiating the two doctrines, Louisiana attempted in 1968 to retain them. This comment will outline the remaining utility of de facto incorporation and estoppel to deny corporate existence in Louisiana.

The Traditional Common Law Rules

De Jure Incorporation

A de jure corporation is one created in substantial compliance with all mandatory conditions precedent to incorporation.¹ Its existence is usually immune from even direct attack by the state.² When the acts of formation fall short of substantial compliance, the defective corporation³ will seek recognition under the de facto incorporation or estoppel to deny corporate existence rules.⁴

De Facto Incorporation

A de facto corporation is one created in colorable, good faith compliance with an existing law, and for which there is a user of the corporate franchise. Its existence may be attacked only in a direct proceeding by the state, not collaterally by the state or by a private person.⁵

1. Robertson v. Levy, 197 A.2d 443, 445 (D.C. Ct. App. 1964); H. BALLANTINE, CORPORATIONS 71, 76 (rev. ed. 1946) [hereinafter cited as BALLANTINE]; H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS 238 (2d ed. 1970) [hereinafter cited as HENN]; 8 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS 38, 81 (rev. ed. 1966) [hereinafter cited as 8 FLETCHER]; see Frey, *Legal Analysis and the "De Facto" Doctrine*, 100 U. PA. L. REV., 1153, 1155-56 (1952).

2. Robertson v. Levy, 197 A.2d 443, 445 (D.C. Ct. App. 1964); BALLANTINE, *supra* note 1, at 75-76; HENN, *supra* note 1, at 238 & n.3 (some jurisdictions permit direct attack by the state if a condition subsequent to incorporation is not met); 8 FLETCHER, *supra* note 1, at 38; Frey, *supra* note 1, at 1155-56.

3. "Defective corporation," "organization," and "association" are used broadly herein to designate the organization seeking recognition of its corporate existence, whether or not the specific organization under consideration is due any corporate privileges.

4. Certain corporate privileges can be acquired by other means, such as contractual limitation of liability. Frey, *supra* note 1, at 1154.

5. Robertson v. Levy, 197 A.2d 443, 445 (D.C. Ct. App. 1964) (dictum); BALLANTINE, *supra* note 1, at 76; HENN, *supra* note 1, at 240; 8 FLETCHER, *supra*

Reflecting the early distrust of all corporations,⁶ courts at first required strict conformity with incorporation statutes before bestowing corporate privileges.⁷ Later cases showed a tendency to bend the rules where equity demanded,⁸ to encourage stability in business transactions⁹ and to protect those acting in good faith from the harsh consequences of defective incorporation; for in the usual case, the merits of a controversy are unaffected by failure to conform strictly to statutory requirements and only the rights of the state are impinged upon.¹⁰ Authorities finally agreed on a deceptively simple rationale of three requirements:¹¹ (1) an existing law under which a de jure corporation of the same kind could have been formed, (2) a colorable compliance with the statute while attempting in good faith to incorporate,¹² and (3) a user of the corporate franchise. Despite the orderly rationale, application of the doctrine remained confusing and met with disfavor among the commentators.¹³

note 1, at 138-42; *accord*, *Dillard v. Hal Brown & Co.*, 22 F.2d 677 (5th Cir.), *cert. denied*, 277 U.S. 587 (1927) (Louisiana and general common law rules preclude collateral attack); *John Lucas & Co. v. Bernhardt's Estate*, 156 La. 207, 100 So. 399 (1924); *Weil v. Leopold Weil Bldg. & Imp. Co.*, 126 La. 938, 53 So. 56 (1910).

In cases where the de facto corporation attempts to exercise the power of eminent domain, the majority rule precludes collateral attack, but there are many cases to the contrary. BALLANTINE, *supra* note 1, at 86; HENN, *supra* note 1, at 242; 8 FLETCHER, *supra* note 1, at 170-74; *cf.* *Tulare Irrig. Dist. v. Shepard*, 185 U.S. 1 (1902) (dictum) (collateral attack is permitted). *See also* *Shreveport Traction Co. v. Kansas City, S. & G. Ry.*, 119 La. 759, 44 So. 457 (1907); *New Orleans Terminal Co. v. Teller*, 113 La. 733, 37 So. 624 (1904).

6. *Robertson v. Levy*, 197 A.2d 443, 444 (D.C. Ct. App. 1964); H. BALLANTINE, *supra* note 1, at 38; 1 W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* 6-7 (rev. ed. 1974) [hereinafter cited as 1 FLETCHER].

7. *See* *Robertson v. Levy*, 197 A.2d 443, 444-45 (D.C. Ct. App. 1964). *See also* 1 FLETCHER, *supra* note 6, at 6-7.

8. *See* *Robertson v. Levy*, 197 A.2d 443, 444-45 (D.C. Ct. App. 1964). *See generally* BALLANTINE, *supra* note 1, at 68-100; 8 FLETCHER, *supra* note 1, at 34-187.

9. BALLANTINE, *supra* note 1, at 87; Note, 53 MICH. L. REV. 283, 184 n.5 (1954); *accord*, *Screwmen's Benev. Ass'n v. Monteleone*, 168 La. 664, 123 So. 116 (1929); *New Iberia Sugar Co. v. Lagarde*, 130 La. 387, 58 So. 16 (1912).

10. HENN, *supra* note 1, at 240; Note, 53 MICH. L. REV. 283, 284 (1954); *see* BALLANTINE, *supra* note 1, at 87.

11. *See, e.g.*, *Tulare Irrig. Dist. v. Shepard*, 185 U.S. 1, 13 (1902); *Robertson v. Levy*, 197 A.2d 443, 445 (D.C. Ct. App. 1964); 8 FLETCHER *supra* note 1, at 48-50; HENN, *supra* note 1, at 239-44; Frey, *supra* note 1, at 1156.

12. Although the authorities differ as to the correct statement of the second element, all either expressly or implicitly make good faith necessary for de facto incorporation. Some, for example, make good faith a separate fourth element. *Robertson v. Levy*, 197 A.2d 443, 445 (D.C. Ct. App. 1964); BALLANTINE, *supra* note 1, at 77.

13. *E.g.*, BALLANTINE, *supra* note 1, at 71 ("a discouraging and baffling

The de facto corporation generally enjoys all the privileges of a de jure corporation,¹⁴ except immunity from direct attack by the state.¹⁵ Thus, the de facto corporation and its members escape the consequences of doing business without proper incorporation: personal liability of associates¹⁶ and denial of procedural¹⁷ or contractual¹⁸ capacity.

Estoppel to Deny Corporate Existence

A "corporation by estoppel" is not really a corporation: it is merely an association given one or more corporate attributes for equitable reasons.¹⁹ The courts invented estoppel to deny corporate existence when confronted with cases where fairness demanded that an organization be treated as a corporation despite an absence of the requisites for de jure or

maze"); Frey, *supra* note 1, at 1180 ("legal conceptualism at its worst"). Contrary to what the traditional approach implies, there was really no one de facto doctrine, owing to the many jurisdictional differences.

14. 8 FLETCHER, *supra* note 1, at 151-52; *accord*, Audobon Park Comm'n v. Board of Comm'rs, 153 So. 2d 574, 577 (La. App. 4th Cir.), *cert. denied*, 156 So. 2d 223 (1963). *But see* BALLANTINE, *supra* note 1, at 71; HENN, *supra* note 1, at 242. *See generally* Frey, *supra* note 1, at 1179 (criticizing the general rule because a holding based on one type of defect might be extended improperly to another factual context). Compare estoppel to deny corporate existence, where the party is allowed only the specific corporate privilege at issue. BALLANTINE *supra* note 1, at 71, 88; 8 FLETCHER, *supra* note 1, at 290.

For examples of privileges which might be conferred on corporations, see LA. CIV. CODE arts. 433-37 and Miller, *The 1968 Business Corporation Law of Louisiana*, 29 LA. L. REV. 435, 449 (1969).

15. See authorities cited in note 2, *supra*.

16. Frey, *supra* note 1. Earlier cases found a partnership if there was no cooperation and if estoppel did not apply, but there is now a reluctance to hold inactive members liable as partners. HENN, *supra* note 1, at 249-50.

17. 8 FLETCHER, *supra* note 1, at 154. In Louisiana, an unincorporated association now has the capacity to sue and be sued in its own name. LA. CODE CIV. P. arts. 689 & 738.

18. 8 FLETCHER, *supra* note 1, at 161. Similarly, "[a] de facto corporation has the same power to acquire and transfer property as a de jure corporation." *Id.* at 158; *see* HENN, *supra* note 1, at 241-42. The Louisiana position is apparently in accord. *See* LA. CIV. CODE art. 446 ("Corporations unauthorized by law . . . may acquire and possess estates. . . ."); Supreme Council of the Lily of the Valley v. Lee, 171 La. 433, 131 So. 289 (1930); Audobon Park Comm'n v. Board of Comm'rs, 153 So. 2d 574 (La. App. 4th Cir.), *cert. denied*, 156 So. 2d 223 (1963). *But see* Globe Realty Co. v. Whitney, 106 La. 257, 30 So. 745 (1901); *cf.* Screwmen's Benev. Ass'n v. Monteleone, 168 La. 664, 123 So. 116 (1929) (charter of corporation had expired, therefore corporation could not pass marketable title to property it held).

19. *E.g.*, Robertson v. Levy, 197 A.2d 443, 445 (D.C. Ct. App. 1964) ("corporation by estoppel" . . . is a complete misnomer."); 8 FLETCHER, *supra* note 1, at 191-92, 290; Comment, *Estoppel to Deny Corporate Existence*, 31 TENN. L. REV. 336 (1964).

de facto incorporation.²⁰ The traditional elements for such estoppel were a *holding out* of an association as a corporation, causing others to act in *reliance* on their belief of valid incorporation.²¹ However, courts sometimes apply estoppel to deny against a creditor of an organization merely because he dealt with it as a corporation.²² The "estoppel" label is inappropriate in such situations, because the two traditional elements are usually absent.²³

There are limitations on estoppel to deny corporate existence flowing from the two traditional elements and from the nature of estoppel, an equitable remedy used only when failure to apply it would cause injustice.²⁴ For example, estoppel will not lie when the conduct relied on was consistent with recognizing a mere unincorporated association,²⁵ nor when the party asserting estoppel had knowledge of the defective incorporation,²⁶ nor when a party was induced by fraud to recognize the corporate existence.²⁷ Furthermore, estoppel will not be applied against the dictates of an express statutory prohibition²⁸ or to matters beyond the particular transaction or conduct working the estoppel.²⁹

There is an overlap of areas covered by the de facto incorporation and

20. *Robertson v. Levy*, 197 A.2d 443, 445 (D.C. Ct. App. 1964).

21. 8 FLETCHER, *supra* note 1, at 194, 217; HENN, *supra* note 1, at 244; *Estoppel to Deny*, *supra* note 19, at 338.

22. BALLANTINE, *supra* note 1, at 91-96; 8 FLETCHER, *supra* note 1, at 219; HENN, *supra* note 1, at 244.

23. *Robertson v. Levy*, 197 A.2d 443, 445 (D.C. Ct. App. 1964); *Estoppel to Deny*, *supra* note 19, at 341-42. See generally 8 FLETCHER, *supra* note 1, at 219-41. See the text at note 163, *infra*.

24. 8 FLETCHER, *supra* note 1, at 235; *Estoppel to Deny*, *supra* note 19, at 346; see BALLANTINE, *supra* note 1, at 88; HENN, *supra* note 1, at 244.

25. BALLANTINE, *supra* note 1, at 89; 8 FLETCHER, *supra* note 1, at 197-98; *accord*, *Williams v. Hewitt*, 47 La. Ann. 1076, 17 So. 496 (1895); *Spencer Field & Co. v. Cooks*, 16 La. Ann. 153 (1861).

26. 8 FLETCHER, *supra* note 1, at 214-15; *accord*, *Provost v. Morgan's La. & Tex. R. R.*, 42 La. Ann. 809, 8 So. 584 (1890); see *Estoppel to Deny*, *supra* note 19, at 347.

27. 8 FLETCHER, *supra* note 1, at 218; *Estoppel to Deny*, *supra* note 19, at 347.

28. 8 FLETCHER, *supra* note 1, at 212; *accord*, *Factors' & Traders' Ins. Co. v. New Harbor Protection Co.*, 37 La. Ann. 233 (1885); *Workingmen's Bank v. Converse*, 33 La. Ann. 963 (1881); *Workingmen's Accommodation Bank v. Converse*, 29 La. Ann. 369 (1877). *But see* *American Homestead Co. v. Linigan*, 46 La. Ann. 1118, 15 So. 369 (1894) (statutory prohibition against suit by a defective corporation does not preclude estopping a defendant-shareholder when he is sued by that organization).

29. 8 FLETCHER, *supra* note 1, at 237; *Estoppel to Deny*, *supra* note 19, at 346.

estoppel to deny corporate existence theories.³⁰ Often the elements necessary for each occur in the same case.³¹ Although the authorities are in conflict, the majority rule is probably that estoppel to deny can apply even when the requisites of de facto incorporation are lacking.³²

Louisiana Law Before 1968

Providing a completely accurate formulation of the two doctrines as they were applied in Louisiana prior to 1968 is impossible. The few Louisiana cases have, over time, dealt with so many different statutory provisions³³ that there are no clear majority positions on a given application of de facto incorporation or estoppel to deny corporate existence. Innumerable variations of fact prevent isolating the effect of a single

30. See Frey, *supra* note 1, at 1176 (concluding that whether dealings were on a corporate basis is the deciding factor in many cases using the traditional de facto incorporation rationale).

31. See, e.g., John Lucas & Co. v. Bernhardt's Estate, 156 La. 207, 100 So. 399 (1924); Bond & Braswell v. Scott Lumber Co., 128 La. 818, 55 So. 468 (1911).

32. See Robertson v. Levy, 197 A.2d 443, 445 (D.C. Ct. App. 1964) (dictum); BALLANTINE, *supra* note 1, at 88; 8 FLETCHER, *supra* note 1, at 201-05; HENN, *supra* note 1, at 244; *Estoppel to Deny*, *supra* note 19, at 337-38.

Louisiana embraces the majority rule. Tulane Imp. Co. v. S. A. Chapman & Co., 129 La. 562, 56 So. 509 (1911); Bond & Braswell v. Scott Lumber Co., 128 La. 818, 55 So. 468 (1911); see North Am. Contr. Corp. v. Gibson, 327 So. 2d 444 (La. App. 3d Cir.), cert. denied, 332 So. 2d 280 (La. 1976). *But cf.* Weil v. Leopold Weil Bldg. & Imp. Co., 126 La. 938, 53 So. 56 (1910) (dictum) (estoppel cannot apply where a corporation "has no legal existence").

33. E.g., LA. R.S. 12:25 & 26 (Supp. 1968) (See notes 125 & 139, *infra*); LA. R.S. 12:5, 9 & 10 (1950) (identical to its immediate predecessor); La. Acts 1928, No. 250, §§ 5, 9 & 10 (providing (1) that corporate existence shall begin upon local recordation, (2) for recording with the Secretary of State and issuance of a certificate of incorporation by him, (3) that the certificate shall be conclusive evidence of due incorporation against all but the state, and (4) for personal liability of officers and directors conducting business prior to local recording or paying-in of capital); La. Acts 1914, No. 267, § 2 (requiring publication of the charter and making the certificate of incorporation issued by the Secretary of State prima facie proof of legal corporate existence); La. Acts 1904, No. 120, §§ 1 & 2 (similar to Act 78 of 1904, § 2, but applicable to all corporations); La. Acts 1904, No. 78, § 2 ("[W]herever parties have attempted to form a corporation and have executed, recorded and published the charter, all contracts made and acts done by such corporation shall be treated as the contracts and acts of valid corporations" except as against the state. Section 3 made the act inapplicable to insurance or banking corporations or those with the power of eminent domain.); La. Acts 1898, No. 59 (required recording with the Secretary of State); La. Acts 1888, No. 36 (required use of the word "limited" in the corporate name and provided that a "mere informality" would not render the charter null or make a shareholder personally liable); La. Acts 1852, No. 176, § 4 (required local recording of the charter and subscriptions, and publication of the charter).

defect in formation. Authorities have complained of the same difficulty when dealing with the many common law cases.³⁴ The Louisiana courts were usually content to cite the common law authorities' general rules, which were themselves misleading,³⁵ without explaining the exact analysis used to reach the decision.³⁶ This confusion, not unique to Louisiana, was one incentive for adopting the more certain provisions of the Model Business Corporation Act.³⁷ Despite the impracticability of formulating unassailable "Louisiana rules," the decisions will be summarized so far as possible to facilitate later discussion of the remaining utility of the de facto incorporation and estoppel to deny corporate existence theories. The general common law rule in each case will be compared.³⁸

De Facto Incorporation

Louisiana has adopted the general common law rules of de facto incorporation by court decision and by statute. For example, in *Weil v. Leopold Weil Building & Improvement Co.*,³⁹ the Louisiana Supreme Court held that even though the purposes of the corporation under attack were not authorized by statute, there was de facto incorporation, reasoning that: "[I]t could not be said, that the attempt might not be made in good faith, and if, the conditions of that section having been complied with, there should be a subsequent user of the corporate franchise, nothing more would be needed for the creation of a corporation de facto."⁴⁰

34. Frey, *supra* note 1, at 1175; see BALLANTINE, *supra* note 1, at 71.

35. Frey, *supra* note 1, at 1178-79; see BALLANTINE, *supra* note 1, at 71; 8 FLETCHER, *supra* note 1, at 47-48.

36. See, e.g., Supreme Council of the Lily of the Valley v. Lee, 171 La. 433, 131 So. 289 (1930); Shreveport Traction Co. v. Kansas City, S. & G. Ry., 119 La. 759, 44 So. 457 (1907).

37. See ABA-ALI MODEL BUS. CORP. ACT §§ 56 & 146, Comments (1971) [hereinafter cited as MODEL ACT].

38. It is important to note the general rules stated by 8 FLETCHER, *supra* note 1, because the revision committee's comment to section 26 of The Louisiana Business Corporation Law of 1968 expressly refers to that work (an earlier edition) after calling for "full application" of the de facto incorporation and estoppel to deny corporate existence theories.

39. 126 La. 938, 53 So. 56 (1910).

40. *Id.* at 956, 53 So. at 62; accord, *Screwmen's Benev. Ass'n v. Monteleone*, 168 La. 664, 123 So. 116 (1929); *Audobon Park Comm'n v. Bd. of Comm'rs*, 153 So. 2d 574 (La. App. 4th Cir.), *cert. denied*, 156 So. 2d 223 (1963).

Some early cases required substantial compliance before bestowing any corporate status. *Williams v. Hewitt*, 47 La. Ann. 1076, 17 So. 496 (1895); *Spencer Field & Co. v. Cooks*, 16 La. Ann. 153 (1861); *Finlay, Dicks & Co. v. Caire*, 6 Orl. App. 303 (La. App. 1909); *Ahrens & Ott Mfg. Co. v. Caire*, 5 Orl. App. 154 (La. App. 1908).

Louisiana Act 78 of 1904, section 2,⁴¹ adopted the traditional de facto doctrine.⁴² The statute provided that when persons attempt to form a corporation and execute, record, and publish a charter, a corporation so formed is to be treated as a valid corporation.⁴³

To help predict the result likely in a certain instance, decisions on de facto incorporation are classified here by the type of irregularity occurring in each case rather than simply by the traditional rationale. Two qualifications are necessary: a rule as to one defect might not control where other irregularities are present in the same case, and all decisions are affected by the interplay of the estoppel rationale.⁴⁴

When the articles of incorporation were not recorded at the time of the transaction, both the Louisiana⁴⁵ and the general common law⁴⁶ rules deny de facto status. Between 1928 and 1968, the Louisiana courts were constrained to apply this majority rule, as the Louisiana Business Corporation Act of 1928, section 9,⁴⁷ imposed joint and several liability on officers and directors participating in business transactions before the articles of incorporation were filed for record in the office of the Recorder of Mortgages.⁴⁸ In the 1968 revision of the Business Corporation Law, the

41. See note 33, *supra*.

42. *Bond & Braswell v. Scott Lumber Co.*, 128 La. 818, 55 So. 468 (1911); *Leader Realty Co. v. Lakeview Land Co.*, 127 La. 1059, 54 So. 350 (1911); see *Ozone Lumber Co. v. King*, 7 Orl. App. 501 (La. App. 1910).

43. La. Acts 1904, No. 120, § 2, note 33, *supra*, applied to types of corporations not covered by Act 78, but was otherwise similar. See *Provident Bank & Trust Co. v. Saxon*, 123 La. 243, 48 So. 922 (1909); *Shreveport Traction Co. v. Kansas City, S. & G. Ry.*, 119 La. 759, 44 So. 457 (1907); *Louisiana Nat'l Bank v. Henderson*, 116 La. 413, 40 So. 779 (1906); *Provident Bank & Trust Co. v. Saxon*, 116 La. 408, 40 So. 778 (1906).

44. See BALLANTINE, *supra* note 1, at 68-71, 80-81; Frey, *supra* note 1, *passim*.

45. *Provident Bank & Trust Co. v. Saxon*, 116 La. 408, 40 So. 778 (1906); *Spencer Field & Co. v. Cooks*, 16 La. Ann. 153 (1861) (cases cited note 48, *infra*); see *Lind v. Senton*, 10 La. App. 633 (1929); *Workingmen's Accommodation Bank v. Converse*, 29 La. Ann. 369 (1877). *But cf.* *John Lucas & Co. v. Bernhardt's Estate*, 156 La. 207, 100 So. 399 (1924) (alternative holding) (estoppel and de facto incorporation both used. Court did not say there was no recording: it noted only a failure to record with the Secretary of State, without disclosing whether local recording had taken place).

46. 8 FLETCHER, *supra* note 1, at 105-07; Bennett, *The Louisiana Business Corporation Act of 1928*, 2 LA. L. REV. 597, 605 (1940); see Frey, *supra* note 1, at 1158-62, 1176-77. See also HENN, *supra* note 1, at 242-44. There are conflicting decisions on this issue, as with most de facto incorporation questions. BALLANTINE, *supra* note 1, at 78; 8 FLETCHER, *supra* note 1, at 103, 105-07.

47. La. Acts 1928, No. 250, § 9 incorporated as LA. R.S. 12:9 (1950). Relevant provisions are outlined at note 33, *supra*.

48. See *Daniel A. Pouwels & Assoc. v. Fiumara*, 233 So. 2d 16 (La. App. 4th

provision was "eliminated to permit the full application of the de facto-corporation and estoppel-to-deny-corporate-existence rules."⁴⁹

When the statutes require recording of the articles both locally and at the Secretary of State's office, and the articles were recorded locally only, the general rule is that a de facto corporation exists.⁵⁰ The Louisiana case of *Bond & Braswell v. Scott Lumber Co.*⁵¹ conferred de facto status in this situation, reasoning that while filing locally was a condition precedent to incorporation, filing with the Secretary of State was not. No Louisiana case has ruled on the converse situation, where filing is required locally and with the Secretary of State but the articles are recorded only with the Secretary of State. Aside from *Bond & Braswell*, which is dictum in this context, there is nothing to indicate that the courts here would deviate from the general rule,⁵² which is to confer de facto status.

Noncompliance with paid-in capital requirements usually does not preclude de facto incorporation.⁵³ The earlier Louisiana cases agreed.⁵⁴ Many jurisdictions make paid-in capital a mere condition precedent to doing business;⁵⁵ Louisiana adopted this course in 1928,⁵⁶ thus making the

Cir. 1970); *Southland Rentals, Inc. v. Walker*, 147 So. 2d 73 (La. App. 2d Cir. 1962), *cert. denied*, 243 La. 1007, 149 So. 2d 764 (1963); *Avoyelles Wholesale Grocery Co. v. Ville Platte Sawmill Co.*, 17 La. App. 56, 135 So. 251 (La. App. 1st Cir. 1931); *Bennett*, *supra* note 46, at 605-06.

49. LA. R.S. 12:26 (Supp. 1968), Comment. For a discussion of the deletion and the comment, see the text at note 126, *infra*.

50. 8 FLETCHER, *supra* note 1, at 107-08; see BALLANTINE, *supra* note 1, at 78. *But see* Frey, *supra* note 1, at 1165-67 (organization in this circumstance is treated as if there were no recording anywhere; author considers only those cases where personal liability of associates was sought).

51. 128 La. 818, 55 So. 468 (1911); cf. *John Lucas & Co. v. Bernhard's Estate*, 156 La. 207, 100 So. 399 (1924) (alternative holding—estoppel and de facto incorporation both used. The court noted only a failure to record with the Secretary of State, without disclosing whether local recording had taken place). See generally HENN, *supra* note 1, at 238-39 (explaining conditions precedent to incorporation).

52. 8 FLETCHER, *supra* note 1, at 107-08; see BALLANTINE, *supra* note 1, at 78; Frey, *supra* note 1, at 1167-69, 1177. See also HENN, *supra* note 1, at 242 (Many jurisdictions provide by statute that filing with the Secretary of State begins corporate existence; local filing is merely a condition subsequent to incorporation).

53. 8 FLETCHER, *supra* note 1, at 96; see BALLANTINE, *supra* note 1, at 83-84; Frey, *supra* note 1, at 1170.

54. See *Dillard v. Hal Brown & Co.*, 22 F. 2d 677 (5th Cir.), *cert. denied*, 277 U.S. 587 (1927); *Chronos Land Co. v. Crichton*, 150 La. 963, 91 So. 408 (1922); *Bond & Braswell v. Scott Lumber Co.*, 128 La. 818, 55 So. 468 (1911); *Leader Realty Co. v. Lakeview Land Co.*, 127 La. 1059, 54 So. 350 (1911).

55. BALLANTINE, *supra* note 1, at 83-84; 8 FLETCHER, *supra* note 1, at 98-102; Frey, *supra* note 1, at 1170.

56. La. Acts 1928, No. 250, § 9 incorporated as LA. R.S. 12:9 (1950).

de facto doctrine inapplicable in this situation.⁵⁷ Of course, denominating this requirement a condition precedent to doing business does not determine the availability of the important corporate attribute of limited liability for associates.⁵⁸ The courts have no freedom to protect the associates when the express requirements of a statute are disobeyed and liability is expressly imposed therefor. One commentator has argued convincingly that, in the absence of such a provision, paying in at least a part of the required amount weighs heavily in favor of bestowing the privilege of limited liability.⁵⁹

There is a distinction in Louisiana between the effect of disobeying paid-in capital rules and disobeying stock subscription rules. Louisiana courts have denied de facto status to organizations failing either to procure or to record stock subscriptions.⁶⁰ This position appears contrary to the general rule that subscription to capital stock is unnecessary for de facto existence.⁶¹ However, in the case of such defects, statutes often expressly answer the question of corporate capacity.⁶² Thus the Louisiana decisions,

57. See *Three Bros. Towing Co. v. Louisiana Gulf Indus., Inc.*, 317 F. Supp. 814 (E.D. La. 1969); *Sulphur Export Corp. v. Carribean Clipper Lines, Inc.*, 277 F. Supp. 632 (E.D. La. 1968); *Temple Iron Works, Inc. v. Reburn Oil & Gas, Inc.*, 187 So. 2d 160 (La. App. 2d Cir.), *cert. denied*, 249 La. 472, 187 So. 2d 446 (1966); *Construction Eng'r Co. v. Village Shopping Center, Inc.*, 168 So. 2d 826 (La. App. 2d Cir. 1964), *cert. denied*, 247 La. 261, 170 So. 2d 512 (1965); *Wunsch v. Noel*, 177 So. 92 (La. App. 2d Cir. 1937).

58. See Frey, *supra* note 1, at 1169-73.

59. *Id.* at 1169-73, 1177.

60. See *Globe Realty Co. v. Whitney*, 106 La. 257, 30 So. 745 (1901) (at time of transaction, corporation did not have the statutorily required amount of capital stock subscribed); *Williams v. Hewitt*, 47 La. Ann. 1076, 17 So. 496 (1895) (corporation had failed to list the number of shares held by each shareholder as required by law); *Ahrens & Ott Mfg. Co. v. Caire*, 5 Orl. App. 154 (La. App. Orl. Cir. 1908) (failure to record list of subscriptions). See also *Louisiana Nat'l Bank v. Henderson*, 116 La. 413, 40 So. 779 (1906) (failure to record original stock subscriptions; remanded to determine whether defects were cured by La. Acts 1904, No. 120, the statute adopting the de facto doctrine); *Sentell v. Hewitt*, 50 La. Ann. 3, 22 So. 970 (1898) (failure to record list of subscribers; limited liability permitted on estoppel and contractual grounds).

Measuring the effect of these cases is complicated by some early decisions requiring substantial compliance under La. Acts 1888, No. 36. Compare *Williams v. Hewitt*, 47 La. Ann. 1076, 17 So. 496 (1895) and *Ahrens & Ott Mfg. Co. v. Caire*, 5 Orl. App. 154 (La. App. 1905) (both finding no substantial compliance when other defects besides subscription irregularities were present) with *Finlay Dicks & Co. v. Caire*, 6 Orl. App. 303 (La. App. 1909) (holding that when the sole defect was failure to record the list of stock subscriptions, there was substantial compliance).

61. 8 FLETCHER *supra* note 1, at 96-103; see BALLANTINE, *supra* note 1, at 83 (both caution that there is conflict in the decisions).

62. See authorities cited in note 61, *supra*.

which denied de facto status because of controlling statutes,⁶³ did not depart from the traditional rationale in order to reach their contrary result.

The early Louisiana rule denied de facto status in cases where a corporation was formed for a purpose prohibited⁶⁴ or unauthorized⁶⁵ by law, or where a corporation was formed for two purposes incompatible under the statutes.⁶⁶ There are, however, contrary later decisions.⁶⁷ Logic supports the early rule, for Louisiana has expressly adopted the first element of the traditional de facto doctrine, existence of a statute under which a de jure corporation of the same kind could have been formed.⁶⁸ The majority position in the general common law agrees with Louisiana's early cases, but there are contrary decisions.⁶⁹

On the question of incorporation under an unconstitutional statute the sole Louisiana authority is a dictum hinting that a municipal corporation so formed should be recognized as de facto.⁷⁰ One commentator has stated: "The better rule is that there cannot be a corporation de facto created under a statute which is unconstitutional, since an unconstitutional law is absolutely void, and a void law is no law."⁷¹ While titling this the majority rule, he added that contrary decisions abound.⁷²

63. See cases cited in note 60, *supra*.

64. See *Lehman & Co. v. Knapp*, 48 La. Ann. 1148, 20 So. 674 (1896); *Workingmen's Accommodation Bank v. Converse*, 29 La. Ann. 369 (1877).

65. See *Vredenburg v. Behan*, 33 La. Ann. 627 (1881).

66. See *Bayou Cook Nav. & Fish. Co. v. Doullut*, 111 La. 517, 35 So. 729 (1904).

67. See *Weil v. Leopold Weil Bldg. & Imp. Co.*, 126 La. 938, 53 So. 56 (1910); *Dilzell Eng'r & Constr. Co. v. Lehmann*, 120 La. 273, 45 So. 138 (1907) (dictum) (even if incorporators intended to form under a statute not authorizing such a corporation, due incorporation may be found under another statute — La. Acts 1904, No. 78, a statute adopting the de facto doctrine); *Shreveport Traction Co. v. Kansas City, S. & G. Ry.*, 119 La. 759, 44 So. 457 (1907) (dictum) (even if combining street and other railroads in the same charter were illegal, the corporation was valid under La. Acts 1904, No. 120, a statute adopting the de facto doctrine). See also *New Orleans Debenture Redemption Co. v. Louisiana*, 180 U.S. 320 (1901), *aff'g* 51 La. Ann. 1827, 26 So. 586 (1899) (corporation had acquired de facto existence even though organized for unauthorized purpose; therefore, allowing suit against the organization without joining the shareholders did not violate due process; but the Louisiana court had not dealt with the issue of de facto status).

68. See cases cited in notes 40 & 42, *supra*. See also 8 FLETCHER, *supra* note 1, at 56-59.

69. *Id.* at 56-60.

70. *Chicago, St. L. & N.O.R. v. Town of Kentwood*, 49 La. Ann. 931, 22 So. 192 (1897).

71. 8 FLETCHER, *supra* note 1, at 62-63 (footnote omitted); *accord*, BALLANTINE, *supra* note 1, at 80-81.

72. 8 FLETCHER, *supra* note 1, at 64-66; *accord*, BALLANTINE, *supra* note 1, at 80-81.

In Louisiana prior to 1968, "when a charter of a corporation expire[d] by limitation of time as fixed in the charter, the corporation [was] thereby dissolved and cease[d] to exist, and [was] without any corporate powers either de jure or de facto."⁷³ The general common law position is identical:⁷⁴ it is the source of the quoted rule.⁷⁵

That incorporators lack capacity to incorporate does not preclude de facto status.⁷⁶ Again, Louisiana agreed with the general rule.⁷⁷

The early Louisiana cases showed uncharacteristic deviation from the general rule when the articles of incorporation were not published properly.⁷⁸ Later Louisiana decisions⁷⁹ appear to have agreed with the general rule, which bestows de facto status in this situation;⁸⁰ however, because these cases involve several defects each, the impact of failure to publish cannot be isolated with precision.

Estoppel to Deny Corporate Existence

The Louisiana courts did not track the general common law estoppel rationale as closely as they did the common law de facto doctrine. They attempted, not always successfully, to restate the elements of estoppel and to repudiate the use of estoppel against a creditor of the defective corporation.

Many Louisiana decisions focused on whether a "benefit" was received by the estopped party.⁸¹ This approach, though somewhat broad-

73. *Screwmen's Benev. Ass'n v. Monteleone*, 168 La. 664, 672, 123 So. 116, 119 (1929).

74. 8 FLETCHER, *supra* note 1, at 133-34. However, there are many contrary decisions. *Id.* at 134-36; BALLANTINE, *supra* note 1, at 98 ("By the better view corporate existence continues either de facto or by estoppel, for some purposes, even after the expiration of the charter . . ."); Note, 33 MICH. L. REV. 633 (1935).

75. *Screwmen's Benev. Ass'n v. Monteleone*, 168 La. 664, 123 So. 116 (1929).

76. 8 FLETCHER, *supra* note 1, at 85-87.

77. *See Bond & Braswell v. Scott Lumber Co.*, 128 La. 818, 55 So. 468 (1911); *Audobon Park Comm'n v. Board of Comm'rs*, 153 So. 2d 574 (La. App. 4th Cir.), *cert. denied*, 156 So. 2d 223 (1963).

78. *Williams v. Hewitt*, 47 La. Ann. 1076, 17 So. 496 (1895); *Ahrens & Ott Mfg. Co. v. Caire*, 5 Orl. App. 154 (La. App. 1908). *See also Monroe Sand & Gravel Co. v. Sanders*, 79 F.2d 292 (5th Cir. 1935); *Louisiana Nat'l Bank v. Henderson*, 116 La. 413, 40 So. 779 (1906).

79. *See Chronos Land Co. v. Crichton*, 150 La. 963, 91 So. 408 (1922); *Provident Bank & Trust Co. v. Saxon*, 123 La. 243, 48 So. 922 (1909).

80. 8 FLETCHER, *supra* note 1, at 114-15.

81. *See Anderson v. Thompson*, 51 La. Ann. 727, 25 So. 399 (1899); *Lehman & Co. v. Knapp*, 48 La. Ann. 1148, 20 So. 674 (1896); *Williams v. Hewitt*, 47 La. Ann.

er in statement, operates much like the common law requirement of "reliance," especially when one considers that both common law requisites ("holding out" and "reliance") are often disregarded.⁸² If the party to be estopped has received a benefit he would not otherwise have obtained without the pretended incorporation, the party invoking estoppel must have relied on the ostensible corporate existence. In those cases where the benefit to the estopped party does not flow from an advantage gained by assuming incorporation, such as estopping a creditor of an organization merely because he dealt with it as a corporation,⁸³ the elements of "holding out" and "reliance" are also lacking.

*Williams v. Hewitt*⁸⁴ is a well-reasoned case refusing to apply estoppel. Unlike many other Louisiana decisions, it emphasized the importance of finding the common law elements of "holding out" and "reliance," as well as the analogous Louisiana requirement of "benefit." The plaintiff depositors were permitted to attack the corporate existence of a bank in order to impose personal liability on the shareholders. The Louisiana Supreme Court reasoned:

The plaintiffs have obtained no benefit or advantage from defendants, nor done any act or pursued any line of conduct by which defendants have been prejudiced, or at all inconsistent with plaintiffs' suit to obtain their money from those who took it on deposit.⁸⁵

The Louisiana courts at first tried to eliminate the misapplication of estoppel occurring when a creditor is precluded from denying the corpo-

1076, 17 So. 496 (1895); *American Homestead Co. v. Linigan*, 46 La. Ann. 1118, 15 So. 369 (1894); *Oliver v. Home Serv. Ice Co.*, 161 So. 766 (La. App. 2d Cir. 1935); *National Oil Works, Inc. v. Korn Bros.*, 6 La. App. 75 (La. App. Or. Cir.), *rev'd on other grounds*, 164 La. 800, 114 So. 659 (1927). An example of a party who should be estopped because he has received a benefit is a debtor of a corporation on a contract made in the corporate name who, when called to pay, asserts that the creditor organization was not duly incorporated and therefore did not have capacity to contract. See *Lehman & Co. v. Knapp*. The latest estoppel case retains the "benefit" rationale. *North Am. Contr. Corp. v. Gibson*, 327 So. 2d 444 (La. App. 3d Cir.), *cert. denied*, 332 So. 2d 280 (La. 1976).

Louisiana courts also employed the common law elements of estoppel: "holding out" and "reliance". See, e.g., *Williams v. Hewitt*, 47 La. Ann. 1076, 17 So. 496 (1895); *East Pascagoula Hotel Co. v. West*, 13 La. Ann. 545 (1858); *Southland Rentals Inc. v. Walker*, 147 So. 2d 73 (La. App. 2d Cir. 1962), *cert. denied*, 243 La. 1007, 149 So. 2d 764 (1963).

82. BALLANTINE, *supra* note 1, at 88; *Estoppel to Deny*, *supra* note 19, at 341-47; see the text at notes 164 & 165, *infra*.

83. *Estoppel To Deny*, *supra* note 19, at 341-47.

84. 47 La. Ann. 1076, 17 So. 496 (1895).

85. *Id.* at 1084, 17 So. at 498.

rate existence merely because he had contracted with the organization on a corporate basis.⁸⁶ This is a misuse of estoppel because it lacks the essential elements. "Benefit,"⁸⁷ "holding out," and "reliance"⁸⁸ are absent: the creditor would get no more than he had a right to expect from a corporation—performance as agreed—and the creditor has not asserted the corporation's existence or caused the organization and its members to rely on the immunity from personal liability. Fault rests only with the incorporators.

That situation must be distinguished from estopping a *debtor* of a corporation. The early case of *Lehman & Co. v. Knapp*⁸⁹ reasoned:

The plea of estoppel has never been applied to the creditor of a corporation seeking the payment of his claim. . . . [T]he debtor has received a benefit that estops him; . . . the creditor has sued to recover an amount due by those who have failed to avail themselves of the terms of the statute.⁹⁰

Estopping a debtor is especially appropriate when he is a shareholder whose payments for subscribed stock are owing.⁹¹

Notwithstanding the cogent arguments and authorities against it, the inappropriate form of estoppel survived. Later cases used it on the ground that to allow a creditor to deny the corporate existence of his debtor would impose an obligation not contemplated by the contracting parties.⁹²

86. See *Louisiana Nat'l Bank v. Henderson*, 116 La. 413, 40 So. 779 (1906); *Provident Bank & Trust Co. v. Saxon*, 116 La. 408, 40 So. 778 (1906); *Lehman & Co. v. Knapp*, 48 La. Ann. 1148, 20 So. 674 (1896); *Williams v. Hewitt*, 47 La. Ann. 1076, 17 So. 496 (1895).

87. *Lehman & Co. v. Knapp*, 48 La. Ann. 1148, 20 So. 674 (1896); *Williams v. Hewitt*, 47 La. Ann. 1076, 17 So. 496 (1895).

88. *Estoppel to Deny*, *supra* note 19, at 441-42; see *Timberline Equip. Co. v. Davenport*, 267 Or. 64, 514 P.2d 1109 (1973) (dictum); cf. *Robertson v. Levy*, 197 A.2d 443, 445 (D.C. Ct. App. 1964) (dictum) (referring to all applications of estoppel: "there was not estoppel in the pure sense of the word because generally there was no holding out followed by reliance on the part of the other party.'). See generally BALLANTINE, *supra* note 1, at 91-96.

89. 48 La. Ann. 1148, 20 So. 674 (1896).

90. *Id.* at 1154, 20 So. at 677. For further discussion of this application of estoppel, see the text at note 107, *infra*.

91. See *Williams v. Hewitt*, 47 La. Ann. 1076, 17 So. 496 (1895) (dictum); *Latiolais v. Citizens' Bank*, 33 La. Ann. 1444 (1881); *East Pascagoula Hotel Co. v. West*, 13 La. Ann. 545 (1858); cf. 8 FLETCHER, *supra* note 1, at 256 (stating the general rule that shareholders are estopped to deny corporate existence); *Estoppel to Deny*, *supra* note 19, at 343-44 (noting cases where estoppel is applied against stockholders in a suit on the stock subscription). See further discussion in the text at notes 97-100, *infra*.

92. *Tulane Imp. Co. v. S.A. Chapman & Co.*, 129 La. 562, 56 So. 509 (1911);

The following classification of the estoppel decisions by party estopped helps to clarify the law, but the rules derived must be used cautiously. Assuming unvarying rules will mislead and confuse, for estoppel to deny corporate existence is an equitable doctrine demanding case-by-case treatment.⁹³

An *organization and its members* are usually estopped to deny the corporation's existence when it is sued as a debtor on a contract made as a corporation,⁹⁴ although merely using a name signifying corporate status might not work an estoppel.⁹⁵ In the only case before 1968 in Louisiana, a corporation attempted to escape a contractual price limitation on ice sold to its incorporators, retail ice dealers, by alleging that it had signed the contract before attaining legal status. The court held the corporation estopped from denying its own existence.⁹⁶

Similarly, in Louisiana a shareholder is estopped when he would attack the corporate existence in defense of a suit by the corporation on his stock subscription⁹⁷ or contract with the corporation.⁹⁸ Nor can a shareholder, when he wants the corporation dissolved in order to take his share of the corporate assets, deny its existence after long participation in the

Bond & Braswell v. Scott Lumber Co., 128 La. 818, 55 So. 468 (1911); *see* Reynolds v. St. John's Grand Lodge, 171 La. 295, 131 So. 186 (1930) (dictum) ("The broad rule deducible from all the pertinent cases is that one dealing with a corporation is estopped to deny its corporate existence."); John Lucas & Co. v. Bernhardt's Estate, 156 La. 207, 100 So. 399 (1924); *cf.* Evans v. Delta By-Products, 52 So.2d 593 (La. App. Or. Cir. 1951) (plaintiff creditor was not permitted to recover from officer of defective corporation; holding unclear); Calhoun v. David Burk Co., 153 So. 568 (La. App. 2d Cir. 1934) (creditor estopped, but basis of holding unclear). *See also* Sentell v. Hewitt, 50 La. Ann. 3, 22 So. 970 (1898).

93. *See* BALLANTINE, *supra* note 1, at 88; 8 FLETCHER, *supra* note 1, at 192, 235; *Estoppel to Deny*, *supra* note 19, at 346-47.

94. BALLANTINE, *supra* note 1, at 90; 8 FLETCHER, *supra* note 1, at 241-42, 248-49; *Estoppel to Deny*, *supra* note 19, at 338-41.

95. 8 FLETCHER, *supra* note 1, at 245-47.

96. Oliver v. Home Serv. Ice Co., 161 So. 766 (La. App. 2d Cir. 1935); *accord*, North Am. Contr. Corp. v. Gibson, 327 So. 2d 444 (La. App. 3d Cir.), *cert. denied*, 332 So.2d 280 (La. 1976).

97. Williams v. Hewitt, 47 La. Ann. 1076, 17 So. 496 (1895) (dictum); Latiolais v. Citizens' Bank, 33 La. Ann. 1444 (1881); East Pascagoula Hotel Co. v. West, 13 La. Ann. 545 (1858); *see* Dilzell Eng'r & Constr. Co. v. Lehmann, 120 La. 273, 45 So. 138 (1907) (shareholder estopped when sued for the value of his stock subscription by a creditor of the corporation); Psychaud v. Lane, 24 La. Ann. 404 (1872) (alternative holding).

98. American Homestead Co. v. Linigan, 46 La. Ann. 1118, 15 So. 369 (1894); Latiolais v. Citizens' Bank, 33 La. Ann. 1444 (1881).

organization's activities.⁹⁹ The common law general rule mirrors the Louisiana position in these situations.¹⁰⁰

Under the usual rule, an organization may not deny corporate existence in an action once it has admitted corporate existence in pleading or if it has appeared as a corporation contesting the merits.¹⁰¹ Louisiana authorities on this issue agree: "[C]orporate capacity assumed to obtain a standing in court cannot be afterward denied. . . ."¹⁰²

Third parties dealing with the corporation have been estopped to deny the corporate existence where "holding out" and "reliance" are present. Furthermore, as discussed above, creditors are often estopped even if there is no "holding out," "benefit" to the estopped party, or "reliance" by the defendants, *e.g.*, when the contract was made in the usual course of business, the creditor believing the organization validly incorporated.¹⁰³ The Louisiana rule in this instance now appears to comport with the common law position that a creditor can be estopped merely because he contracted with an organization as if it were a corporation.¹⁰⁴ However, since the earlier cases holding that such estoppel is inappropriate have not been expressly rejected, there remains the possibility that the courts will strictly interpret estoppel rationale in a given case, to require at least a benefit to the estopped party caused by his affirmative act misleading the corporation and its members.

A creditor who contracted, knowing he dealt with an inchoate corpo-

99. *Anderson v. Thompson*, 51 La. Ann. 727, 25 So. 399 (1899); see *Weil v. Leopold Weil Bldg. & Imp. Co.*, 126 La. 938, 53 So. 56 (1910). *But see* *Factors' & Traders' Ins. Co. v. New Harbor Protection Co.*, 37 La. Ann. 233 (1885) (an incorporator seeking to dissolve the defective organization was not estopped because there can be no estoppel where it is legally impossible to incorporate; corporations had attempted to join and form a corporation, but only natural persons were permitted to do so). See also *Reynolds v. St. John's Grand Lodge*, 171 La. 395, 131 So. 186 (1930) (members fully aware of, and some voting for, a sale of corporate property were estopped from denying the corporation's existence in their action to annul the sale).

100. 8 FLETCHER, *supra* note 1, at 250, 256-60; *Estoppel to Deny*, *supra* note 19, at 343-44.

101. 8 FLETCHER, *supra* note 1, at 270, 273.

102. *Williams v. Hewitt*, 47 La. Ann. 1076, 1084, 17 So. 496, 498 (1895) (dictum); *accord*, *Jones v. Trustees of the Congregation of Mount Zion*, 30 La. Ann. 711 (1878).

103. See the text at notes 86-92 *supra*.

104. See cases cited in note 83, *supra*. Although this is the most controversial use of estoppel (see *Timberline Equip. Co. v. Davenport*, 267 Or. 64, 514 P.2d 1109 (1973); BALLANTINE, *supra* note 1, at 91), the general common law rule estops a creditor of the organization if he dealt with it on a corporate basis.

ration and indicating intent to hold only the corporation, is an example of a third party receiving a benefit by leading others to rely on his recognition of their limited liability. A Louisiana dictum approves the use of estoppel here,¹⁰⁵ as does the general rule, which embraces anyone dealing with an organization as a corporation.¹⁰⁶

When a third party is the debtor of an organization and asserts the defect in incorporation as an afterthought to escape liability to the "corporate" plaintiff, he is usually estopped in Louisiana, whether a debtor on an ordinary contract¹⁰⁷ or an insurer of the corporation.¹⁰⁸ The Louisiana cases are not so clear when the party is a surety. One court estopped the surety when he was a guarantor of the corporation's obligation to another and later attacked the corporation's existence when called to pay.¹⁰⁹ The Louisiana Supreme Court held to the contrary when dealing with a surety who guaranteed to the corporation the fidelity of its employees,¹¹⁰ but the decision turned on a prohibitory law denying a corporation without legal existence the right to sue in its own name,¹¹¹ not on the kind of surety involved. The common law majority rule in each of these cases estops the debtor.¹¹²

105. *Williams v. Hewitt*, 47 La. Ann. 1076, 17 So. 496 (1895) (dictum).

106. 8 FLETCHER, *supra* note 1, at 216-17, 219.

107. *Shreveport Long Leaf Lumber Co. v. Jones*, 188 La. 519, 177 So. 593 (1937) (dictum); *Williams v. Hewitt*, 47 La. Ann. 1076, 17 So. 496 (1895) (dictum); *Morris Plan Bank v. Schmidt*, 164 So. 270 (La. App. Orl. Cir. 1935) (dictum); *see New Prytania Market Ass'n v. Beoubay*, 185 So. 531 (La. App. Orl. Cir. 1939) (dictum); *cf. Blanc v. Germania Nat'l Bank*, 114 La. 739, 38 So. 537 (1905) (estoppel applied to preclude pledgee from denying corporate existence and retaining the item given in pledge by a defective corporation). *See also National Oil Works, Inc. v. Korn Bros.*, 6 La. App. 75 (La. App. Orl. Cir.), *rev'd on other grounds*, 164 La. 800, 114 So. 659 (1927).

108. *Liverpool & L. Fire & Life Ins. Co. v. Hunt*, 11 La. Ann. 623 (1856).

109. *Music Box, Inc. v. Henry Mills and Milwaukee Social Club*, 10 La. App. 665, 121 So. 196 (La. App. Orl. Cir. 1929).

110. *Workingmen's Accommodation Bank v. Converse*, 29 La. Ann. 369 (1877); *accord, Workingmen's Bank v. Converse*, 33 La. Ann. 963 (1881). *But cf. American Homestead Co. v. Linigan*, 46 La. Ann. 1118, 15 So. 369 (1894) (criticizing *Workingmen's Accommodation Bank v. Converse*, 29 La. Ann. 369 (1877), and holding the reasoning of that decision inapplicable to actions by the corporation against a shareholder).

111. LA. CIV. CODE art. 446 provides: "Corporations unauthorized by law or by an act of the Legislature, enjoy no public character, and can not appear in a court of justice, but in the individual name of all the members . . ." An unincorporated association now has the capacity to sue and be sued in its own name. LA. CODE CIV. P. arts. 689 & 738.

112. 8 FLETCHER, *supra* note 1, at 219, 239, 283-84; *see Estoppel to Deny, supra* note 19, at 341-47.

Finally, when a party to a suit opposing an organization has admitted in court that the corporation exists, he will be estopped to deny the corporate capacity later in the action, both under the Louisiana¹¹³ and general¹¹⁴ rules. The two rules diverge, however, when the party to be estopped is the state in a quo warranto proceeding. The general rule estops the state when it brings the action against the organization in its corporate name,¹¹⁵ while the Louisiana courts permit the state to proceed against the corporation without thereby admitting its corporate existence.¹¹⁶

Effect of the Model Business Corporation Act

The law of de facto incorporation and estoppel to deny corporate existence was in a hopeless state of confusion.¹¹⁷ Therefore, many states adopted provisions similar to sections 56 and 146 (formerly sections 50 and 139) of the Model Business Corporation Act,¹¹⁸ discarding the de facto doctrine at least.¹¹⁹

Section 56 of the Model Act makes issuance of the certificate of incorporation by the Secretary of State conclusive evidence of valid

113. *Latiolais v. Citizens' Bank*, 33 La. Ann. 1444 (1881) (alternative basis for applying estoppel); *Peychaud v. Lane*, 24 La. Ann. 404 (1872) (alternative holding); *Pochelu v. Kemper*, 14 La. Ann. 308 (1859) (basis was judgment against the corporation in a prior suit); *Calhoun v. David Burk Co.*, 153 So. 568 (La. App. 2d Cir. 1934). *But see* *Southland Rentals, Inc. v. Walker*, 147 So. 2d 73 (La. App. 2d Cir. 1962), *cert. denied*, 243 La. 1007, 149 So. 2d 764 (1963) (party which had obtained a prior judgment solely against the corporation was not estopped to deny the corporate existence against the members, because LA. R.S. 12:9 (1950) expressly imposed liability; the court added that the defendants had not shown that they had suffered injury).

No estoppel lies unless there was an unequivocal admission that the organization was a corporation, as distinguished from an unincorporated business entity. *Williams v. Hewitt*, 47 La. Ann. 1076, 17 So. 496 (1895); *Spencer Field & Co. v. Cooks*, 16 La. Ann. 153 (1861); *accord*, 8 FLETCHER, *supra* note 1, at 269-71; *cf.* BALLANTINE, *supra* note 1, at 89 (in reference to estoppel generally).

114. 8 FLETCHER, *supra* note 1, at 261-62, 269-70.

115. *Id.* at 273-76.

116. *State v. Debenture Guarantee & Loan Co.*, 51 La. Ann. 1874, 26 So. 600 (1899); *State v. New Orleans Debenture Redemption Co.*, 51 La. Ann. 1827, 26 So. 586 (1899), *aff'd*, 180 U.S. 320 (1901).

117. See the authorities cited in note 13, *supra*. De facto incorporation was the primary target of criticism, estoppel drawing fire chiefly because disorder followed from intermingling the two doctrines. See *Robertson v. Levy*, 197 A.2d 443 (D.C. Ct. App. 1964); MODEL ACT, *supra* note 37, §§ 56 & 146, Comments; BALLANTINE, *supra* note 1, at 71; Frey, *supra* note 1, *passim*.

118. MODEL ACT, *supra* note 37, §§ 56 & 146. See notes 120 & 123, *infra*.

119. See authorities cited in note 124, *infra*.

incorporation against all except the state in a direct attack.¹²⁰ Since issuance of the certificate cures prior irregularities, there is no need for a de facto doctrine to protect incorporators from pre-recording defects.¹²¹ Furthermore, "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."¹²²

Section 146 of the Model Act imposes personal liability for attempting without authority to act as a corporation.¹²³ Hence, because authority to act as a corporation comes only from completing the procedures specified in the Act and obtaining the certificate as required in section 56, the two sections probably eliminate estoppel to deny corporate existence as well as de facto incorporation.¹²⁴

120. MODEL ACT, *supra* note 37, § 56 provides: "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."

121. 8 FLETCHER, *supra* note 1, at 41-42; see Ballantine, *A Critical Survey of the Illinois Business Corporation Act*, 1 U. CHI. L. REV. 357, 380 (1934).

122. MODEL ACT, *supra* note 37, § 56, Comment; see *Robertson v. Levy*, 197 A.2d 443, 446 (D.C. Ct. App. 1964) ("Before the certificate issues, there is no corporation de jure, de facto or by estoppel."); *Timberline Equip. Co. v. Davenport*, 267 Or. 64, 514 P.2d 1109 (1973). *Contra*, *Vincent Drug Co. v. Utah State Tax Comm'n*, 17 Utah 2d 202, 407 P.2d 683 (1965) (applied de facto incorporation even though state had adopted provisions similar to sections 56 and 146 of the Model Act).

123. MODEL ACT, *supra* note 37, § 146 provides: "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."

124. *Robertson v. Levy*, 197 A.2d 443 (D.C. Ct. App. 1964); 8 FLETCHER, *supra* note 1, at 41-42, 191-92; see *Swindel v. Kelly*, 499 P.2d 291 (Alas. 1972) (dictum) (dealt with de facto incorporation only); *Timberline Equip. Co. v. Davenport*, 267 Or. 64, 514 P.2d 1109 (1973) (dealt with de facto incorporation only); Folk, *Corporation Statutes: 1959-1966*, 1966 DUKE L.J. 875, 884-86 (1966) (implies that sections 56 and 146 together eliminate the two doctrines, but notes that estoppel remains if only section 56 is enacted); MODEL ACT, *supra* note 37, §§ 56 & 146, Comments (only de facto incorporation mentioned). *But see* *Vincent Drug Co. v. Utah State Tax Comm'n*, 17 Utah 2d 202, 407 P.2d 683 (1965) (applied de facto incorporation even though the state had adopted provisions similar to sections 56 and 146); Ballantine, *A Critical Survey of the Illinois Business Corporation Act*, 1 U. CHI. L. REV. 357, 380-81 (1934) (stating that de facto incorporation and estoppel might still need to be invoked in cases of foreign corporations and corporations failing to file a charter or obtain a certificate of incorporation).

Remaining Utility of the Doctrines in Louisiana

The 1968 Business Corporation Law

Louisiana adopted a provision similar to section 56 of the Model Act, section 25 of the Business Corporation Law,¹²⁵ making issuance of the certificate conclusive evidence of due incorporation against all but the state in a direct action. However, Louisiana did not enact a general personal liability provision similar to section 146 of the Model Act, thereby rejecting the trend in many other states. Without further explanation, the comment to section 26 of the Louisiana Act states:

The former provision expressly imposing personal liability on officers and directors participating in business transactions before filing of the articles, has been eliminated to permit the full application of the defacto-corporation and estoppel-to-deny-corporate-existence rules.¹²⁶

Despite this expressed intention to retain "full application," the Act covers with piecemeal rules many situations where de facto incorporation might have applied.¹²⁷

Even if the comment to section 26 of the Louisiana Act had not been added, one could have argued convincingly that Louisiana left de facto incorporation and estoppel to deny corporate existence intact, because most authorities rely on both sections 56 and 146 of the Model Act working *together* to preclude application of the doctrines.¹²⁸ On the other

125. LA. R.S. 12:25B (Supp. 1968), *as amended* by La. Acts 1976, No. 580, § 1, provides: "When all incorporation taxes, fees and charges have been paid as required by law, the Secretary of State shall record the articles . . . and issue a certificate of incorporation The certificate of incorporation shall be conclusive evidence of the fact that the corporation has been duly incorporated, except that in any proceeding brought by the state to annul, forfeit or vacate a corporation's franchise, the certificate of incorporation shall be only prima facie evidence of due incorporation."

Id. § 25C: "Upon the issuance of the certificate of incorporation, the corporation shall be duly incorporated, and the corporate existence shall begin, as of the time when the articles were filed with the Secretary of State, except that, if the articles were so filed within five days (exclusive of legal holidays) after acknowledgement thereof or execution thereof as an authentic act, the corporation shall be duly incorporated, and the corporate existence shall begin, as of the time of such acknowledgement or execution."

126. *Id.* § 26, Comment.

127. See the text at notes 130-42, *infra*.

128. See authorities cited in note 124, *supra*. One commentator has said, in reference to estoppel to deny corporate existence: "Without the equivalent of section [146 of the Model Act], section [56] should not be construed as ipso facto removing the traditional discretionary power of courts to decide particular cases so

hand: "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."¹²⁹ The result of the 1968 Act should be neither the rigid Model Act position nor "full application." As will be detailed below, while de facto incorporation should now be eliminated, many appropriate estoppel applications remain.

When De Facto Incorporation is Obviated by Statute

Nearly all pre-recording defects are cured by the conclusive presumption of due incorporation which attaches upon issuance of the certificate of incorporation,¹³⁰ obviating that need for de facto incorporation. Included in this class are: signing by incorporators who have no capacity to incorporate, incorporating for an unauthorized purpose, neglecting publication requirements, and failing to comply with stock subscription requirements. Besides curing defects that occur prior to issuance of the certificate of incorporation, the 1968 Act ensures that all of these problems will be rarer now than under prior statutes. The Act reduced the required number of incorporators to one.¹³¹ It also provided that "[a] corporation may be formed for any lawful business purposes" with few exceptions.¹³² Furthermore, the Business Corporation Law now contains no publication requirement, nor does it require procuring stock subscriptions or listing subscribers.

Arguably, incorporation under an unconstitutional statute is a defect not corrected by issuance of the certificate, as the higher law must prevail; however, the Louisiana Constitution, in Article XII, Section 12, seems to adopt the provisions of the Business Corporation Law and other corporation statutes that regulate methods of ending the corporate existence. That

as to implement reasonable expectations and promote the security of transactions." Folk, *supra* note 124, at 885-86. See also Cranson v. International Bus. Mach. Corp., 234 Md. 477, 200 A.2d 33 (1964) (applying estoppel to deny corporate existence without mentioning the state's provision similar to section 56; the state had no statute equivalent to section 146).

129. MODEL ACT, *supra* note 37, § 146, Comments.

130. See note 125, *supra*; cf. Louisiana Dist., Church of the Nazarene v. Church of the Nazarene, 132 So. 2d 667 (La. App. 1st Cir. 1961) (conclusive presumption of due incorporation attaching under the former law upon issuance of the certificate of incorporation precluded collateral attack on a corporation not having its charter executed in authentic form as required). See also the authorities cited in note 121, *supra*.

131. LA. R.S. 12:21 (Supp. 1968).

132. *Id.* § 22; accord, *id.* § 24B(2).

section states in part: "Every corporation shall be subject to dissolution or forfeiture of its charter or franchise, as provided by general law." Thus, if a corporation were formed in violation of the Louisiana Constitution, a court might liberally construe this section to conclude that attacks on the corporate existence are subject to the Business Corporation Law, under which the conclusive presumption of due incorporation would maintain the organization's de jure corporate status. This approach would not perpetuate an "unconstitutional corporation," for the state could attack the corporation's existence in a direct action.¹³³

When the articles were not recorded locally but were recorded at the Secretary of State's office, section 25 of the Louisiana Act clearly renders the de facto doctrine unnecessary, assuming that the certificate of incorporation is issued, because the corporation is then de jure.¹³⁴ The certificate of incorporation will have been issued in this situation, for "recording" presupposes filing and payment of taxes, fees, and charges and is followed by issuance of the certificate without further action by the incorporators.¹³⁵ Section 25D reaffirms that failure to file locally does not prevent de jure existence: that section, read with section 25C, makes such filing a mere condition subsequent to incorporation.¹³⁶ Arguably, application of the de facto incorporation theory is appropriate in the more difficult case of an organization for which there was no recording, if the articles were filed and the liability was incurred in good faith. This situation is discussed below.¹³⁷

The Louisiana Act permits de jure incorporation without paid-in capital, making de facto incorporation unnecessary in this situation. No statement of paid-in capital is required in the articles of incorporation;¹³⁸ and even if an amount is specified by the articles, payment is only a condition precedent to beginning business under section 26.¹³⁹ Furthermore, the de facto doctrine could not affect the personal liability expressly

133. *Id.* § 25B; see note 125, *supra*.

134. *Id.* § 25B & C; see note 125, *supra*.

135. *Id.* § 25B; see note 125, *supra*.

136. *Id.* §§ 25C (quoted in note 125, *supra*) & 25D. See generally HENN, *supra* note 1, at 238-39 (discussing conditions subsequent to incorporation).

137. See the text at notes 147-53, *infra*.

138. LA. R.S. 12:24, Comment (f) (Supp. 1968).

139. *Id.* § 26 provides: "A corporation formed under this Chapter shall not incur any debts or begin the transaction of any business, except business incidental to its organization, or to the obtaining of subscriptions to, or payment for, its shares, until the amount of paid-in capital with which it will begin business, if stated in the articles, has been paid in full." *Accord, id.* § 24, Comment (f).

imposed by section 92A¹⁴⁰ on officers and directors violating the prohibition of section 26.

Nor is the de facto doctrine necessary to validate the acts of a corporation which has functioned after lapse of the time specified in the articles. Section 31D of the Louisiana Act¹⁴¹ permits amendment of the articles to extend the duration of the corporation even if such amendment occurs after the corporation's duration has expired. Again, this defect will seldom occur, as a corporation may now have perpetual duration.¹⁴²

When Estoppel is Obviated by Statute

Estoppel to deny corporate existence will be inapplicable in cases where the certificate of incorporation has been issued, for two reasons. First, since the certificate of incorporation is conclusive evidence of due incorporation,¹⁴³ estoppel will be unnecessary in nearly all cases of pre-issuance defects.¹⁴⁴ Second, if there are any irregularities not cured by the conclusive presumption, a possible example being incorporation under an unconstitutional statute,¹⁴⁵ the courts would hardly extend an equitable doctrine further than a legislative enactment carefully aimed at pre-recording defects.

Uses of De Facto Incorporation Not Obviated by Statute But Nevertheless Inappropriate

Two possible uses for the de facto doctrine remain which are not clearly obviated by the Louisiana Business Corporation Law of 1968: when the articles of incorporation were not recorded at all, and when the articles were recorded locally but not with the Secretary of State. For the reasons detailed below, in neither of these situations should the courts apply de facto incorporation, despite the call for "full application" in the comment to section 26.¹⁴⁶

Of course, failure to record can embrace many degrees of noncompliance. At one extreme is failing even to attempt to meet statutory

140. *Id.* § 92A: "If a corporation has transacted any business in violation of R.S. 12:26, the officers who participated therein and the directors shall be liable jointly and severally with the corporation and each other for the debts or liabilities of the corporation arising therefrom."

141. *Id.* § 31D.

142. *Id.* §§ 24B(a); 24, Comment (C).

143. *Id.* § 25B; see note 125, *supra*.

144. See 8 FLETCHER, *supra* note 1, at 191-92; Ballantine, *A Critical Survey of the Illinois Business Corporation Act*, 1 U. CHI. L. REV. 357, 380 (1934).

145. See the text preceding note 133, *supra*.

146. Quoted in the text at note 126, *supra*.

requirements; at the other is paying fees and filing the articles, only later to have them temporarily rejected merely because, for example, the incorporators' addresses were omitted. When there has been no attempt to comply, the common law and Louisiana courts have never suggested that there is de facto incorporation.¹⁴⁷ But when the articles have been filed in good faith but rejected, a court would be confronted with a most difficult case, one in which one state supreme court has recognized a de facto corporation even though that state had adopted statutes similar to both sections 56 and 146 of the Model Business Corporation Act.¹⁴⁸ Obviously, the incorporators making such an attempt to comply in Louisiana would occupy an even stronger position than a party in the situation mentioned in the comment to section 26, one who participated in business transactions before *filing*.¹⁴⁹

Nevertheless, there are cogent reasons for discarding even this application of de facto incorporation in Louisiana. De facto incorporation might be unnecessary when the certificate is later issued, because corporate existence relates back to filing and execution of the articles under section 25C of the Louisiana Act.¹⁵⁰ But the legislature probably did not intend, in

147. See authorities cited in notes 40 & 42, *supra* (indicating that Louisiana by statute and court decision adopted the traditional de facto rationale, including the requirement of colorable compliance with incorporation laws); 8 FLETCHER, *supra* note 1, at 74; Frey, *supra* note 1, at 1164 ("When confronted with no attempt to incorporate the judicial mind summarily rejects the idea of 'de facto' corporate existence . . ."). See also *Nichols Const. Corp. v. Spell*, 315 So. 2d 801 (La. App. 1st Cir. 1975) (denying de facto existence where the only grounds asserted were that the corporation later formed used the same equipment and took on the same jobs as the predecessor sole proprietorship).

148. *Vincent Drug Co. v. Utah State Tax Comm'n*, 17 Utah 2d 202, 407 P.2d 683 (1965).

The borderline situation discussed in the text must be distinguished from a similar case in which de facto incorporation is patently inappropriate. Section 25A of the Louisiana Act provides: "The articles and initial report may be delivered to the Secretary of State in advance, for filing as of any specified date (and, if specified upon such delivery, as of any given time on such date) within thirty days after the date of delivery." Clearly, de facto incorporation should not be used to allow one to avoid personal liability on a contract he made after early delivery of the articles but before the certificate of incorporation was issued. Here, the reasons for denying de facto status in the situation discussed in the text apply with even more force. See the text at notes 149-53, *supra*. Moreover, the person making an early delivery of the articles and specifying the effective date of filing certainly must have understood at least that corporate existence would not begin until the specified filing date; therefore, the element of colorable, good faith compliance is absent and a de facto corporation cannot exist.

149. Quoted in the text at note 126, *supra*.

150. Quoted at note 125, *supra*.

this situation when a certificate is not issued until some time later, after correction and refiling, that the corporation's existence relate back to the first filing. Even if the certificate is never issued or if section 25C is construed to comport with the above assessment of legislative intent, the de facto doctrine arguably is precluded by the absence of the second traditional element, colorable compliance. The comment to section 56 of the Model Act states: "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."¹⁵¹ Louisiana adopted a provision¹⁵² similar to section 56, as noted above.

Finally, a court constrained to protect incorporators acting wholly in good faith should use estoppel to deny corporate existence. Estoppel is a more manageable tool: it produces a narrower rule and can be successfully urged in later cases only when fairness demands.¹⁵³

In the second situation, recording locally but not with the Secretary of State, it is also inappropriate to use the de facto doctrine, for similar reasons. First, if filing with the Secretary of State (without issuance of a certificate) does not constitute apparent compliance, neither should local filing, which is made a mere condition subsequent to incorporation by the statute.¹⁵⁴ Second, in cases where fairness requires bestowing a corporate privilege, estoppel to deny corporate existence should be preferred over de facto incorporation.¹⁵⁵

Uses of Estoppel Not Obviated by Statute But Nevertheless Inappropriate

Louisiana decisional law on estoppel to deny corporate existence remains intact with regard to defective corporations for which a certificate of incorporation has never been issued. In this case, estoppel enjoys the same support as de facto incorporation, *i.e.*, the comment to section 26 calling for "full application," and the legislature's rejection of section 146 of the Model Act, viewed in light of the authorities' emphasis on both sections 56 and 146 of the Model Act working *together* to discard the

151. MODEL ACT, *supra* note 37, § 56, Comment (1971).

152. LA. R.S. 12:25 (Supp. 1968); see note 125, *supra*.

153. See the text at notes 159-62, *infra*.

154. LA. R.S. 12:25C & D (Supp. 1968); see the text and authorities at note 136, *supra*.

155. See the text at notes 159-62, *infra*.

doctrines.¹⁵⁶ At the same time, estoppel does not suffer the infirmities of de facto incorporation, *i.e.*, piecemeal coverage of pre-issuance defects by specific provisions of the Louisiana Act,¹⁵⁷ and cogent reasons for discarding de facto incorporation in cases where a certificate was never issued.¹⁵⁸

Application of estoppel to deny corporate existence, in the appropriate instances discussed below, is a sound result. The courts need a tool to moderate the rigid Model Act approach, which can lead to injustice.¹⁵⁹ Estoppel serves that purpose better than de facto incorporation, because estoppel presents less danger of creating precedent unworkable in another factual context. Estoppel is precise: there is no need to find that a de facto corporation with a full array of corporate privileges has been created.¹⁶⁰ Estoppel is self-limiting: it can be applied only when it is inequitable not to apply it.¹⁶¹ Estoppel is straightforward: a detour through de facto rationale is unnecessary to explain results often reached simply because dealings were on a corporate basis.¹⁶²

Though some uses of estoppel can serve a valuable function, estop-

156. See the text and authorities at note 124, and authorities cited at note 128, *supra*.

157. See the text at note 130-42, *supra*.

158. See the text at notes 146-55, *supra*.

159. See, *e.g.*, *North Am. Contr. Corp. v. Gibson*, 327 So. 2d 444 (La. App. 3d Cir.), *cert. denied*, 332 So. 2d 280 (La. 1976) (corporation, sued as a debtor on a contract made in the corporate name six weeks before incorporation, was estopped to deny that it had corporate capacity at the time of the transaction). *But see Folk*, *supra* note 124, at 886: "Given the ease with which corporations can be formed, it would seem desirable now to draft a statute making filing an absolute prerequisite for limited liability and imposing partnership liability when compliance is not proven, thereby definitively abandoning the old and uncertain common law doctrines of *de facto* corporation and estoppel."

160. See authorities cited in note 19, *supra*.

161. See authorities cited in note 24, *supra*.

162. In reference to de facto incorporation as a reason for bestowing limited liability, Frey, *supra* note 1, at 1176-79 states: "[T]he 'de facto' statement, in addition to being pure surplusage, can be positively misleading." He explains that a case stating only that the associates are personally liable when the incorporation process is defective for a certain reason will not be extended in another case to hold that such a corporation cannot own property; but, if the first case states that the corporation is not de facto, *therefore* the associates are personally liable, a court will be tempted later to say that such a defective corporation is not de facto, *therefore* it cannot own property.

Professor Frey also criticizes estoppel, because it fails to answer the ultimate question of why limited liability was given.

ping a creditor of an organization is inappropriate and should be repudiated, as some early Louisiana cases attempted to do.¹⁶³ There are two types of creditors who should not be estopped. The first is a creditor who sues the defective corporation's individual members on a contract made as a corporation in the usual course of business while the creditor believed the organization duly incorporated. The "estoppel" applied to this creditor is not genuine estoppel. There was no "holding out" of a pretended corporation by the party to be estopped:¹⁶⁴ the creditor did not represent that the organization was duly incorporated; instead he acted on the organization's representation. The organization or its members cannot truthfully say they relied to their prejudice on an act of the creditor,¹⁶⁵ since the creditor's actions were based solely on his limited knowledge of the organization, while the organization's members had superior means of discovering whether the proper steps had been taken in formation. Finally, no "benefit" went to the creditor as a result of his actions, for he will get no more from the members than he had a right to expect from the corporation—performance as agreed. Certainly, the creditor who is not estopped will recover from a pool of assets he had thought were out of reach, but denying him recovery on that basis alone should not be called estoppel. In the rare case where the creditor's actions go far enough to mislead and seriously prejudice the members—and when he actually indicated an intention to hold only the organization—it is more correct to say that he impliedly agreed to the limited liability of the members. There is support in Louisiana for this straightforward approach.¹⁶⁶

Another objection to estopping the creditor of a defective corporation

163. See cases cited in note 86, *supra*.

164. See *Robertson v. Levy*, 197 A.2d 443 (D.C. Ct. App. 1964); *Timberline Equip. Co. v. Davenport*, 267 Or. 64, 514 P.2d 1109 (1973); BALLANTINE, *supra* note 1, at 88; Frey, *supra* note 1, at 1162; *Estoppel to Deny*, *supra* note 19, at 342.

165. See *Robertson v. Levy*, 197 A.2d 443 (D.C. Ct. App. 1964); BALLANTINE, *supra* note 1, at 88; *Estoppel to Deny*, *supra* note 19, at 341-42.

166. Two Louisiana cases expressed this contractual reason for permitting associates of a defective corporation to enjoy limited liability, but they unnecessarily added that such implied contractual limitations are a basis for estoppel. *Tulane Imp. Co. v. S. A. Chapman & Co.*, 129 La. 562, 56 So. 509 (1911); *Bond & Braswell v. Scott Lumber Co.*, 128 La. 818, 55 So. 468 (1911). In appropriate situations, these two cases could serve as authority for simply finding an implied agreement. See also *Sentell v. Hewitt*, 50 La. Ann. 3, 22 So. 970 (1898) (an incorporator had written the plaintiff creditor, saying that he agreed to be personally liable while his associates in the organization had to be given limited liability; held that because the creditor dealt with the defective corporation after receiving the letter, he had impliedly agreed to the limitation of liability); BALLANTINE, *supra* note 1, at 92, 96; Frey, *supra* note 1, at 1154, 1163, 1177.

from denying corporate existence, when he dealt with persons actively transacting business as agents of the pretended corporation, is that such estoppel is in derogation of Louisiana mandate law. In *North American Contracting Corp. v. Gibson*,¹⁶⁷ the individual defendants who had contracted in the name of a corporation not formed until after the transaction were held liable as "agents signing a contract for a nonexistent principal" under Louisiana Civil Code articles 3010, 3012, and 3013. Estoppel to deny corporate existence was not urged by the defendants in this case probably because they were unable to prove a necessary part of the "reliance" element, their ignorance of the defects,¹⁶⁸ as they had not incorporated until six weeks after the transaction. However, even had the defendants met all the elements of estoppel, they would have remained "agents signing a contract for a nonexistent principal."¹⁶⁹ Corporate existence is not conferred by estoppel.¹⁷⁰

Professor Ballantine examined the great conflict in the authorities concerning estoppel of a creditor of a defective corporation and concluded that in a suit to impose personal liability upon the members of a corporation so defective that it cannot be recognized as a de facto corporation, only the active associates such as those acting as directors, officers, or agents of the ostensible corporation should be personally liable while passive associates should not be.¹⁷¹ This approach apparently has not appealed to the courts, for Professor Frey found, in studying all the limited liability cases decided prior to 1952, that "one is not justified in concluding that participation in management is an important factor in predicting the probable impact of a defect in incorporation upon the liability of the members."¹⁷² Professor Ballantine's argument, which is based on considerations of fairness to the unaware, passive associate, loses its force today in many jurisdictions, including Louisiana, where "the process of acquiring de jure incorporation is both simple and clear."¹⁷³ The passive shareholder has a better opportunity to protect himself than does the creditor. The shareholder can limit his exposure by seeing that no business is transacted before issuance of the certificate, and he is protected once the

167. 327 So.2d 444 (La. App. 3d Cir.), *cert. denied*, 332 So.2d 280 (La. 1976).

168. See authorities cited in note 26, *supra*.

169. *But see* BALLANTINE, *supra* note 1, at 94-96 (implies that persons may be held individually liable as agents of a nonexistent principal only if they "actively engage in business for profit under the name and pretense of a corporation which they know has no legal existence . . .").

170. See authorities cited in note 19, *supra*.

171. BALLANTINE, *supra* note 1, at 91-96.

172. Frey, *supra* note 1, at 1178.

173. MODEL ACT, *supra* note 37, § 146, Comment.

certificate is issued, because pre-issuance defects are cured¹⁷⁴ and because passive officers and all mere shareholders are not liable for business transacted before capital is paid in.¹⁷⁵

Professor Folk noted the ease with which corporations can now be formed and recommended elimination of both de facto incorporation and estoppel to deny corporate existence, at least so far as they affect the privilege of limited liability.¹⁷⁶ The course suggested in this Comment would reach the end urged by Professor Folk only in the case of a creditor of the defective corporation seeking to impose personal liability on the associates, while retaining estoppel for use in other more appropriate cases, such as estopping a debtor organization from denying its own corporate existence when sued as a corporation.

The second situation of creditor estoppel that the courts should discard occurs when the creditor contracted knowing he dealt with an inchoate corporation and indicated an intent to hold only the corporation.¹⁷⁷ Here, the rules concerning a promoter's liability for contracts made before creation of the corporation cover the issue of limited liability with greater precision and theoretical consistency.¹⁷⁸ But if courts insist on using estoppel language in this case, they are not wholly in error, for at least clear reliance on the creditor's recognition of corporate status is present: those signing for the organization depend entirely upon the tacit agreement to protect them.

Another case in which estoppel should be replaced by a better rationale is estopping the corporation, its members, or a third party because they have admitted the corporation's existence by pleading in court.¹⁷⁹ True, "holding out," "reliance," and "benefit" might exist in these situations if the pleading were used to lure the other party into ambush. However, the estoppel label should be discarded, whether the conduct working the estoppel is a pleading in the same or a prior suit or a judgment obtained against the party in a prior action. If the estoppel arises merely from a pleading (called "judicial estoppel" in common law jurisdictions),¹⁸⁰ the narrower Louisiana Civil Code doctrine of judicial con-

174. See authorities and text at note 130, *supra*.

175. LA. R.S. 12:92A (Supp. 1968). Of course, estoppel could not override an express statutory personal liability provision such as § 92A.

176. Folk, *supra* note 124, at 886.

177. See authorities and text at notes 105-06, *supra*.

178. See *Folse v. Loreauville Sugar Factory, Inc.*, 156 So. 667 (La. App. 1st Cir. 1934); BALLANTINE, *supra* note 1, at 114-18; 1 FLETCHER, *supra* note 6, at 775-81.

179. See authorities and text at notes 101-02 & 113-16, *supra*.

180. See *Stevens v. New Orleans & N.E. R.R.*, 341 F. Supp. 497 (E.D. La. 1972).

fession¹⁸¹ applies, so the courts are not free to borrow rules from other jurisdictions. If the estoppel arises from a prior judgment (called "estoppel by judgment" in common law jurisdictions),¹⁸² the courts should apply Louisiana *res judicata* law,¹⁸³ which gives a more limited preclusive effect to judgments than the complementary common law doctrines of *res judicata* and estoppel by judgment.¹⁸⁴

Appropriate Uses of Estoppel

There are many instances where estoppel remains the best available tool. When the organization is sued as a debtor on a contract made as a corporation, the organization and its members should be estopped to deny

181. LA. CIV. CODE art. 2291 provides: "The judicial confession is the declaration which the party, or his special attorney in fact, makes in a judicial proceeding. It amounts to full proof against him who has made it. It can not be divided against him. It can not be revoked, unless it be proved to have been made through an error in fact. It can not be revoked on a pretense of an error in law." *See, e.g.*, *J. H. Jenkins Contractors, Inc. v. Farriel*, 261 La. 374, 259 So. 2d 882 (1972); *Jackson v. Gulf Ins. Co.*, 250 La. 819, 199 So. 2d 886 (1967); *Sanderson v. Frost*, 198 La. 295, 3 So. 2d 626 (1941). A judicial confession in Louisiana does not arise from a pleading in a *prior* suit, *id.*, while: "An estoppel [under the general common law rule] may arise from allegations or admissions in former proceedings, and this applies to an estoppel to deny corporate existence." 8 FLETCHER, *supra* note 1, at 269 (footnotes omitted).

182. *See Stevens v. New Orleans & N.E. R.R.*, 341 F. Supp. 497 (E.D. La. 1972); 8 FLETCHER, *supra* note 1, at 284-86.

183. LA. CIV. CODE art. 2286 provides: "The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality." *See Mitchell v. Bertolla*, 340 So. 2d 287 (La. 1976).

184. In the case of one suing a corporation in the first suit and then suing the shareholders in the second suit, Louisiana *res judicata* would not bar the second suit, because there is no identity of parties. *See State v. Debenture Guarantee & Loan Co.*, 51 La. Ann. 1874, 1885, 26 So. 600, 605 (1899); *Hincks v. Converse*, 37 La. Ann. 484 (1885) (dictum). *See also Quinette v. Delhommer*, 247 La. 1121, 176 So. 2d 399 (1965). Furthermore, even though the common law rule of estoppel to deny corporate existence bars the second suit, 8 FLETCHER, *supra* note 1, at 284-86, such a result is incompatible with Louisiana law in two ways. First, collateral estoppel might not survive in Louisiana, *Mitchell v. Bertolla*, 340 So. 2d 287 (La. 1976), but even if it does, it applies only when the suits are on different causes of action, as defined broadly by the common law. *Id.* Second, the Louisiana courts using collateral estoppel in the past have preferred to apply it only when the parties in both actions were identical. *See Mitchell v. Bertolla*, 340 So. 2d 287 (La. 1976); *California Co. v. Price*, 234 La. 338, 99 So. 2d 743 (1957); Comment, *Preclusion Devices in Louisiana: Collateral Estoppel*, 35 LA. L. REV. 158, 171 (1974) (calling for re-examination of the requirement). *But see Brown v. Globe Tool & Engr. Co.*, 337 So. 2d 894 (La. App. 4th Cir. 1976) (and authorities cited therein).

corporate existence because the organization usually has held itself out as a corporation and the other party has relied on that representation. The Louisiana Third Circuit Court of Appeal held in this situation that "[t]he corporation, . . . having recognized the validity and accepted the benefits of the contract, is also liable since it is estopped to deny its corporate existence at the time the contract was entered into."¹⁸⁵

In the analogous case of an organization sued as a tortfeasor,¹⁸⁶ estoppel should also be used, despite the failure of these facts to mesh with the traditional rationale. There will be no "reliance" at the time the liability is incurred, since the plaintiff cannot choose his tortfeasor. However, arguably there is "reliance" later, when the plaintiff files his suit against the organization as a corporation, the capacity in which the organization dealt with the public. In any case, estoppel here is appropriate, as it might be necessary to prevent injustice (by precluding dismissal of a subsequent suit against the members due to prescription), and might serve judicial efficiency by avoiding an unnecessary suit—one against the associates to reach indirectly the same assets.

Estoppel to deny corporate existence should also be applied when a shareholder tries to escape liability for his stock subscription by attacking the corporate existence. The reason for estopping the shareholder in *East Pascagoula Hotel Co. v. West*¹⁸⁷ remains convincing: "He cannot now, by such objections, refuse to pay his note for stock, for it was on the faith of his note, and notes of a similar character, that the public may have been induced to credit the company."¹⁸⁸ The courts should also estop a shareholder contracting with the organization on an ordinary contract, because the reasons for estopping other debtors where equity demands also apply to a shareholder¹⁸⁹ and because the shareholder is in a better position to discover the true legal status of the organization.

When a shareholder attacks the corporate existence for reasons other than escaping liability, such as to dissolve it as a partnership, estoppel is often appropriate, as shown by the cases.¹⁹⁰ But here, even more than in the usual case where estoppel is argued, each situation will present a new

185. *North Am. Contr. Corp. v. Gibson*, 327 So.2d 444, 451 (La. App. 3d Cir.), *cert. denied*, 332 So.2d 280 (La. 1976).

186. *See, e.g., Vredenburg v. Behan*, 33 La. Ann. 627 (1881).

187. 13 La. Ann. 545 (1858).

188. *Id.* *See generally* LA. R.S. 12:93A (Supp. 1968) (detailing the extent of a shareholder's liability for an unpaid share subscription).

189. *See* the text at notes 191-93, *infra*.

190. *See* authorities cited in note 99, *supra*.

assortment of equitable considerations, a fact which warns against adopting a general rule.

There are several cases remaining in which estoppel of the party dealing with the organization is correct. The one occurring most often is that of a debtor liable under an ordinary contract who asserts the defective incorporation of the creditor organization as an afterthought, to escape liability.¹⁹¹ Although the traditional elements of "holding out" and "reliance" are absent here, two considerations militate in favor of estoppel. First, the debtor has received a "benefit" and recognized the organization as a corporation.¹⁹² Second, the debtor is not treated unfairly, for he is required only to perform as agreed, though to a different person.¹⁹³

A surety liable to a third party, with a defective corporation as principal, should be estopped to deny the corporate existence of its principal. If such a case arises in the usual context, a major stockholder guaranteeing the organization's obligations at the creditor's behest, the court should look beyond mere form and recognize the indirect benefit to the surety.¹⁹⁴ Clearly, a compensated surety has also received a benefit and should be estopped.

Despite the two cases rejecting estoppel in similar situations, there is no reason to distinguish the usual case of a surety indebted to the defective corporation, for the surety clearly received a benefit, in the form of premiums. The case refusing to apply estoppel in this situation,¹⁹⁵ where the court relied on the Louisiana Civil Code article 446 prohibition against corporations unauthorized by law appearing in a court of justice, is no longer authoritative, since Louisiana Code of Civil Procedure articles 689

191. See authorities and text at note 107, *supra*.

192. See cases cited in notes 89-90 & 107-08, *supra*. See also *North Am. Contr. Corp. v. Gibson*, 327 So. 2d 444, 451 (La. App. 3d Cir.), *cert. denied*, 332 So. 2d 280 (La. 1976) (quoted in the text at note 185, *supra*; approving the "benefit" rationale in the context of estopping a corporate debtor attempting to deny its own existence).

193. BALLANTINE, *supra* note 1, at 90-91. Of course, other factors might intervene: for example, if the debtor can claim compensation, see LA. CIV. CODE arts. 2207 *et seq.*, against an individual member and not against the corporation, the court should refuse to apply the equitable remedy of estoppel.

194. See *Universal C.I.T. Corp. v. Love*, 264 So. 2d 281, 284 (La. App. 1st Cir. 1972) (dictum), *rev'd on other grounds*, 279 So. 2d 182 (La. 1973) ("We also think it would be patently inequitable to allow one who had guaranteed the debts of a corporation to later deny its existence when called upon to satisfy such a debt.").

195. *Workingmen's Accommodation Bank v. Converse*, 29 La. Ann. 369 (1877), *criticized in American Homestead Co. v. Linigan*, 46 La. Ann. 1118, 15 So. 369 (1894).

and 738 give an unincorporated association the procedural capacity to sue and be sued in its own name. In a recent case,¹⁹⁶ the Louisiana Fourth Circuit Court of Appeal declined to estop a surety from denying the corporate existence of a defectively incorporated engineering firm to which the surety would otherwise have been liable. The engineering firm had asserted its Private Works Act¹⁹⁷ privilege and the surety had filed a bond to remove the encumbrances from the developer's property. The defendants filed exceptions to the engineering firm's action, asserting that the plaintiff had no right or cause of action since the services for which payment was due had been rendered before the corporation was created and only those performing the work are entitled to the privilege. The Court of Appeal held for the surety, stating that the engineering firm's estoppel arguments were insufficient "to mitigate the long established rule that the lien statutes . . . are considered stricti juris and must be rigidly construed."¹⁹⁸ In light of the dominant role played by the strict interpretation rule, this case is not authority that sureties liable to the defective corporation are immune from estoppel.

Estoppel is appropriate and should be applied in the similar case of an insurer of the corporation.¹⁹⁹ It has recognized the corporation and pocketed the premiums.

Conclusions

The remaining utility of de facto incorporation and estoppel to deny corporate existence can be summarized as follows.²⁰⁰

1. De facto incorporation is no longer applicable in these situations:²⁰¹ signing by incorporators who have no capacity to incorporate, incorporating for an unauthorized purpose, neglecting publication requirements, failing to comply with stock subscription requirements, incorporating under an unconstitutional statute, functioning after lapse of the corpo-

196. *Subdivision Planning Eng'r, Inc. v. Manor Dev. Corp.*, 337 So. 2d 618 (La. App. 4th Cir. 1976), *cert. granted*, 341 So. 2d 405 (La. 1977).

197. LA. R.S. 9:4801 *et seq.* (amended in part by La. Acts 1975, No. 673, § 2).

198. *Subdivision Planning Eng'r, Inc. v. Manor Dev. Corp.*, 337 So.2d 618, 620 (La. App. 4th Cir. 1976), *cert. granted*, 341 So. 2d 405 (La. 1977).

199. See the text at note 108, *supra*.

200. These classifications are offered only as a key to the more detailed discussion above, for it is foolish to superimpose unqualified rules on an area of the law which has been called "a wilderness of single instances." *American Ball Bearing Co. v. Adams*, 222 F. 967, 976 (N.D. Ohio 1915), *rev'd sub. nom. Kardo Co. v. Adams*, 231 F. 950 (6th Cir. 1916).

201. See notes 130-42, *supra*.

rate lifetime specified in the articles, and neglecting to meet paid-in capital requirements.

2. Estoppel to deny corporate existence is no longer necessary to overcome defects occurring prior to issuance of the certificate of incorporation.²⁰²

3. De facto incorporation is inappropriate even in those cases where its application was not obviated by the 1968 Corporation Law, and should therefore be completely repudiated.²⁰³ These situations are: failing completely either to file or to have recorded the articles or incorporation, and having the articles recorded locally but not with the Secretary of State.

4. Estoppel to deny corporate existence is inappropriate and therefore should not be applied in the following cases:²⁰⁴ against a third-party creditor who sues the associates of the organization on an obligation which the organization incurred as a corporation, against a third-party creditor who contracted with the organization knowing he dealt with an inchoate corporation and indicating intent to hold only the corporation to be formed, and against an organization or an opposing party on the ground that the corporate existence was admitted in court.

5. Finally, estoppel to deny corporate existence is appropriate and should be applied when equitable, in the following cases:²⁰⁵ against the defective corporation or its members when the defective corporation is sued as a debtor on liability incurred as a corporation, against a surety who is liable to a third party with the defective corporation as principal, and against a debtor of the corporation, whether he is a debtor on an ordinary contract, a surety, or an insurer.

Many have hailed the Model Business Corporation Act as abolishing de facto incorporation and estoppel to deny corporate existence. In the Business Corporation Law of 1968, Louisiana resisted the trend and feigned an intention fully to revive both doctrines, while simultaneously obviating most of the de facto doctrine with specific statutory provisions. In contrast, estoppel was not eliminated by the 1968 Business Corporation Law and remains the best available tool when justice demands bestowal of a corporate privilege not available under another legal theory.

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202. See notes 143-45, *supra*.

203. See notes 146-55, *supra*.

204. See notes 156-84, *supra*.

205. See notes 185-99, *supra*.

