

"The power to increase or decrease the stock, as in this code elsewhere provided, shall apply to any and all classes of stock; but at no time shall the total amount of the preferred stock exceed two-thirds of the actual capital paid in cash or property; and such preferred stock, or any series thereof, may, if desired, be made subject to redemption at not less than par, at a price, to be expressed in the stock certificate thereof."

**Opinion No. 236**

**Corporations—Capital Stock—Preferred Shares—State Investment Commissioner.**

The capital stock of X corporation, all common at the time of its organization, was fixed at \$200,000. Subsequently, it amended its articles of incorporation as to increase its capital stock from \$200,000 to \$300,000 by issuance of 1000 shares of preferred stock at the par value of \$100 each. The actual capital paid in amounted to only \$750.

HELD: Such increase is legal, since authorized capital stock has no existence or validity until it is actually issued and subscribed for; but the State Investment Commissioner properly refused the corporation a permit to sell all the preferred stock, since the ratio of at least \$1.50 of capital to \$1.00 of preferred stock must always be maintained.

June 8, 1933.

According to your request for an opinion, X is a Montana corporation. At the time of its organization the amount of its capital stock, all common, was fixed at \$200,000.00. Subsequently, it amended its articles of incorporation so as to increase its capital stock from \$200,000.00 to \$300,000.00, by authorizing the issuance of one thousand shares of preferred stock at the par value of \$100.00 each. The actual capital paid in amounts to only \$750.00.

You then inquire whether or not such increase of the capital stock was legal in view of the provisions of Section 5994, Revised Codes 1921, as amended by Chapter 33, Laws of 1931, the applicable part of which is as follows:

Our view is that it was. The quoted language commencing with the word "but" applies, of course, to preferred stock actually issued, not to preferred stock unissued. (See opinion No. 149, this volume.)

Authorized capital stock has no existence or validity until it is actually issued or subscribed for. (Missouri Valley Grocery Co. v. Hall, 178 N. W. 193; Frank Gilbert Paper Co. v. Prankard, 198 N. Y. S. 25; 14 C. J. 383). There is no such thing as capital stock until it is issued and owned by the subscribers or purchasers. In other words, capital stock is not in esse and is not property until it is subscribed for; before that time it is a mere legal fiction, or, at most, a potentiality and not a reality. (Chicago etc. R. R. Co. v. Harmon, 89 Mont. 1; Fletcher, Cyclopedia Corporations, (Perm. Ed.) Sec. 5082; 14 C. J. 406.)

You also state in your letter that the corporation has applied to you, as Investment Commissioner, for a permit to sell all the preferred stock, and you take the position that the permit should not issue. We agree with you. Under the circumstances here existing, we do not see how the corporation could lawfully sell more than fifteen shares of the preferred stock, and then only in the event it sold them at par and placed the entire proceeds in its treasury. The ratio of at least \$1.50 of capital to \$1.00 of preferred stock must always be maintained.