YALE
LAW JOURNAL

Vol. XXXVIII JUNE, 1929 No. 8

PROMOTERS' CONTRACTS

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The promoter is the creative force of the corporate enterprise, for corporations do not spring into being spontaneously. They result logically from planning and preliminary operations on the part of promoters. A Massachusetts judge has said, making vivid his opinion by poetic expression, "The corporation is in the hands of the promoter like clay in the hands of the potter." [1] The promoter undertakes to form and set going a company in reference to a particular project.[2] As was stated in an English case, "the term promoter is a term not of law, but of business, usefully summing up, in a single word, a number of business operations familiar to the commercial world, by which a company is generally brought into existence." [3] When the corporation does achieve legal existence, the promoter frequently continues as its directing mind. The natural continuity and the logical identity between the corporation and the promoter is the influence which permeates and colors the law relative to promoters' contracts.

The promoter's efforts are largely devoted to making contracts on behalf of the proposed corporation, which it may ignore or refuse to sanction, or by which it may become bound after its

[1] Old Dominion Copper Co. v. Bigelow, 203 Mass. 159, 187, 89 N. E. 193, 206 (1909).

[2] First Avenue Land Co. v. Hildebrand, 103 Wis. 530, 79 N. W. 753 (1899).

[3] Whaley Bridge Co. v. Green, 5 Q. B. D. 109, 111 (1879). For other cases containing definitions of term "promoter" see Armstrong v. Sun Printing Ass'n, 137 App. Div. 828, 830, 122 N. Y. Supp. 531, 532 (2d Dep't 1910); Dickerman v. Northern Trust Co., 176 U. S. 181, 203, 20 Sup. Ct. 311, 319 (1900); Wheal Ellen Gold Mining Co. v. Read, 7 Austr. C. L. R. 34, 43 (1908); Erlanger v. New Sombrero Phosphate Co., 3 App. Cas. 1218, 1236 (1878).

organization. These contracts are in their very nature anomalous for although the promoter is a party to the contract, performance is not expected of him, nor is he acting for any existing principal. The courts in interpreting and enforcing these agreements have made a sincere attempt to effect justice, and, at the same time, with rather disastrous results, to adapt contract law to the unusual situations involved. Since crystallized law has frequently no application, it is difficult to regard the decisions as precedents, for they seem predicated primarily on the facts, and only secondarily on the law. Resorting to rules of law in these cases, particularly in this country, is an afterthought necessary to sustain and place them in some recognized category.

It is the purpose of this article to analyze and illustrate the promoter's and the corporation's rights and liabilities under contracts made on behalf of corporations to be organized.

PROMOTERS' RIGHTS AND LIABILITIES ON CONTRACTS MADE ON BEHALF OF PROPOSED CORPORATIONS

The proposed corporation until it achieves legal existence is obviously unable to contract, either through promoters or other agents. The reasoning in the general run of cases is somewhat as follows: An agent without a principal is a patent absurdity,[4] and if he assumes to act for a principal when in fact he has none, he is individually liable. Since the promoter acts for the corporation before its organization, he is under the general rule of agency responsible as principal on contracts of this character.[5] If this were not so, agreements made by him on behalf of future corporate enterprises would be altogether inoperative until adopted by the corporation.[6] Since the promoter is usually held

[4] Buffington v. Bardon, 80 Wis. 635, 639, 50 N. W. 776 (1891): "The law is that a corporation is liable for its own acts only after it has a legal existence. Until that time, no one whether a promoter or not can sustain to the corporation the relation of agent. Were this not so, we would have an agent without a principal, which is an absurdity."

[5] Weiss v. Baum, 218 App. Div. 83, 217 N. Y. Supp. 820 (2d Dep't 1926) —a case involving promoters' contracts. "The proposition presented here does not appear to have been decided in this State, but the principles involving the personal liability of one assuming to act as agent for a nonexistent principal or claiming a power of agency without authority, have been frequently set forth. Speaking in a case where the defendant executed a note in the name of another without authority, Judge Selden, in White v. Madison, 26 N. Y. 117, 123, pointed out that prior decisions in this State supporting such liability have been regarded by the courts as 'substantially repudiated,' adding: 'If it were necessary, in disposing of the present case, to decide the question, whether, as a general principle, one entering into a contract in the name of another, without authority, is to be himself holden as a party to the contract, I should hesitate to affirm such a principle. By that rule courts would often make contracts for parties which neither intended nor would have consented to make.'"

[6] Kelner v. Baxter, L. R. 2 C. P. 174, 183 (1866).

bound by these contracts, it logically follows, according to well established principles, that even after the contract becomes the corporation's, he cannot, in the absence of a novation, be released from its obligations.[7]

The situation would be a simple one if the rules in regard to the promoter's liability could be so authoritatively and definitely summarized. Fairness and business usage, however, frequently demand otherwise. Rules applying and restating the general premises of the law of contract are not ordinarily applicable to the promoter's case, for he is in a different position from the ordinary party to a contract. The persons who contract with him gamble on the ability of the proposed corporation to perform, and expect little except good faith from the promoter. Certainly they do not anticipate performance by the promoter, and once the contract becomes the corporation's, it is substituting a legal theory for the intention of the parties to continue to hold him liable on the contract. The courts have recognized this, and the decisions reveal exceptions and qualifications, which nullify the value of the application of general principles of contract law to promoters' agreements.

A leading English case,[8] cited extensively by our courts, states the logical and orthodox principle in reference to the promoter's liability on contracts made for future corporations. There the plaintiff, addressing the defendant promoters "on behalf of the proposed Gravesend Royal Alexandra Hotel Co., Ltd.," offered to sell his extra stock of liquor. The acceptance of the offer was signed by the defendants, adding the same description after their names. The liquor was accepted and consumed in the hotel business, and the directors by a resolution made at a meeting prior to complete incorporation specifically ratified the contract. The hotel corporation was subsequently organized and became insolvent. After the suit was brought, the completely organized corporation again ratified the contract. The court, in holding the defendants individually liable, said: "But as there was no corporation in existence at the time, the agreement would be wholly inoperative, unless it was held to be binding on the defendants personally. The cases referred to in the course of the argument fully brought out the proposition that where a contract was signed by one who professes to be signing as 'agent,' but who has no principal existing at the time, and the contract would be wholly inoperative unless binding upon the person who signed it, he is bound thereby; and a stranger cannot by subsequent ratification relieve him from that responsibility." Certainly, reasoned the court, the defendants did not intend that the liquor would only be paid for if the corporation was organ-

[7] Bonsall v. Platt, 153 Fed. 126, 129 (C. C. A. 2d, 1907).

[8] Kelner v. Baxter, *supra* note 6.

ized, particularly as payment was promised on a definite date.

Under the authority of this case, therefore, unless and until there is a novation, the promoter is held to continue liable on his contracts made on behalf of proposed corporations. Many cases in our own courts set forth this principle with equal strictness.[9] They proceed upon the arbitrary premise that the law assures persons dealing with promoters of corporations to be formed the double security of the promoter and of the corporation, unless a definite intention to the contrary can be shown.[10]

This theory is predicated on such clear and obvious legal principles, that it hardly needs illustration. In *Ennis Cotton-Oil Co. v. Burks*,[11] the promoters and the corporation were joined as parties defendant. The agreement, under which the goods were delivered, was made with the promoter of the corporation, and was subsequently adopted by it. The court said that the promoter was not discharged by the adoption of the agreement, for liability attached to him when the contract was made, and he was not released therefrom. Both the corporation and the promoter were held liable on the agreement. It was also decided that where the corporation had entered into a new agreement with the plaintiff for goods, it was alone liable thereon. In *Mt. Pleasant Coal Co. v. Watts*,[12] the promoters agreed with the plaintiff that they would form a corporation to take over a lease of coal lands which he owned, and that in consideration of the assignment the corporation would employ him as mine boss for life, and issue to him a specified amount of stock. The corporation took over the lease, but failed to transfer the stock, and discharged the plaintiff. The corporation and the promoters were joined as defendants. The court held that the promoters were not released from their liability on the contract, although adopted by the corporation, for nothing short of a novation could effect this result. These decisions are apparently contradictory to the real meaning of the agreement of the parties, for there is nothing in the facts to indicate any intention to bind the promoters individually.

It is interesting to note that in a Porto Rican case,[13] the court stretched the orthodox rule to effect justice instead of to defeat

[9] Wells v. Fay & Egan Co., 143 Ga. 732, 85 S. E. 873 (1915); Garnett v Richardson, 35 Ark. 144 (1879); Ennis Cotton-Oil Co. v. Burks, 39 S. W. 966 (Tex. Civ. App. 1897); Lewis v. Fisher, 167 Mo. App. 674, 157 S. W. 172 (1912); O'Rorke v. Geary, 207 Pa. 240, 56 Atl. 541 (1903). See *supra* note 7.

[10] Carle v. Corhan, 127 Va. 223, 103 S. E. 699 (1920); Strause v. Richmond Woodworking Co., 109 Va. 724, 65 S. E. 659 (1909).

[11] *Supra* note 9.

[12] 151 N. E. 7 (Ind. App. 1926); see also Thistle v. Jones, 45 Misc. 215, 92 N. Y. Supp. 113 (County Ct. 1904).

[13] Crane v. Bennett, 3 P. R. 185 (1907).

it. There the defendants induced the plaintiff to bring his mother to Porto Rico, representing that he would be made joint superintendent of their plantation, and that they would give him a house to live in. He, in turn, was to contribute $4,000 toward the development of the plantation, for which he was to receive an interest in the property. Later the plaintiff, a young man obviously unschooled in business matters, consented to the substitution of a corporation for the defendant partners as the owners of the land, and to take stock, instead of an interest in the property itself, for his cash contribution. Before signing the contract, the plaintiff noticed that it contained nothing about his appointment as joint superintendent of the property, and when he called this to the defendants' attention, they told him that was understood. He never received the house, the stock or his position. The court held both the promoters and the corporation liable, in spite of the fact that the plaintiff had consented to the substitution of the corporation for the defendants.

The facts indicated that the corporate fiction was merely used to defeat the plaintiff's claim. This the court would not permit, although the accepted technique and convention of judicial reasoning prevented it from stating this in so many words as the ground for its decision. Instead it was held judicially that the only manner in which the promoters could be released was by a definite agreement by the plaintiff to look to the corporation *alone* for redress.

Although the foregoing decisions illustrate the general orthodox rule as to the promoter's liability, it has been relaxed in many cases where the contract has been adopted by the corporation.

The equities of the situation are somewhat different where the plan to form the corporation fails. There the promoter is almost invariably held liable on his contracts with third parties, a salutary rule where the third party has parted with value, for without it the contract would be inoperative, and he would be remediless. There are two different types of situations which give rise to this responsibility: where the promoter represents himself as acting for an existing corporation, which, in fact, has never been formed,[14] and where the promoter frankly states to the third party that he is representing a corporation which he proposes to organize. The decision in the first type of case rests on clear definite reasoning. The promoter is liable in these cases on his implied warranty of corporate existence. This responsibility

[14] See Seeberger v. McCormick, 178 Ill. 404, 53 N. E. 340 (1899); Kaiser v. Lawrence Savings Bank, 56 Iowa 104, 8 N. W. 772 (1881); Abbott v. Omaha Smelting & Refining Co., 4 Neb. 416 (1876); Wechselberg v. Flour City National Bank, 64 Fed. 90 (C. C. A. 7th, 1894).

rests on the same ground as that of the person who assumes to act as agent for a principal whom he does not represent.[15]

In *Harrill v. Davis*,[16] the promoters purchased lumber and other materials of the plaintiff in the name of a non-existent corporation, the organization of which was never completed, for the certificate was not filed as required by statute. Although the plaintiff delivered the merchandise to what he assumed was the contracting corporation and intended to extend credit to it, the court held the promoters liable because "they represented themselves to be a corporation, when they knew they were not." *Hurt v. Salisbury*[17] also illustrates this principle. The note in suit was signed by the promoters assuming to act as directors of a corporation in process of formation. The only remaining step necessary to complete incorporation was to file a copy of the articles of association with the secretary of state. The promoters were held liable on the note as partners, for, said the court, it was their duty to prove that their principal had a legal existence.

In cases where the promoter negotiates contracts with parties, openly as an apparent link toward the formation of a new corporation, and the company is never organized, he is usually chargeable. He is responsible both for his failure to organize the corporation and also as if he had contracted in his individual capacity. In a leading case in New York, *Kirschmann v. Lediard & Ree*,[18] the plaintiff agreed to assign a patent to a corporation which was to be organized by the defendants, for which the corporation was to pay him cash and stock. The defendants failed to form the corporation. The court held the promoters liable for breach of their contract to incorporate, the damages being determined by the putative value of the stock. *Heisen v. Churchill*[19] also illustrates this principle. There the evidence showed that the plaintiff clearly understood, when entering into the contracts in suit, that the defendant promoter had acted for a corporation in process of formation. Incorporation was never effected, as the promoter failed to file the certificate of incorporation in the required offices. It was the plaintiff's obligation, said the court, to organize the corporation properly, and to take every necessary step incidental to its formation, and failing to do this, he could not interpose the corporate liability in defense of his own personal responsibility.

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[15] See *supra* notes 5 and 9. Where the promoter acts for a future corporation, as if it were existing and doing business, there can, of course, be no doubt of his liability.

[16] 168 Fed. 187 (C. C. A. 8th, 1909).

[17] 55 Mo. 310 (1874).

[18] 61 Barb. 573 (N. Y. 1872).

[19] 205 Fed. 368 (C. C. A. 7th, 1913).

The *Kirschmann* [20] case, incidentally, is interesting also, for it indicates the measure of damages in an action against a promoter for failure to organize a corporation, particularly if the plaintiff is to be paid in stock. The value of the stock in such cases may be shown by a variety of circumstances, such as the assets of the corporation, its debts, its capitalization, and the possibilities of its business. All these factors are for consideration by the jury.[21] Proof may of course be made that the stock would be worthless.[22]

As was stated at the outset, however, the rule holding the promoter liable on contracts for future corporations has exceptions. Most of these relate to cases where the contemplated corporation has been formed and is held for any one of a number of reasons bound by the contract. The promoter has, however, rather confusingly been held free from liability, even where the corporation has not been organized. In an Arkansas case,[23] the plaintiff leased a photographic machine to the defendant promoter, specifically described in the contract as agent and trustee for a proposed corporation. The machine was delivered, but it was understood that payment was to be made on a certain future date or earlier, upon the company's organization. The plaintiff knew that incorporation was contingent upon the receipt of $20,000 in stock subscriptions. As this was not accomplished, the corporation was never organized and payment was not made to the plaintiff, although it was past the date fixed in the contract. It was held that the promoter was not liable on the lease, for his undertaking was to act for a disclosed principal when it came into existence. This decision is not in accordance with the general rules of law, but it is sustained by the equity of the situation, for the plaintiff himself was a subscriber to the stock, and knowingly assumed the risk of a possible failure to incorporate when he delivered the machine to the defendant. The contract did not provide that the defendant was to be liable only if the corporation was organized, so that under the form of the contract, as the court concedes, there would ordinarily be no doubt as to the defendant's liability, for similarly worded instruments are construed as absolute obligations to pay on the date fixed or earlier on the happening of the specified contingency.

A somewhat similar Alabama case [24] is most radical in holding the promoter harmless on his contract. There a traveling salesman, representing the plaintiff printing company, solicited an order for stationery and fixtures from the promoters of a na-

[20] See *supra* note 18.

[21] Crichfield v. Julia, 147 Fed. 65 (C. C. A. 2d, 1906).

[22] Eisenmayer v. Leonardt, 148 Cal. 596, 84 Pac. 43 (1906).

[23] Belding v. Vaughan, 108 Ark. 69, 157 S. W. 400 (1913).

[24] McQuiddy Printing Co. v. Head, 7 Ala. App. 384, 62 So. 287 (1913).

tional bank. The order was placed with the approval of a board of directors elected for the future bank. The merchandise was charged and shipped to "The National City Bank," just as if its organization had been perfected. The venture was abandoned as a result of a disagreement between the parties, and the subscriptions to the stock were repaid. The court in holding the promoters free from liability on the contract based its decision on the fact that both parties knew that the bank was non-existent, and that the plaintiff never expected payment from the individuals. The court, reasoning in a matter-of-fact and business-like manner said:

> "The state of facts, disclosed by the evidence that the case presented, was that of a dealer who was so eager to make disposition of his wares, and so confident from the impression made on him by the situation as it really existed, that the proposition for the establishment of a bank had progressed so far that it would be consummated as planned that he undertook, on the mere approval of his offer by those who were expected to be in charge of the affairs of the bank when it should come into existence, to supply the stationery which it would need and to look to it alone for the payment of the price, without suggesting or requiring that those who acted in behalf of the proposed bank, or any of them, should incur any personal liability for the articles to be furnished. If a party merely speculates on the chance of being paid by a corporation not yet in existence, and has no claim in contract or in tort against those with whom dealing was had, the latter cannot be held to liability merely because the plan to organize a corporation was not carried out."

This is an extreme case of its type, and the correctness of the decision may well be questioned. Ordinarily where promoters assume to contract for a proposed corporation, and it is never organized, they are liable in any event on the theory that it is their obligation to bring about incorporation and the adoption of the contract by the corporation. If they contract with third parties and accept delivery of goods from them, it seems only fair that the risk that the corporation may not be formed should be theirs, and not the third party's, even if the latter is advised of the exact state of affairs.

Weiss v. Baum [25] is a case decided on a similar theory. It involved an action for the specific performance of a contract for the purchase of real property against Baum, one of the promoters of a projected real estate corporation. At the time the contract was made the sellers understood that the purchase was made on behalf of a corporation in process of formation. In fact the

[25] *Supra* note 5. See also Branning Mfg. Co. v. Norfolk-Southern R. R., 138 Va. 43, 121 S. E. 74 (1924).

agreement was signed, "Ruth Realty Corp. by Charles Baum." The court held that the case did not come within the rule which holds an agent personally liable because acting for a non-existent principal. The basis of this liability is that the agent warrants his authority, while in the case under consideration it was clearly understood that Baum was not the purchaser, and that the corporation which he represented was non-existent. It was the intention of the seller to hold the real estate corporation and not the defendant, and to charge him as vendee would be the making of a new contract by the court. Specific performance against the defendant was consequently refused.

Of course the promoter may, at the outset, tell the third party: "You must look to the corporation, which is to be formed, for performance of this contract, and I am in no event to be held responsible." There are few cases in which the agreement exempting the promoter from liability is as clear as this, but the courts have spelled out this intention from a number of different situations. The classic case on this point is an English one. *Wheeler v. Fradd*[26] involved a loan of £1000 made by the plaintiff, which it was agreed was to be used in connection with a business which the defendant contracted to purchase. The contract provided that the plaintiff was to receive a bonus of £1000, the sum of £2000, the amount of the loan plus the bonus, to be paid to the plaintiff "as and when I receive payment from the company." The underwriting of the corporation failed, and it was never registered. In holding that the plaintiff could not recover, the court said that the defendant did his best to effect the proposed incorporation, which was all he undertook, and repayment was expressly conditioned upon the receipt of payment from the corporation by the defendant. *Strause v. Richmond Woodworking Co.*[27] is an interesting case on this point. When the contract here was signed "M. M. Strause for American Shock Binding Company," that corporation had not yet been organized. The shockbinders contracted for were delivered and billed to the company and partly paid for by it, and the evidence disclosed that it was fully understood by the plaintiff that Strause was acting for a corporation in process of being organized. There was no definite clause in the contract relieving the promoter from liability. The court held that in spite of the form of the contract and the general rule of agency which has been applied to promoters,[28] the question of whether there was an intention to hold the promoter should have been submitted to the jury, stating:

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[26] 14 T. L. R. 302 (1898).

[27] 109 Va. 724, 65 S. E. 659 (1909).

[28] *Supra* note 9.

> "The general rule as to a promoter's liability cannot in reason or fair dealing be carried to the extent of holding him liable in the face of his contract against liability, fairly and legally entered into."

There are also decisions which proceed on a closely related theory. Where the evidence shows that the contracting party intended to extend credit to the proposed corporation, and not to the promoter individually, the latter is held free from liability, particularly where the corporation has been organized. In a recent Virginia case,[29] notes signed "American Theatre, Inc." by its president and secretary were given to the plaintiff in payment for real property. The Theatre Corporation was not in fact organized at the time, and the makers of the notes here sued were its promoters, who, it was clear, were acting for a corporation in process of formation. Although the court stressed the orthodox rule that the persons dealing with promoters are ordinarily entitled to the double security of the promoters and the corporation, it decided that if it appears from the evidence that the contract was made solely on behalf of, and credit was extended solely to, a corporation which was then being organized and which shortly thereafter did procure its charter, the rule's application fails, and the promoters are not liable on the contract.

In *Marconi Telegraph Co. v. Cross*,[30] the agreement provided that the Marconi Telegraph Company was to install its system in Hawaii and adjacent islands. The agreement was made with the defendant promoter, but the clear understanding was that a corporation was to be formed to which the contract was to be assigned. This was done, and the corporation assumed the contract and made payments thereunder. Subsequently certain difficulties arose with the system, and the stockholders of the corporation were loath to continue advancing money under the contract. The plaintiff thereupon sued the defendant promoter, claiming that he was personally liable. The court in deciding in the defendant's favor held that the facts came within one of the exceptions to the general rule, for both parties knew that the agreement was to be assumed by the corporation, and credit was extended solely on that basis.

Although these cases effect justice, they are deviations from the general rule. The ratiocination of the decisions, it is true, that credit was extended to the corporation and not to the promoter, might justifiably be applied to every case in which a contract is made with a promoter avowedly representing a future corporation. Rarely, if ever, is there a conscious intention to

[29] Carle v. Corhan, 127 Va. 223, 103 S. E. 699 (1920).

[30] 16 Hawaii 390 (1905). To the same effect see Esper v. Miller, 131 Mich. 334, 91 N. W. 613 (1902).

hold the promoter.[31] The promoter should only be held liable if that was the intention of the parties, or if it can be fairly implied that he agreed to organize a corporation to take over his obligations, or if he acted in bad faith. A person who contracts with a promoter, and to whom the facts are fully disclosed, ordinarily does so at his own risk, for his undertaking usually is to keep his offer open for acceptance by the corporation when it is organized, and the promoter's intended obligation ordinarily is only to use his best efforts to organize the corporation and to effect the acceptance of the third party's offer by it.

Of course where it appears that the promoters and the corporation are in fact identical, and the corporate fiction is used by the individuals only as a convenient pretext to avoid liability, the promoters should be held liable. A federal case illustrates this.[32] Bonsall, individually, employed Platt to manage his business, with the understanding that if the business succeeded Platt would be fairly compensated. Thereafter Bonsall organized a corporation to take over the business. He was sole stockholder and Platt was an officer. Platt, the plaintiff, continued working in the same capacity. Failing to receive proper compensation, he brought an action against Bonsall for services performed subsequent to incorporation. The defendant attempted to shield himself from responsibility by claiming that the corporation alone was liable. The court held that the plaintiff could properly hold Bonsall on the original agreement, stating:

> "Evidently the organization of the corporation, in which the defendant owned all the stock, was merely a convenient and proper method adopted by him for carrying on his business. . . . We cannot accede to the proposition that an individual having large business interests, who employs agents to carry on his business, can relieve himself of his individual responsibility for their services merely by creating a corporation and causing them to be chosen as officers. In order to establish such a claim of change of liability, there must also be evidence of a novation, either express or implied."

To hold in all cases that the promoters can only be discharged by a novation is too strict and frequently disregards the parties' intentions,[33] if the term "novation" is used in its accepted legal sense.[34] Professor Williston,[35] it is true, is of the opinion that,

[31] A reading of the cases cited in the notes in this article demonstrates this. See *supra* notes 9, 12, 14.

[32] Bonsall v. Platt, *supra* note 7. *Cf.* McQuiddy Printing Co. v. Head, *supra* note 24.

[33] See *supra* notes 9 and 12.

[34] Novation is the "substitution of a new obligation for an old one which is thereby extinguished"—3 BOUVIER'S LAW DICTIONARY (1897) 2375. Kirkup v. Anaconda Amusement Co., 59 Mont. 469, 197 Pac. 1005 (1921), a case involving promoters' contracts, contains a definition of "novation," with especial reference to these agreements.

[35] 1 WILLISTON, CONTRACTS (1920) § 306.

by assenting to the promoter's contract, the corporation agrees to take the place of the promoter, a change of parties to which the other party to the contract consented in advance, and that consequently there would be a novation by which the promoter would be discharged when the corporation assumed the obligation. Under this theory, whenever a corporation became bound on a promoter's contract, there would be a novation, and the promoter would be released.

Van Vlieden v. Welles [36] is an application of the principle expounded by Professor Williston. There the plaintiff was a minister permanently employed by agreement of the deacons of a church prior to its organization. Subsequently he served in his capacity for the deacons and later for the corporation and accepted a salary from each in turn until his discharge. He then claimed that the individuals, with whom he had made the original contract, were liable for his salary. The court held that the defendants were not chargeable, for the facts showed a waiver of the original contract, and the church-corporation, instead of the deacons, became the plaintiff's debtor. In short, there was a novation.

In *Bradshaw v. Jones*,[37] the plaintiff was employed by the promoters of a railroad company to procure subsidies from landowners and residents along the proposed route. At the time the railroad company was organized, nothing had been done by him on his contract, and all his services were performed for the railroad after incorporation had been perfected. The court, in effect, said that the promoters were not liable under these facts, because by working for the railroad, the plaintiff released the promoters. This is another case which applies Professor Williston's theory.

The discussion so far has concerned itself with actions for damages against promoters on their contracts for projected corporations. The question arises as to whether it is possible for the third party to enforce these contracts specifically as against the promoter. For example, is it possible for the third party to compel the promoter to organize a corporation by means of a decree in specific performance? Obviously this question must be answered in the negative. It is difficult to conceive of a situation where the terms and details of the corporate organization are sufficiently definite to enable the court to decree its organization in specific terms.

Brown v. Swarthout [38] illustrates this. The defendants agreed to assign patents and to make tests for a proposed corporation, of which they were to receive one-fourth of the stock, and the

[36] 6 Johns. 85 (N. Y. 1810).

[37] 152 S. W. 695 (Tex. Civ. App. 1913).

[38] 134 Mich. 585, 96 N. W. 951 (1903).

balance was to go to the promoters. The amount of the capitalization was not provided for in the contract. When the defendants refused to proceed with the agreement, the plaintiff promoters sought to compel them to perform it. The court said that the action was not tenable because the contract lacked mutuality, since the defendants could not have compelled the plaintiffs to organize the corporation by court order. The contract was not sufficiently definite to permit this, for there was no provision in the contract fixing the amount of the capital stock.

Even if the promoter's contract definitely outlines the terms upon which the corporation is to be organized, so that the court might compel incorporation, still it is doubtful whether the courts would decree specific performance. The court's judgment could only provide for the organization of the corporation, but could not force the corporation to function. Incorporation, therefore, by court order would be a meaningless gesture.

The much abused promoter, who so often is held responsible where liability was never intended, seems, if the reported decisions are any criterion, to have brought action but infrequently against the third party on contracts made for proposed corporations. Of course, if before the corporation has become bound by the agreement the person with whom the promoter contracts refuses to perform, the promoter should be allowed an action for damages. *Abbott v. Hapgood*,[39] a leading Massachusetts case, contains one of the rare decisions in reference to this situation. The contract here was made by the plaintiffs in the name of "Penn Match Co. Ltd. of Philadelphia." Under this agreement the defendants contracted to deliver certain machines to the Penn Match Co. Ltd. of Philadelphia, which the defendants alone could furnish, the plaintiffs informing them that the factory was to be built and the corporation to be organized only if the machines were received. The defendants refused to deliver the machines. An action in the name of the projected corporation was dismissed and subsequently the promoters sued for breach of the contract. One of the defenses interposed was that the contract was not with the plaintiffs individually. The court said that the defendants, when they made the contract, must have understood that the corporation was only projected, and that the plaintiffs as general partners were the only parties who could do business with them in the manner proposed. The plaintiffs assumed the name of Penn Match Co. Ltd. as that under which they chose to do business until the corporation was formed. The defendants were, under their agreement, bound to deliver the machinery to the promoters, who could recover the damages due to the defendants' preventing them from establishing the corporate business under as favorable auspices, and with as

[39] 150 Mass. 248, 22 N. E. 907 (1889).

scientific equipment as would have been the case had the defendants performed their contract. This is a rather unusual case, for the contract, it will be noted, was made in the Penn Match Company's name, to which the machines, by the terms thereof, were to be delivered. The court based its decision in part on the Massachusetts rule in regard to promoters' agreements: that in no event could the corporation have become a party to the contract, and the contract must have been intended to be binding. However, some other court might have rendered a contrary decision, stating that the contract contemplated performance by the corporation only, and the contract was made with the promoters acting for it, when it should come into existence.

It has been decided that if after the corporation has adopted the contract the third party fails to perform, the promoter cannot bring action for the breach of the agreement.[40] The reasoning here was that the contract was intended to inure solely to the benefit of the proposed corporation, a corollary to the rule sometimes applied which exempts promoters from liability on agreements made for projected corporations, on the ground that credit was extended to, and performance was expected only of, the company.

RIGHTS AND LIABILITIES OF CORPORATIONS ON CONTRACTS MADE ON THEIR BEHALF BY PROMOTERS

The organized corporation is the culmination of the promoter's hopes, but until it is formed, it is "of such stuff as dreams are made of," and cannot contract. When the corporation finally emerges from the confusion of pre-organization plans, negotiations and sanguine promises, what is its position with reference to the contracts which the promoter has assumed to make with the conviction that they will become the company's? In what manner can it become bound by these contracts?

Mere incorporation does not of itself affect the promoter's contracts. In order to render them binding on the corporation, it must take some affirmative action indicating its assent. The courts of this country have formulated no precise rule as to the character of this assent. In England, on the contrary, the preponderance of judicial opinion seems to hold that the corporation cannot make itself liable on agreements of this kind except by making a new contract on the same terms as that entered into by the promoter.[41]

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[40] Wiley v. Borough of Towanda, 26 Fed. 594 (W. D. Pa. 1886).

[41] Melhado v. Porto Alegre, 43 L. J. 253 (1874); In re English & Colonial Produce Co., [1906] 2 Ch. 435; North Sydney Invest. & Tramway Co. v. Higgins, [1899] A. C. 263; In re Dale & Plant, Ltd., 61 L. T. (N. S.) 206

The English judicial attitude toward the problem of promoters' contracts contrasts strongly with that of the American courts.[42] Here the corporation may become bound on agreements of this type in one of a number of ways, and the primary inquiry in most cases is, was it the intention of the corporation to be bound by the contract. If such an intention can reasonably be inferred, the courts are quick to find a theory within recognized legal categories to sustain the corporation's liability.[43]

An analysis of the English cases shows how logical and traditionally legal is their reasoning. In fact, the court often deplores the result of the law's application, but holds itself powerless to remedy it.

Falcke v. Scottish Imperial Insurance Co.,[44] although not a case in which the law of promoters' contracts was involved, contains a dictum which reflects the attitude of the English courts toward the possibility of the adoption of these agreements by the organized corporation. The court said:

> "There is nothing more vague than the way in which the word 'adoption' is used in arguments of law, and sometimes the ambiguous language used about 'adoption' is imported into arguments about ratification. There is no such thing in law as 'adoption' or 'ratification' of anything except of some act which purports to be done for or on a man's be-

(1889); In re National Motor Mail Coach Co., 77 L. J. 790 (1908); Falcke v. Scottish Imp. Ins. Co., 56 L. J. 707 (1886); Natal Co. v. Pauline, [1904] A. C. 120; Gunn v. London & Lancashire Ins. Co., 12 C. B. (N. S.) 694 (1866); In re Empress Engineering Co., 16 Ch. D. 125 (1880); Bagot Pneumatic Tire Co. v. Clipper Co., [1902] 1 Ch. 146.

These decisions must not be confused with Lord Cottenham's rule in railroad cases, since abandoned, to the effect that where landowners withdrew their opposition to the incorporation of a railroad company because promised an especial benefit by the promoters, such as a station located at a particular point, the corporation could not refuse to carry out their agreement, because its charter was procured partly through the withdrawal of opposition in the agreement made by the promoters with the landowners, of which it received the benefit and the obligation of which it could not refuse to assume. Edwards v. Grand Junction Ry., 1 Myl. & C. 650 (1836); overruled in effect in Caledonian & Dunbartonshire Ry. v. Helensburgh, 2 Macq. 391 (1856). Lord Cottenham's rule was re-enacted in substance by Act of Parliament in 1864.

[42] See Gardiner v. Equitable Office Bldg. Corp., 273 Fed. 441 (C. C. A. 2d, 1921), in which the Circuit Court of Appeals recognized the difference between the American and English rules, stating that "the English Courts hold that a contract made by promoters in behalf of a corporation projected, but not formed, cannot, by adoption, bind the company when incorporated. They hold that a new contract is necessary. The adoption and confirmation by the deed of settlement, or its modern equivalent, the memorandum of association, will not render the contract binding on the company." See also Kirkup v. Anaconda Amusement Co., 59 Mont. 469, 197 Pac. 1005 (1921).

[43] See *infra* notes 59-86.

[44] *Supra* note 41.

> half. . . . Ratification can only take effect in law by referring it to some previous mandate, and a previous mandate is an incident which arises only in the relation of principal and agent. There have been many attempts to make persons liable by what is called adoption of a contract . . . and such attempts have always failed. A leading type of such class of cases are those where it has been sought to make companies liable for contracts entered into by promoters."

Such is the rule in England, and it has been followed almost without variation. The courts there, as they reluctantly admit, have been unable to find any logical reason for excepting these cases from the general rules of contract law, which superficially are completely applicable. The fact that the equities of the situation demand a decision which modifies the rule has not influenced them.

In re Dale & Plant, Ltd.[45] is one of the strictest of the English decisions. There promoters of a future corporation employed Bloomer as its secretary, in consideration of his agreeing to subscribe to some of its stock. The articles of association signed by Bloomer and the directors of the corporation, five of whom were also its promoters, confirmed the agreement. Bloomer was then employed by the corporation as secretary, at the salary stipulated in the agreement. Upon the winding up of the company, prior to the expiration of the agreed term of his employment, he brought an action against it, both for arrears of salary and for damages for breach of the contract. The court said rather helplessly:

> "I do not see my way clear to helping the claimant, though I would do so if I could. He was the secretary of the company and is entitled to remuneration for all the work he has done; for that he is entitled to claim. But he asks for damages on the ground that he was really appointed secretary for five years, and that his appointment was summarily determined on the winding up of the company within five years. . . ."

The court continued:

> "Instead of signing a new agreement on the same terms between themselves and Bloomer, they contented themselves with doing this: On the 10th of November they passed a resolution 'confirming the agreement of the 13th of October, 1886,' between A. J. Bloomer and the company. Now there was no agreement between Bloomer and the company at all, but between Bloomer and the promoters. The directors had no power to confirm the agreement. What they ought to have done was to have entered into an agreement

[45] *Ibid.*

> in the same terms. Therefore, that resolution was an invalid attempt on their part to ratify an agreement which they were incapable of ratifying."

The claim for arrears of salary was allowed as on a *quantum meruit,* but the claim for damages for breach of the five year contract was disallowed.

There are many other English decisions of a similar nature. These are more frequently cases in which recovery on contracts to pay for legal or other services incidental to incorporation was denied, even though the contracts were expressly confirmed by the corporation subsequent to organization.

In *Melhado v. Porto Alegre,*[46] the articles of association of the defendant railroad company provided that all expenses and charges incurred in the formation of the company should be paid by it, not to exceed £2000. The promoters sued the company for that amount. Lord Coleridge in holding for the defendant said:

> "With some reluctance I have come to the conclusion that the defendants are entitled to our judgment; for if a company derives advantage from expenditures incurred upon its behalf, before its incorporation, it is desirable that it should be held liable to repay those who have aided in its formation; but upon reflection, I cannot find any ground upon which the defendants can succeed at law."

The plaintiffs, the promoters, relied on the terms of the articles of association as establishing their case, but the court held that they could not base their suit on these articles to which they were not parties.

In another English case,[47] the court went so far as to hold the corporation not liable, where in the articles of association it was agreed that solicitors' fees for professional services incidental to incorporation were to be paid, which agreement the directors of the organized company subsequently expressly ratified. The court reasoned that the corporation could not ratify an agreement made at a time when it was non-existent. Furthermore, the solicitors were not parties to the articles of association or to the so-called ratification by the directors. The court remarked by way of dictum that the solicitors might have a claim against the corporation on a *quantum meruit,* an expression of opinion frequent in this type of case. The courts are loth to think the aggrieved party remediless.[48]

The courts of Massachusetts have in most cases followed

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[46] *Ibid.*

[47] In re National Motor Mail Coach, *ibid.*

[48] *Cf.* In re Dale & Plant, *ibid.*

the English rule.[49] In *Pennell v. Lothrop*,[50] a corporation published books in accordance with a contract made with its promoters, in which the author granted the future corporation the right of exclusive publication on a royalty basis. There was an assignment by the corporation for the benefit of creditors, and the author made an independent arrangement with the assignee for the publication of her books. The promoters joined with the corporation and brought an action against the author on their agreement with her. The court held that the corporation was improperly joined as plaintiff. It was not a party to the contract and had no interest in it. This case illustrates the manner in which the application of a purely legalistic principle may defeat the intentions of the parties. It would have been logical and apparently sound theoretically to hold the corporation a proper party plaintiff, on the ground that it had adopted and ratified the contract by publishing the author's books with knowledge of the agreement.

As has been stated, in the majority of American jurisdictions the corporation may become bound on the promoter's contracts in several different ways. Here again our courts have made an effort to adapt the law to the facts, and the apparent inquiry has been, is it fair to exempt the corporation from liability, or is the company, by resort to formal rules, attempting to evade an obligation which it assumed both by apparent intent and act. As was stated by the Utah Supreme Court:

> "It is contended by counsel for the appellant that a contract made for a corporation, before it is in actual existence, is not enforceable by or against it. This contention is too broad. It indicates that a corporation cannot, even in the exercise of its power to make contracts, accept and adopt a contract made for it by the promoters, before its existence as an entity. The legitimate consequence of this would be that a corporation, upon full and complete organization under the Statute, might accept and adopt such a contract, receive and retain the benefits thereof, and at the same time be absolved from its burden. We have no sympathy with a doctrine that would lead to such results—that might be employed as an instrument of fraud and injustice to the unwary." [51]

In the United States the rule enunciated in England has with apparent sincerity been repeatedly stated as the existing law, only to be distinguished and nullified in effect by the decision in

[49] Penn. Match Co. v. Hapgood, 141 Mass. 145, 7 N. E. 22 (1886); Abbott v. Hapgood, 150 Mass. 248, 22 N. E. 907 (1889); Bradford v. Metcalf, 185 Mass. 205, 70 N. E. 40 (1904).

[50] 191 Mass. 357, 77 N. E. 842 (1906).

[51] Wall v. Niagara Mining & Smelting Co., 20 Utah 474, 481, 59 Pac. 399, 400 (1899).

the very case in which it is quoted.[52] Possibly the English manner of disposing of these cases is ultimately the simpler one. The promoter there, and those dealing with him, know just where he stands in reference to liability on contracts made for proposed corporations, while the status of the promoter's contracts in the courts in this country, in spite of some so-called general rules, is uncertain and speculative. It depends on whether the particular court has the mental perspective which subordinates the theory of the inviolability of legal concepts to the dictates of fairness and justice, or whether it is of an uncompromising legalistic turn of mind which refuses to blur the fair, clearcut and logical outlines of legal principles. For just as moral concepts of "right" and "wrong" must vary, change and sometimes disappear under the pressure of modern life, so legal principles must also change and become less absolute and less dogmatic.

The cases in our courts are all in agreement in principle that the promoter's contract is not binding on the corporation unless either expressly or impliedly adopted by the organized corporation. An excellent and broad statement of the rule, so broad indeed that it fits almost any situation, is contained in a Utah case:

> "It may be assumed as true that promoters have no standing in any relation to agency, since that which has no existence can have no agent, and in the absence of any act authorizing them so to do, can enter into no contract, nor transact any business which shall bind the proposed corporation after it becomes a distinct entity, but notwithstanding this be true, still such promoters and incorporators may, acting in their individual capacities, make contracts in furtherance of the incorporation and for its benefit, and, after the incorporation comes into being as an artificial person under the forms of law, it may, at least under the weight of American authority, accept and adopt such contracts and thereupon they become its own contracts, and may be enforced by or against it. This the corporation may do, not because of an agency on the part of the incorporators, before the existence of the entity, for there is none, but because of its own inherent powers as a body corporate, to make contracts. Moreover the adoption of such a contract need not be by express action of the corporation, entered on its minutes, but may be inferred from its own acts and acquiescence, or those of its agents, and there need be no express acceptance, or the corporation may be bound by the contracts of its promoters, if made so by its charter, which it has accepted and to which it was agreed. Unless, however, there be an acceptance and adoption thereof in some such way, the corporation will not,

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[52] Kridelbaugh v. Aldrehn Theatres Co., 195 Iowa 147, 191 N. W. 803 (1917); Kirkup v. Anaconda Amusement Co., *supra* note 42.

in general, be bound by the contracts of its promoters and incorporators made for it before its complete organization." [53]

Mere incorporation does not of itself render the promoter's contracts binding on the newly created company, and there must be some affirmative act from which it can be inferred that the corporation intended to obligate itself. The court said in a recent leading case:

> "It is our opinion that a promoter's contract as such cannot upon any theory, ipso facto by the incorporation of the company in contemplation, become the contract of the corporation. The legal entity itself must act in its corporate capacity before it shall be held liable. . . ." [54]

In a still later decision the court, in discussing the adoption of a promoter's contract to pay for legal services rendered in connection with incorporation and incidental matters, said very forcefully:

> "This is not a case in which the corporation can accept or refuse the benefits of a contract. Under the instruction received, it had no choice. Like a child at its birth, it must be born in the manner provided. There is no volition on its part." [55]

The corporation, however, was held liable in this case, for the court decided that it had impliedly adopted the contract on an entirely different ground.

It is only fair and logical that this should be the rule, for the corporation could not with justice come into existence burdened with the obligation to perform its promoter's promises. That would be unfair to its stockholders and subsequent creditors, and would destroy all distinction between the corporation and its projectors. The application of such a rule would be disastrous, as the promoter, because of the very nature of his occupation, is an optimist and has the salesman's psychology. Promises are his stock in trade, and it is through them and his confidence in their fulfillment that he stimulates interest in the corporation, but his dreams would become the corporation's chimeras if it were bound to realize them.[56] Common sense and sound legal prin-

[53] Wall v. Mining & Smelting Co., *supra* note 51, at 481, 59 Pac. at 400.

[54] Kirkup v. Anaconda Amusement Co., *supra* note 42, at 478, 197 Pac. at 1007.

[55] Kridelbaugh v. Aldrehn Theatres Co., *supra* note 52, at 149, 191 N. W. at 804.

[56] See New York, N. H. & H. R. R. v. Ketchum, 27 Conn. 170 (1858); Park v. Modern Woodsmen of America, 181 Ill. 214, 54 N. E. 932 (1899); Rockford, Rock Island R. R. v. Sage, 65 Ill. 328 (1872); COOK, CORPORATIONS (1923) § 707.

ciples therefore accord in the rule that the corporation is not chargeable on promoters' agreements.

The rule that the corporation, under certain circumstances, is bound is equally fair, for it makes effective the intention of the parties. Whether the courts hold the agreement to be that of the corporation by ratification, adoption, novation or acceptance of benefits is often mere technical quibble. It is necessary, however, in order to understand the law in this country relative to this subject to discuss these distinctions.

The corporation cannot "ratify" the promoter's agreements, for it was not in existence to authorize them. In the words of an Alabama case:

> "In order, however, for the corporation to be bound by the acts of its promoters, it must, after it comes into existence, do some act which makes the contract binding on it; it is sometimes said that it must ratify the contract, but strictly speaking, it cannot and does not ratify. As pointed out by the text-writers and judges, contracts made by the promoters for the corporation to be organized cannot in law or in equity be ratified by the corporation when it comes into existence, because ratification implies at least the existence of a person or thing in whose behalf the contract might have been made at the time it was made. Being incapable of binding the corporation when they were made, for the all sufficient reason that the corporation then had no existence, such contracts cannot afterwards be ratified by the body." [57]

In spite of the fact that this logical reasoning has been adopted and approved by our courts,[58] the important thing is that it is possible for the corporation to become bound by the promoter's contracts without formally making a new contract on the same terms. Ratification and adoption are identical in effect, although possibly susceptible of technical distinction.

The court recognized this in *Schreyer v. Turner Flouring Co.*,[59] a suit for money loaned to promoters, which the corporation subsequently promised to repay and probably used. The court, in holding the corporation liable, discussed the application of the so-called principles of ratification and adoption to promoters' contracts:

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[57] Stone v. Walker, 201 Ala. 130, 134, 77 So. 554, 558 (1917).

[58] See Buffington v. Bardon, 80 Wis. 635, 50 N. W. 776 (1891); Holyoke Envelope Co. v. U. S. Envelope Co., 182 Mass. 171, 65 N. E. 54 (1902); Huron v. Kittleson, 4 S. D. 520, 57 N. W. 233 (1902); Bond v. Atlantic Terra Cotta Co., 137 App. Div. 671, 122 N. Y. Supp. 425 (1st Dep't 1910); Dayton W. Valley & X Turnpike Co. v. Coy, 13 Ohio St. 84 (1864); Queen City Furniture & Carpet Co. v. Crawford, 127 Mo. 356, 30 S. W. 103 (1895).

[59] 29 Ore. 1, 43 Pac. 719 (1896).

"Now as regards a contract made or an obligation incurred by the promoters of a corporation in the name of, or for and in behalf of a contemplated corporation, it would seem that an adoption or a ratification thereof by the corporation after it had developed into a legal entity would mean one and the same thing and would be accomplished by one and the same process. True the promoters cannot be the agents of an unborn corporation; but where they have assumed to act for it and to contract in its name, the approval and confirmation of such acts by the corporation, when organization has been duly accomplished, is but the ratification of the acts of an unauthorized agent. And the result is the same whether we call it 'adoption' or 'ratification'." [60]

In *Queen City Furniture & Carpet Co. v. Crawford*,[61] the court emphasizes the point that the corporation in adopting or ratifying the promoters' contracts is held to be acting in the same manner as it would in making an original contract—a slight rationalization to sustain the cases, for original contracts could hardly be made so informally.

It would be an impossible task to collate the decisions in which promoters' contracts have been held adopted by the corporation and to arrive at a general principle. They are legion and decided on various theories. One of the most ingenious and nicely applicable is that the third party's agreement with the promoter is a mere continuing offer which may be accepted or rejected by the organized corporation when it is ready to function.

The clearest statement of the law relative to this theory is contained in a Utah case. There the conveyance to the corporation was made in accordance with the promoters' contract. It was claimed that the organized company was not bound to pay the price specified in an agreement made at a time when the corporation was non-existent. In refusing to apply the strict rule, which in this case would have been the evasion of an actual and intended debt, the court said:

"Where a contract is made by and with promoters, which is intended to inure to the benefit of a corporation about to be organized, such contract will be regarded as in the nature of an open offer which the corporation upon complete organization may accept and adopt or not as it chooses, but if it does accept and adopt and retain the benefits of it, it cannot reject any liability under it, but in such case will be bound to perform the contract, upon the principle that one who accepts and adopts a contract which another under-

[60] *Ibid.* at 6, 43 Pac. at 721. See also Stanton v. New York R. R., 59 Conn. 285, 22 Atl. 300 (1890).

[61] 127 Mo. 356, 30 S. W. 163 (1895).

took to perform in his name and on his behalf, must take the burden with the benefit." [62]

In a Wisconsin case, the court in considering an agreement to purchase lumber made by a promoter, who subsequently became the superintendent of the defendant corporation, said:

"As indicated the contract originally existing between the plaintiff, Jones, and Wyman, was, at the time the defendant was organized and so far as it was concerned, a mere open offer on the part of the plaintiff. The mere fact that Jones had been a party to the original contract did not prevent him, as superintendent, and in behalf of the defendant firm, from accepting such offer and assuming such responsibility." [63]

There are many other cases which proceed on this ingenious theory.[64] This continuing offer, in fact, amounts to an agreement by the third party with the promoter to keep his offer open for acceptance by the corporation.

There are few, if any, cases in which the organized company formally enters into a new contract on the terms of that made by the promoter. It is also rare that the corporation's assent to the agreement is definite or express. In most cases where a promoter's contract has been held binding on the corporation, it is because it has with knowledge of its terms derived some benfit from the contract.

A leading case on this point is *Rogers v. The New York & Texas Land Co.*[65] A corporation was formed to take over property conveyed to trustees for the holders of the second mortgage bonds of the Great Northern Railroad Company. A committee devised a plan later adopted by the bondholders under which the land was to be developed and marketed. The corporation was

[62] Wall v. Niagara Mining & Smelting Co., *supra* note 51, at 482, 59 Pac. at 401.

[63] Pratt v. Oshkosh Match Co., 89 Wis. 406, 410, 62 N. W. 84, 85 (1895).

[64] Hackbarth v. Wilson Lumber Co., 36 Idaho 628, 631, 212 Pac. 969 (1923): "Several different legal theories have been advanced, some of which have been subjected to criticism on logical grounds. The most logical theory of liability to fit the case is that the proposal of one seeking to contract with a corporation through its promoters should be regarded as a continuing offer, which is accepted by the corporation by receiving the benefits after it is organized, notwithstanding its acceptance in the first instance by the promoters." Here the corporation was held liable on the promoters' contract.

Holyoke Envelope Co. v. U. S. Envelope Co., *supra* note 58; Deschamps v. Loiselle, 50 Mont. 565, 148 Pac. 335 (1915), and cases cited. This rule has most frequently been applied to cases relating to stock subscriptions. Until the corporation is formed, the promise of the subscriber is in the nature of an open offer to the corporation.

[65] 134 N. Y. 197, 32 N. E. 27 (1892).

organized, took title to the property and issued stock in accordance with the plan. The court said:

> "The bondholders were the promoters of the land company. Being about to form a corporation for an authorized purpose, they made an agreement upon the subject in which they provided for benefits to be conferred upon it and burdens to be assumed by it after its organization. While it could have refused, when it came into existence, to accept the one or to be bound by the other, it could not accept the advantages and then refuse to assume the obligations. By accepting title to the land it adopted and ratified the agreement entered into by all its stockholders, and thereby voluntarily made itself a party thereto and became bound thereby. The adoption by the land company of the contract between the stockholders was a reasonable means of carrying into effect its authorized objects, and, after knowingly receiving the benefit of the arrangement, it cannot be permitted to deny that it agreed to assume the corresponding burdens."

A much cited federal case [66] holds that where the claimant, pursuant to a contract with promoters of a future corporation, actually assisted in procuring a valuable mining lease of which the corporation, upon its organization, took an assignment, he was entitled to the compensation specified in the agreement. The court said succinctly: "If the corporation accepts the benefits of the contract, it thereby adopts it."

It is apparent that a mere acceptance of the benefits of the contract, without knowledge of its terms, is not sufficient to bind the corporation. An analysis of the cases decided on the theory of acceptance of benefits discloses that the majority of the corporations involved were closely held, and that the promoters, the directors and the stockholders were practically identical. There are numerous illustrations of this. In a recent federal case,[67] a firm of promoters agreed that a corporation to be

[66] In re Ballou, 215 Fed. 810 (D. Ky. 1914). See also Girard v. Case Bros. Cutlery Co., 225 Pa. 327, 74 Atl. 201 (1909). There it was held that the plaintiff, employed under an agreement with the promoters and discharged after working for the corporation at the salary specified in the agreement, was entitled to receive from the corporation the stock promised him by the promoters. His employment by the corporation was an adoption of the agreement, particularly as the promoters were the majority stockholders of the corporation.

See further Smith v. Parker, 148 Ind. 127, 45 N. E. 770 (1897). *Cf.* Bank of Forest v. Orgile Bros. & Co., 82 Miss. 81, 34 So. 325 (1903), where a safe was delivered to the bank on the order of the promoter; the court said that there must be an adoption of or acceptance of the benefits of the contract to render the defendant liable. The facts in this case were not sufficient to infer either adoption or acceptance.

[67] New England Oil Refining Co. v. Wiltsee, 3 F. (2d) 424 (C. C. A. 1st, 1925).

organized would take over oil fields which the plaintiff Wiltsee, a man of some experience, agreed to bring in. Valuable properties discovered by him were taken over by the organized corporation, which refused to transfer to him the stock specified in the agreement as compensation. The plaintiff, said the court, was entitled to recover the value of the stock from the corporation, for the promoters and the corporation were one and the same, and the promoters had complete knowledge of the agreement. The organized company was held liable on the contract since it had knowingly accepted its benefits.

In *Brautigam v. Dean & Co.*,[68] the members of a partnership, promoters of a corporation, became the sole owners of its stock. The partnership contracted with the plaintiff, in consideration of his investing $10,000 in the stock of the future corporation, to employ him for five years at a stipulated salary. Subsequently the corporation employed the plaintiff and issued stock to him as provided in the promoters' contract, which it refused to sign. The court held that there were sufficient facts from which a ratification of the contract might be inferred, since the plaintiff's services had been accepted by the corporation. The owners of all the stock of the corporation and the promoters were identical, and their knowledge of the agreement was its knowledge. Again in *Morgan v. Bon Bon Co.*, [69] a leading New York case, the officers and the promoters of the defendant company were identical. It was held that when the plaintiff was permitted to perform services for the corporation in accordance with a contract with the promoters he was entitled to recover under it from the corporation.

Another case of the same type is *In re Acadia Dairies*.[70] There a promoter representing the bondholders of a corporation bought in its property on a receiver's sale. He had agreed with the bondholders that if he acquired the property he would organize a new corporation, the bonds of which were to be issued to them in the same proportion as their former holdings. The company was organized and took over the property. The court said in sustaining the claims of the bondholders as a valid prior lien on the property of the new corporation: "Cook was its organizer and promoter *and, as stated, its sole owner*. His knowledge was its knowledge. The two directors whom he selected to act with him had the same knowledge." Since the corporation had taken over the property, the court held that it had adopted the agreement authorizing the mortgage and the bonds.

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[68] 85 N. J. L. 549, 89 Atl. 760 (1914), *aff'd*, 86 N. J. L. 676, 92 Atl. 344 (1914).

[69] 222 N. Y. 22, 118 N. E. 205 (1917); see Outing Kumfy Kab Co. v. Ivey, 74 Ind. App. 286, 125 N. E. 234 (1919).

[70] 135 Atl. 846 (Del. Ch. 1927).

In *Battelle v. Northwestern Cement & Concrete Pavement Co.*,[71] real property was conveyed to a corporation in accordance with the agreement of the promoters. The action was brought against the corporation for a deficiency on a mortgage on the property, which the promoters had agreed the corporation would assume. The court overruled the defendant's claim that it was not liable on the contract, stating that adoption need not be express and need not require greater formality than if the agreement were a new agreement made by the corporation. The highest degree of fairness is required in cases of this character, the court commented; the property had been used, and every stockholder, director and officer knew that it was conveyed to the corporation with the understanding that the corporation was to assume and pay the debt to which the property was subjected.[72]

It is natural that the rule holding corporations bound on promoters' contracts by reason of accepting the benefits thereof is applied most frequently to close corporations. As is apparent, one of the essential elements of real assent to a contract is knowledge of its terms, and where the promoters and the corporation are identical, that knowledge is easily inferred, and the corporation can be held liable on the contract. The rule is applicable to any corporation, if its knowledge of the terms of the promoters' contract can be established. This might sometimes be a difficult matter.[73]

The first part of this article treated of the rights and liabilities of the promoter on contracts made for future corporations. Frequently, as was stated, the promoter is released by the adoption of the contract by the corporation. If it is necessary to find a formula to sustain these decisions it may be that the corporation can be held to become liable on the contract by novation. As Professor Williston says:

> "The cases generally speak of the obligation of the corporation as created by adoption, but novation seems the more accurate term. If the assent of the corporation to the bargain is merely an adoption of it, the promoter apparently must still remain liable. But it seems more nearly to correspond with the intentions of the parties to suppose that

[71] 37 Minn. 89, 33 N. W. 327 (1887).

[72] In Transport Utilitor Sales Co. v. Zwergel, 228 Mich. 132, 199 N. W. 668 (1924), the corporation was permitted to sue its salesmanager for advances made to him under a contract with its promoter. It was held that the corporation had adopted the agreement by continuing to employ him on its terms. Other cases of close corporations include Fairbanks v. Merchants & Consumers Market House Ass'n, 199 Mo. App. 317, 202 S. W. 596 (1918); Lewes v. Breakwater Fisheries Co., 13 Del. 234, 117 Atl. 823 (1922).

[73] In re Ideal Steel Wheel Co., 25 F. (2d) 651 (C. C. A. 2d, 1928);

> when the corporation assents to the contract, it assents to take the place of the promoter, a change of parties to which the other side of the contract assented in advance." [74]

It is a little artificial perhaps to say that the parties intended that the promoter should be released when the corporation assented to the contract, for the parties probably assumed to bind the corporation at the outset, and almost certainly did not know that the promoters were personally bound, until difficulties arose and the advice of counsel was sought.

A recent federal case might easily have been decided expressly on Professor Williston's theory.[75] Here the agreement made prior to the organization of a corporation by the owner of all of its stock was definitely assumed by the company by the substitution of its notes for individual notes. The corporate notes were apparently accepted as fulfilling the contract.

Chicago Bldg. & Mfg. Co. v. Talbotton Creamery & Mfg. Co.[76] also appears to be a case to which the theory of novation might readily be applied. Here the plaintiff contracted with the promoters to build a factory. They were to obtain a charter for a corporation, in which each of the promoters was to be interested to the extent of his liability on the contract. The corporation was organized and took over the property. The court, in holding that there was a cause of action against the corporation and not against the promoters, said:

> "It is true that the suit is against the corporation and not against the individuals who subscribed to the contract, but the existence of the corporation sued was in contemplation of the parties when they made the contract; and taking the contract as a whole, it was clearly the intention of both parties thereto that the plaintiff, when it complied with its contract, and the amount specified by the contract became due, should have a right to proceed against the corporation which was to be formed, to carry out the enterprise contemplated by the contract; and if the parties of the second part failed, neglected or refused to have themselves incorporated, that their liability to the plaintiff was to be as individuals, each one being responsible for the amount set opposite his name. It being alleged that the corporation has been formed in conformity to the contract, it would seem that the right of action of the plaintiff against the individuals does not now exist, and that the only right which it has is to sue the artificial person, which the contract provided

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Shaffer v. Mohawk Valley Co., 221 N. Y. 697, 117 N. E. 1084 (1917); see facts of cases cited *supra* notes 65-72.

[74] 1 WILLISTON, CONTRACTS (1920) § 306.

[75] Rahway National Bank v. Thompson, 7 F. (2d) 419 (C. C. A. 3d, 1925).

[76] 106 Ga. 84, 31 S. E. 809 (1898).

> for, and which when brought into being was to take the place of the natural persons who had agreed to form it." [77]

While the court did not emphasize the fact, it will be noted that the corporation took over the property.

If every case which involved promoters' contracts was decided in this manner, it would be easy to conclude that the court had based its conclusion on the theory of an implied novation. However, where the court's decision is not made on the novation theory, or where it does not appear that the basis of the decision was that the corporation accepted the benefits of the contract, the contract has frequently been held adopted. The corporation it is reasoned makes the agreement its own by assenting to it in some manner. A few much quoted cases illustrate this.

The United States Supreme Court considered this question, rather superficially it is true, in *Whitney v. Wyman.*[78] The promoters of a corporation contracted to purchase machinery for it from the plaintiff. The corporation received the machinery, and the plaintiff brought this action to recover the price. In answer to the objection that the agreement was not binding on the corporation, the Court stated:

> "It is said the corporation at the date of these letters [the contract in suit] was forbidden to do any business, not having filed its articles of association as required by the Statute. To this objection there are several answers. The corporation subsequently ratified the contract by organizing and treating it as valid. This made it in all respects what it would have been if the requisite corporate power had existed when it was entered into."

The corporation's assent to the contract was here implied from its acquiescence in its terms.

In *Oakes v. Cattaraugus Water Co.,* [79] a case which is most frequently cited, the active promoter of the proposed Cattaraugus Water Company agreed to pay the plaintiff $1,000 for securing a right of way, and assisting in the financing of the

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[77] *Ibid.* at 89, 31 S. E. at 812. See also International Agricultural Corp. v. Carpenter, 190 App. Div. 359, 179 N. Y. Supp. 819 (1st Dep't 1920).

[78] 101 U. S. 392 (1879).

[79] 143 N. Y. 430, 38 N. E. 461 (1894). See also Chase v. Redfield Creamery Co., 12 S. D. 529, 81 N. W. 951 (1900); *cf.* Horowitz v. Broads Mfg. Co., 54 Misc. 569, 104 N. Y. Supp. 988 (Sup. Ct. 1907), in which a contract of employment was made with the president of a corporation, prior to organization. Although the employee subsequently worked for the corporation, with the president's knowledge, the corporation was held not bound by the contract. The corporation and its president were distinct entities, said the court. This case can be distinguished from the Oakes case, for when the contract of employment was made, nothing was said about the proposed incorporation.

company. The contract was made about two months before the corporation's organization was perfected. The trial court nonsuited the plaintiff on the ground that because of this it was not binding on the corporation. It appeared that the plaintiff performed the services agreed upon at the request of the corporation's president, the promoter who had originally made the contract with him. The New York Court of Appeals said, in reversing the judgment, that the contract in suit was within the president's general powers, and that if it was his intention to adopt the agreement by acknowledging the indebtedness under it, as the evidence showed, the corporation became bound by his action, for his act was the corporation's.

Brownholtz v. The Providers Life Assurance Co.[80] is one of the cases in which the court, rather forcing the facts of the case, based its opinion on the theory that a new contract on the terms of the promoter's contract was entered into between the parties. A promoter, subsequently elected president of the organized corporation, agreed to employ the plaintiff as superintendent for the projected company. The usual defense that the corporation was not in existence at the time of the contract was interposed. The corporation by a resolution of its directors specifically ratified every act of its president before incorporation. The plaintiff performed services for the organized company. The court said that the contract was mutually binding from the date of the organization of the corporation.

> "Here the suit is upon a contract that came into being after the defendant filed its charter. We do not hold that any contract existed before the defendant was chartered, but the acts of the directors and the conduct of the plaintiff constituted the making of the contract, the terms of which were set forth in the document which had been prepared and signed before. Both parties were entitled to adopt the contents of any instrument as constituting the terms of a contract between them."

McArthur v. Times Printing Co.[81] states the rule with a clarity some times absent in other cases. The plaintiff had been employed to solicit advertising for the defendant by a contract made with one of its promoters. The plaintiff performed services for the company for about six months after incorporation. The defendant was held liable on the contract. The court said:

> "This court, in accordance with what we deem sound reasoning as well as the weight of authority, has held that while a corporation is not bound by engagements made on its behalf by its promoters before its organization, it may

[80] 236 Ill. App. 494 (1925).
[81] 48 Minn. 319, 51 N. W. 216 (1892).

> after its organization make such engagements its own contracts. And this it may do precisely as it might make similar original contracts, formal action of its board of directors being necessary only where it would be necessary in the case of a similar original contract. That it is not requisite that such adoption or acceptance be expressed, but it may be inferred from acts or acquiescence on the part of the corporation or its authorized agents any similar original contract might be shown. . . . Of course the agreement must be one which the corporation itself could make and one which the usual agents of the corporation have express or implied authority to make."

This is an intelligent and legally sound opinion. Its application, however, has definite limitations. It could not be applied to contracts which require specific authorization.

An interesting case in which the promoter's contract was expressly adopted is *Boyd v. Michael.*[82] Here a loan was made to the sole promoter of a contemplated corporation. It was agreed that a corporate note was to be given for the loan. The minutes of the meeting of the incorporators confirmed this arrangement, *the plaintiff lender signing them.* The corporation was, of course, held to have assented to the contract. The facts in this case might even be sufficient to satisfy the English and Massachusetts rule, for the lender here was actually a party to the contract of adoption, as set forth in the minutes of the incorporators.

In the *Lance Lumber Co.* case,[83] the organizing promoter of a corporation agreed to purchase lumber, giving his individual notes with the understanding that corporate notes were later to be substituted. The corporation was subsequently organized and paid part of the stipulated price of the lumber and renewed the notes. The assent of the corporation to the contract, it was held, could be implied from the payments made by it, and the renewals of the notes.

In some cases the courts have disposed of the situation with easy insouciance. *In re Quality Shoe Shop*[84] illustrates this. Here we have the familiar picture of a family-held corporation. Cohn ran the Quality Shoe Shop, taking a lease of the premises with the intention of incorporating, which he subsequently did.

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[82] 22 F. (2d) 480 (C. C. A. 2d, 1927).

[83] Webber v. Lance Co., 237 Fed. 357 (C. C. A. 3d, 1916); see also for cases of adoption by acquiescence (implied or express): Belfast v. Belfast Water Co., 115 Me. 234, 98 Atl. 738 (1916); Streator & Independent Tel. Co. v. Continental Construction Co., 217 Ill. 577, 75 N. E. 546 (1905); Castorland Milk & Cheese Co. v. Shantz, 179 N. Y. Supp. 131 (Sup. Ct. 1919); Paxton Cattle Co. v. First Nat. Bank, 21 Neb. 621 (1887); Mulverhill v. Vicksburg Ry., 88 Miss. 689, 40 So. 647 (1906); *cf.* Ireland v. Globe Milling & Reduction Co., 20 R. I. 190, 38 Atl. 116 (1897).

[84] 212 Fed. 321 (D. Pa. 1914).

His wife paid the first month's rent before organization. The corporation repaid her and continued to pay the rent. The stockholders and directors of the corporation were Cohn's wife, his son and son-in-law. The court said that this was a clear case of ratification, commenting, perhaps too confidently:

> "That the corporation could ratify this previously unauthorized act done for its benefit is a proposition that needs no citation of authority to support it and that such ratification might be proved by the company's conduct as completely as by a formal corporate act is I think equally plain."

This decision is a correct one. The court in arriving at its conclusion did not consider the refinements as to whether a promoter's contract can be ratified, but simply assumed that it can, and decided the case accordingly.

The decision in a recent case disregards all legal rules and simply proceeds pragmatically on a theory of its own.[85] Here the contract to purchase a tobacco by-product was made on behalf of a projected corporation by the promoters. The corporation later acted in accordance with the contract. The defense was that the contract was not binding, as the corporation was not a party to it. The court said succinctly, making its own law:

> "The contract of July 17th, 1899, in contemplation of the parties thereto was as much for the benefit of the new company, which that contract provided should be organized, as for the benefit of those signing the instrument, and under the generally recognized rule in this country, where a contract between the parties is for the benefit of a third party, such third party by appropriate action may enforce any right secured to it by such contract, even though such third party were not in existence at the time of the execution of the contract."

Another illustration of the loose manner in which courts sometimes reason in reference to promoters' contracts is found in *Kridelbaugh v. Aldrehn Theatres Co.*[86] The plaintiff, an attorney, procured a charter for the defendant at the request of the promoters, who afterwards became the corporation's only directors. The court held that the corporation did not become liable on the contract by incorporation alone, stating, "It is immaterial that the promoters thereafter became officers of the corporation. The act of a promoter is not the act of the corporation." But the court did manage to hold the corporation liable on the contract, because one of the directors, at a meeting, told the attor-

[85] Kentucky Tobacco Products Co. v. Lucas, 5 F. (2d) 723 (D. Ky. 1925).

[86] *Supra* note 52.

ney that if he would procure a permit to sell the corporate stock, they would pay for his services out of the proceeds. This, the court concluded, constituted an authorization and recognition of his past services, particularly as the board of directors and the promoters were identical. This, obviously, is an inconsistently reasoned case. Certainly what the directors said at the meeting would not, under ordinary circumstances, be held sufficient to bind the corporation, and the real basis of the decision was of course that the promoters and the corporation were identical.

Although, as has been stated, the American courts generally hold that the corporation may expressly or impliedly make the promoters' contract its own, there are many exceptions to this rule, exceptions which cannot be distinguished from exactly contrary decisions. An interesting illustration of this is found in the two cases of *Dayton W. Valley & X Turnpike Co. v. Coy*[87] and *Bloom v. Home Insurance Co.*[88] In the former case a contract was entered into by the promoters of a projected corporation and the owner of land, that if the corporation would locate a road over his property, he would construct a turnpike or subscribe for stock in an amount sufficient to pay for its construction. The corporation was organized, caused the road to be located as agreed and requested the defendant to build the turnpike, which he refused to do. The corporation built the turnpike, tendered stock to the defendant and requested payment as specified in his agreement with the promoters. A judgment sustaining the demurrer to the corporation's complaint was affirmed on appeal. The agreement was unenforceable, said the court, because it lacked mutuality, since at its inception it was not binding on the non-existent corporation, and, therefore, could not be binding on the defendant.

The plaintiff Insurance Company in the second case was organized by several insurance agencies, which agreed that they would not compete individually with the corporation which they proposed to organize. The new company subsequently took over all the contracting agencies. One of them, a party to the contract of promotion, broke it by independently engaging in the insurance business. The court said:

> "It is urged, because the Home Insurance Company was not incorporated and therefore not in existence at the making of the contract, that there was a lack of mutuality, and the contract is not effective on that account. But a promise that lacks mutuality at its inception becomes binding on the promisor after performance by the promisee. Where, therefore, a corporation after its organization makes a contract by adopting and acting on it, the original contract

[87] *Supra* note 58.

[88] 91 Ark. 367, 121 S. W. 293 (1909).

> becomes binding on it; and where all the parties after such organization recognize and act on the original contract, all parties to it are bound by its terms."

The Insurance Company was granted an injunction against the refractory agent.

New York, N. H. & H. R. R. v. Ketchum [89] is an unusual case. Before the plaintiff's organization, Ketchum made successful efforts of an extraordinary character to secure subscriptions to its stock, apparently expecting remuneration, to the knowledge of the promoters. The railroad company in recognition of these services and after discussing the matter with the defendant voted him and his family free transportation during his life on the line. Later this privilege was rescinded. Suit was brought by the railroad company to recover from Ketchum fares he should have paid from the time of the cancellation of the privilege. The plaintiff claimed a contract by the promoters to compensate him, subsequently adopted by the corporation. The court held that the privilege granted to the defendant was a mere gratuity, and that there was no contract with him which could be ratified, for a corporation cannot be held to have come into existence burdened with charges of this character, and it would be inequitable to require it.

In an Indiana case [90] the court also refused to recognize the promoters' contract as that of the corporation. The court had under consideration the usual promoter's suit for compensation for securing stock subscriptions, which the promoters had agreed that the corporation would pay. The contention was that the corporation had adopted the contract by accepting the subscriptions. The comment made, in deciding for the defendant, was:

> "It is difficult to understand how the corporation could be estopped by accepting benefits which it had no power to reject without uncreating itself."

In *Rockford & Rock Island & St. Louis R. R. v. Sage,*[91] a director of the corporation had performed services for it prior to its organization, the benefits of which it had accepted. The decision of the court, holding the promoters' contract to remunerate the plaintiff not binding, is at variance with the majority of American cases.

> "We are disposed to deny the right of recovery for such services and expenses upon any implication resulting from the facts. . . . A right of recovery against a cor-

[89] *Supra* note 56.

[90] Cushion Heel Shoe Co. v. Hartt, 181 Ind. 167, 103 N. E. 1063 (1914).

[91] 65 Ill. 328 (1872).

> poration for anything due before it had a proper existence does not appear to rest on any very satisfactory legal principle. It appears more reasonable to hold any services performed or expenses incurred prior to the organization of a corporation to have been gratuitous, in view of the general good or private benefit expected to result from the object of the corporation. It seems unjust to stockholders who subscribe and pay for the stock in a corporation, that their property should be subject to the incumbrances of such claims, which they had no voice in creating."

A recent leading case, *Kirkup v. Anaconda Amusement Co.*,[92] also runs contrary to the general rule. After delivering an excellent opinion which summarizes the law relative to the manner of the adoption of promoters' contracts, the court finally rejected the claim. The plaintiff, a promoter, contracted with parties who were to convey land to a proposed corporation, for which they were to receive its stock. The promoter was to have alloted to him ten per cent of the stock of the organized company as his commission in stock or in cash. In a suit for this ten per cent, it was the plaintiff's contention that the corporation had adopted the contract by accepting the proceeds of stock sold by his efforts and by issuing stock in accordance with orders obtained by him, and that the usual law of contracts relative to novation and substitution has been abrogated as regards promoters' contracts. The court overruled this claim, stating that in order to bind the corporation some affirmative action must be taken by the corporation itself in recognition of the contract, and none was taken here. The promoter's services must be recognized expressly, said the court, and silence will not bind the corporation. In addition it was held that the contract was *ultra vires*, for under the statute the stock could not be issued for anything but full value.[93]

A federal case, *Weiss v. Arnold Print Works*,[94] seems to follow the English rule, or is based merely on cold and correct theory. The court itself illustrated its decision by the following hypothetical case: "If *A* agrees to secure the employment of *B* by *C*, and *C* does not employ *B*, *B* has no cause of action against *C*.

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[92] *Supra* note 42.

[93] A corporation is not permitted to interpose the defense of *ultra vires* to contracts of which it has received the benefits. This, of course, would apply to promoters' contracts adopted by a corporation.

In Bobzin v. Gould Balance Valve, 140 Iowa 744, 118 N. W. 40 (1908), subscriptions to stock of the defendant corporation were made in consideration of the promoters agreeing to locate its main office in the subscribers' city. It was held that though this contract might be *ultra vires*, it was binding on the corporation which had received the benefit of the agreement.

[94] 188 Fed. 688 (S. D. N. Y. 1911).

In order to hold *C*, it must be shown that he was a party to the contract. If *B* does work for *C* with the latter's knowledge and consent, *C* might be sued upon a *quantum meruit* for the value of *B's* services, and not upon a contract for the reason that *C* has made no contract."

Whether sufficient facts exist in any case to constitute a ratification or adoption of the promoter's contract is a question of fact for the jury.

In *Chesbrough v. North Second Street Railway Company*,[95] where the question arose whether by issuing stock to the lessor the corporation had ratified an agreement to lease franchises, the court held that it was error to dismiss the complaint, for the question whether the defendant corporation had ratified the agreement made by the promoter was for the jury.

In *Moriarity v. Meyer*,[96] a lease was entered into by promoters who intended to organize a bank. After the formation of the bank, its safe was placed in the leased premises. The facts found by the trial court were held not sufficient as a matter of law to prove an intention on the part of the corporation to assume the lease. The appellate court held itself without power to review the decision, for whether there is an intention to assume the contract in cases of this character is always a question of fact.

In considering the adoption of promoters' contracts by corporations, it seems hardly necessary to add that the corporation cannot be held bound on a promoter's contract beyond its corporate powers, just as it cannot be held liable on an original agreement of a similar nature.[97]

At the conclusion of this article the reader may well ask, wearily, what is the law of promoters' contracts? What fair generalization can be arrived at from this mass of conflicting cases? An answer in the form of a statement of definite and inviolable principles is impossible. Promoters' contracts are distinctive in character, and questions relating to their interpretation, operation and effect are not readily solved by the general rules of contract law. Resorting to fixed rules in passing on these cases is ordinarily a perfunctory and mechanical process adhered to as a part of the accepted technique of judicial decisions. It would be simpler if the courts, instead of rationalizing by using formal theories of contract law to sustain their conclusions, arrived at the legal effect of promoters' contracts by a careful consideration of the apparent intent of the parties. It must be conceded, however, that if the courts decided these

[95] 5 N. Y. Week. Dig. 393 (1877).

[96] 21 N. M. 521, 157 Pac. 652 (1916); see Sherl v. Bayer, Pretzfelder & Mills, 213 App. Div. 587, 210 N. Y. Supp. 816 (Sup. Ct. 1925).

[97] Kirkup v. Anaconda Amusement Co., *supra* note 52; Schreyer v. Turner Flouring Co., *supra* note 59.

cases entirely on the facts and without reference to established theories, the scholars and the bar as a whole would not be satisfied, but would painstakingly glean a general principle from the decisions, and then triumphantly assign that principle to its supposed place among the established theories of contract law.

The law of promoters' contracts reflects the frequent and often subconscious conflict in the rationale of judicial decisions, between the dictates of formal rules and principles on the one hand, and the requirements of fairness and the intentions of the parties on the other. Judge Cardozo presents this conflict with his usual philosophic detachment.

> "If we figure stability and progress as opposite poles, then at one pole we have the maxim of stare decisis and the method of decision by the tool of a deductive logic; at the other we have the method which subordinates origins to ends. The one emphasizes considerations of uniformity and symmetry, and follows fundamental conceptions to ultimate conclusions. The other gives freer play to considerations of equity and justice, and the value to society of the interests affected. The one searches for the analogy that is nearest in point of similarity, and adheres to it inflexibly. The other, in its choice of the analogy that shall govern, finds community of spirit more significant than resemblance in externals." [98]

This conflict in cases of promoters' contracts generally results in a victory for the demands of business usage, common sense and justice. It is, however, rather a critical commentary on our present system, that the courts are unable to admit frankly the motivating force of their decisions in cases involving promoters' contracts, but must, by artificial reasoning, insist instead on the application of technical rules of law. This process nullifies the salutary effect of these modern decisions as precedents and tends to weaken the very rules of law which they seek to uphold.

[98] CARDOZO, THE PARADOXES OF LEGAL SCIENCE (1928) 8.