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# Corporations - Promoter's Contracts Binding Upon a Corporation

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to aid in preventing raids upon the estates of deceased persons by disappointed relatives, it is the writer's opinion that proof which is "not too strong" should not be allowed to support a judgment of this nature.

PAUL E. HERBST

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**Corporations—Promoter's Contracts Binding upon a Corporation** — Plaintiff and one Wells agreed to form a corporation to carry on a coal business. Wells personally executed a written contract employing plaintiff as manager for three years at $5,000.00 a year. The corporation was formed thereafter and plaintiff worked under his contract with Wells without any new agreement with the officers and directors of the corporation of which Wells was made President. Shortly after the corporation was formed, plaintiff's salary was temporarily reduced to $4,000.00 a year because of the newness of the business, and upon his discharge some four years later plaintiff sued the corporation to recover the difference between $4,000.00 per year, which was paid him, and $5,000.00 per year, which he contracted for with Wells. Plaintiff recovered judgment. The judgment was affirmed. *Held:* if a corporation accepts the benefits of a pre-incorporation contract, there is an adoption of the contract by the corporation and it is liable on the contract. *Meyers v. Wells, 252 Wis. 352, 31 N.W.(2nd) 512 (1948).*

American decisions in like cases almost unanimously reach the same result, but vary widely in the legal principles applied in finding the corporation liable. The courts all recognize that a corporation is not liable on pre-incorporation contracts unless it becomes so by its own act after it is organized.[1] But in construing this act the courts have used such terms as ratification, adoption, novation, acceptance of a continuing offer or implied adoption in determining corporate liability. Ratification and adoption are used interchangeably by the courts, yet there can be no "ratification" by the corporation under principles of agency, for at the time the promoter contracts, there is no principal in existence.[2] Adoption is a term peculiar to corporation law which the courts have used to label the corporate act of acceptance of the contract. However, by adoption the promoter remains liable and this is invariably contrary to the intention of the contracting parties.[3] In these circumstances adoption can be considered a novation because the promoter is released at the moment the corporation assumes the contract — a change which the other party impliedly assented to in advance.[4] Wisconsin has followed the continuing offer theory; i.e., a

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[1] 123 A.L.R. 726 (1939); Fletcher Cyclopedia Corporations, Vol. 1, Chapt. 9, Sec. 207 (1931); 17 A.L.R. 505 (1922); 49 A.L.R. 673 (1927).
[2] Badger Paper Co. v. Rose, 95 Wis. 145, 70 N.W. 302 (1897).
[3] Fletcher Cyclopedia Corporations, Vol. 1, Chapt. 9, Sec. 207 (1931).
[4] Williston on Contracts, Vol. 1, Chapt. 12, Sec. 306 (1936).

pre-incorporation contract is a continuing offer which the corporation can accept when it comes into existence.[5] This acceptance may be by formal action or may be implied from its conduct. If the corporation knowingly accepts the benefits of a pre-incorporation contract, implied adoption results and it must accept the burdens of the contract.[6] This was the situation in the principal case.

The looseness in applying correct legal principles to effect corporate liability on promoter's contracts is due somewhat to the fact that the promoter is a by-product of modern corporation legislation.[7] A promoter was unknown at common law, and, as a result, in England it is settled that, in absence of a charter or statutory provision, a corporation cannot ratify or adopt a promoter's contract.[8] In America some legal writers have suggested that instead of the courts trying to find corporate ratification or adoption of promoter's contracts, they should give legal recognition to the promoter by granting him power to act definitely for the corporation.[9] Nathan Isaacs, in his article entitled "The Promoter: A Legislative Problem," states that in a few cases statutes have made it possible for corporations to directly succeed the promoter's contracts without any formal adoption or acquiesence.[10] The majority of the American courts, however, have opposed this doctrine. The usual reason for this opposition was advanced by the Illinois Supreme Court quoting with approval *Cook on Stockholders* (Section 707) when it refused to permit a corporation to come into existence committed by promoter contracts:

> "Any other rule would be dangerous in the extreme inasmuch as promoters are proverbially profuse in their promises, and if the corporation were to be bound by them it would be subject to many unknown, unjust and heavy obligations. The only protection of the stockholders and of subsequent creditors against such a result lies in the rule that a corporation is not bound by

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[5] Hinkley v. Sagemiller, 191 Wis. 512 at 517, 210 N.W. 839 (1927); Pratt v. Oshkosh Match Co., 89 Wis. 406, 62 N.W. 84 (1895); Badger Paper Co. v. Rose, 95 Wis. 145, 70 N.W. 302 (1897).

[6] Morgan v. Bon Bon Co., 222 N.Y. 22, 118 N.E. 205; Fletcher Cyclopedia Corporations, Vol. 1, Chapt. 9, Sec. 211 (1931); Indianapolis Blue Print and Mfg. Co. v. Kennedy, 215 Ind. 409, 15 N.E. (2d) 109 (1938), noted in 23 Minn. L. Rev. 224 (1939).

[7] Armstrong v. Sun Printing Assn., 137 App. Div. 828, 122 N.Y. Supp. 531 (1910).

[8] In re Northumberland Ave. Hotel Co., 33 Ch.D. 16 (1886); 33 Harv. L. Rev. 110 (1920).

[9] 123 A.L.R. 726 (1939); Williston on Contracts, Vol. 1, Chapt. 12, Sec. 306 (1936) who says on page 897: "It has been suggested that the question of the promoter's contracts should be treated as one sui juris in the field of corporation law. From this approach the solution may lie in direct legislation permitting the automatic statutory substitution of the corporation upon its organization in place of the promoter."

[10] 38 Harv. L. Rev. 887 (1925); Cumberland Co. v. Daniel, Tenn. Ch. App. 52 S.W. 446 (1899).

the contracts of its promoters. The rule is just and should not be weakened."[11]

Nevertheless we feel Mr. Isaacs is correct when he advocates that a corporation need not come into existence free of all contracts but that by statute, after a certain point is reached, the corporation can succeed the promoter. The promoter who purports to act for the corporation should be labeled or registered, and the scope of his power should be strictly defined. But within that scope he should be able to bind the corporation. Protection against misrepresentation could be afforded the public and the future stockholders of the corporation by statutory provision for administrative control of promotion and extension of "blue sky" provisions to such contracts. In this way the responsibility on these pre-incorporation contracts, which vitally affect the value of the stock of the corporation that is later formed, will be clearly defined instead of being subject to twilight zone reasoning of the courts in trying to find corporate ratification or adoption.

JOHN F. ZIMMERMANN

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**Domestic Relations—General Statute of Limitation as Bar to Divorce Action** — Plaintiff, husband, and defendant, wife, intermarried on the 8th day of May, 1926. Since 1932 the defendant has been an inmate of an asylum for the insane. The plaintiff alleges that from the time of the marriage until the time that defendant was committed, she had been guilty of a course of cruel and inhuman treatment toward him. Defendant demurred on the ground that the action was barred by the general statute of limitation.[1] This statute provides that where an action was cognizable by a court of chancery on or before Feb. 28, 1857, and no other statute of limitation applies to it, it must be brought within ten years. The order sustaining the demurrer was affirmed. *Held:* the jurisdiction of the court over divorce being purely statutory and an action of divorce being cognizable in a court of chancery prior to 1857, the general statute of limitation stands in bar of this divorce action since it was not brought within ten years. *Zlindra v. Zlindra, 252 Wis. 606, 32 N.W.(2d) 656 (1948).*

The application of a general statute of limitation to a divorce action is not a new one. The case at hand is novel inasmuch as it is the first case in Wisconsin which has allowed the general statute to bar a divorce action. Textwriters are almost unanimous in their declaration that a general statute of limitation cannot bar such an action.

"Statutes of limitation in the mere ordinary words common in our states, are not extended to suits for divorce."[2]

[11] Park v. Modern Woodmen, 181 Ill. 214, 54 N.E. 932, 938 (1899).
[1] Wis. Stat. (1947), 330.14, 330.18(4).
[2] 2 Bishop, Marriage, Divorce and Separation 426.