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THE PRINCIPLES OF THE LAW RELATING TO
CORPORATE LIABILITY FOR ACTS OF PRO-
MOTERS.

CHAPTER IV.

RATIFICATION.

§ 1. *On theory, ratification inapplicable in order to charge a corporation for acts prior to incorporation.*

It will have been noticed, in discussing the cases on this subject, that the courts frequently use the term "ratification;" indicating that a corporation may, by ratifying a contract made by its promoters, become liable to perform its terms, though the contract was made before it came into existence.

Ratification is a term originating in the law of agency, which may be used with its scientific intendment, when saying that the act of an agent, or the act of one holding himself out as an agent, has been ratified. It is "an agreement to adopt an act performed by another for us," and is either express or implied.¹ But that there may be a ratification in a technical legal sense, the one purporting to ratify an act must have been in existence at the time the act was done,² for in theory this adoption of an act done by another is only possible because the act was done on our behalf, and it cannot be said in any

¹ Bouvier's Law Dictionary.

² Anson on Contracts, * 335-36; Chitty on Contracts, p. 293.

true sense that an act was done on behalf of a person not *in esse*.

As is said by Pollock:¹ "When a principal is named or described, but is not capable of authorizing the contract so as to be bound by it at the time, there can be no binding ratification, for ratification must be by an existing person on whose behalf a contract might have been made at the time."

It is difficult to perceive, therefore, how this doctrine of agency can be applied, (with any due regard to an exact use of scientific terms,) in order to charge a corporation for having knowingly taken the benefit of a contract made before its existence commenced. The better opinion seems to coincide with this view, and in the leading case of *Kelner v. Baxter*,² Willis, J., said: "Could the company become liable by a mere ratification? Clearly not. Ratification can only be by a person ascertained at the time of the act done, by a person in existence either actually or in contemplation of law, as in the case of the assignees of bankrupts, or administrators whose title for the protection of the estate vests by relation."

The cases denying the applicability of the doctrine of ratification are numerous, and would seem to have the weight of reason and authority,³ for, under the circumstances, privity of contract is impossible.

It is, nevertheless, true that the doctrine of ratification has been made use of in a number of cases,⁴ and where it is employed it would seem that the rule of agency, (that where a contract is ratified, the agent, if he has contracted as such, is relieved from responsibility,) is invoked to discharge the pro-

¹Contracts, * 107.

²L. R. 2 C. P. 175 (1866).

³*Melhado v. Porto Alegre R. R. Co.*, 9 C. P. 503 (1874); *In re Empress Engineering Co.*, L. R. 16 Ch. Div. 125 (1880); *Weatherford R. R. v. Granger*, 24 S. W. 795 (Texas, 1894); *McArthur v. Times Co.*, 57 N. W. 216 (Minn. 1892); *Gunn v. Assurance Co.*, 12 C. B. N. S. 694 (1862); *In re Northumberland Ave. Hotel Co.*, 33 Ch. Div. 16 (1886).

⁴*Carey v. Des Moines Coal Co.*, 47 N. W. 882 (Iowa, 1891); *Bruner v. Brown*, 38 N. E. 318 (Ind. 1894); *Buffington v. Bardon*, 50 N. W. 776 (Wisc. 1891); *Stanton v. R. R. Co.*, 59 Conn. 272 (1890); *Paxton Cattle Co. v. Bank*, 21 Neb. 621 (1887); *Hill v. Gould*, 129 Mo. 106 (1895). Dictum.

moter of personal liability on the contract. Such, at least, was the intimation in *Whitney v. Wyman*,¹ though we have seen that ordinarily the rule is otherwise.²

In *Buffington v. Bardon*³ the laxity of thought which an adoption of this theory necessitates is clearly brought out. That was an action by Buffington to charge the defendants, as stockholders of a corporation, upon a contract which plaintiff alleged that he made with the company. The lower Court instructed the jury that, before they could render a verdict for the plaintiff, they must find that the corporation promised to pay the plaintiff for his services, or that after it was organized the corporation or its authorized agents, knowing all the facts, adopted the services and made use of the same. Verdict was rendered for plaintiff. Lyon, J., held, "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. But if one assumes to act as agent for a prospective corporation, and in form enters into a contract in its behalf, it is competent for such corporation, when organized, to ratify such contract. If with full knowledge of all the facts, but not otherwise, the corporation assumes the contract and agrees to pay the consideration, or accepts the benefit of the contract it will be bound thereby."

Though the language of the lower Court was referred to as being correct, judgment was reversed on the ground that there was no evidence which could have been submitted to the jury tending to prove a ratification with knowledge of all the facts.

While the learned judge in this case justly characterizes as absurd the theory that the promoters are agents of the company, it would seem that he has fallen into a like mistake when he boldly asserts that the technical theory of ratification is applicable to a case in which, as he admits, there is no

¹ 101 U. S. 392 (1879).

² Ante.

³ 50 N. W. 776 (Wisc. 1891).

relation of principal and agent and no principal in existence for whom anyone might assume to act as agent.

§ 2. *Where doctrine recognized, knowledge of facts a prerequisite to liability.*

Where the doctrine is employed, however, one of the prerequisites should be, as the above case lays down, that the corporation must have had knowledge of all the material facts and circumstances of the transaction which it is charged with having ratified, for otherwise, according to the law of agency, no ratification is possible.¹ This rule is recognized in the cases.²

§ 3. *Only acts within scope of the corporate powers can be ratified.*

It is also laid down that only acts within the scope of the corporate powers can be ratified.³ Under the doctrine of "special capacities," according to which any act done without the scope of the powers conferred upon the corporation, is no act, (for there was no power with which to act,) this statement would be literally true. The corporation could not ratify a transaction which was beyond the powers granted, for it has not the inherent force so to do. As a corporate act, ratification could not take place.

But since ratification is purely a question of fact depending in any given case upon the intention of the parties as manifested by their acts and words, ratification is physically possible (if the expression may be permitted) and the above proposition must not be understood in any such sense as that the act of ratification is one implied by law, and that the law will not raise the implication where the act, if done by the corporation, would have been *ultra vires*.⁴

¹Story on Agency, § 239.

²*Stanton v. R. R.*, 59 Conn. 272 (1890).

³*Stanton v. R. R.*, 59 Conn. 222 (1890); *Munson v. R. R. Co.*, 103 N. Y. 58.

⁴*Oakes v. Cattaraugus Water Co.*, 143 N. Y. App. 430 (1894); *Howard v. Patent Ivory Mfg. Co.*, L. R. 38 Ch. Div. 156 (1888).

§ 4. *Ratification relates back.*

Ratification, as we have seen, is the adoption of an act previously done by one who was, in fact, agent for the ratifier, or who assumed to act as agent for one who was in existence at the time. It follows, therefore, that ratification relates back to the time of the act, and the principal is bound or acquires rights as of that date; ¹ *omnis ratihabitis retrohabitur*. So the obligation binding a corporation, which has ratified a contract made by its promoter, dates as of the time of the original agreement.² It is the adoption of the old contract, not the making of a new one.

§ 5. *What acts constitute a ratification.*

As to what constitutes a ratification, it need only be said that the same rules apply in these cases as in those where the term is more truly applicable. It may be express, or implied from carrying out the terms of the contract or acting with reference to it.

CHAPTER V.

ADOPTION.

§ 1. *Conceived of as the adoption of an old contract.*

Many cases, while denying that there can be in any exact sense a ratification, assert that a company may become bound by adoption.³ This is not a "term of art;" there is no recognized legal principle so-called, and it is to a consideration of

¹ *Kelner v. Baxter*, L. R. 2 C. P. 174 (1866).

² *Stanton v. R. R.*, 59 Conn. 272 (1890); *Negley v. Lindsay*, 67 Pa. 218 (1872); *Low v. R. R. Co.*, 45 N. H. 370 (1864).

³ *Pittsburgh v. Quintrell*, 20 S. W. 284 (Tenn. 1892); *Huron Printing Co. v. Kittleson*, 57 N. W. 233 (S. Da. 1894); *Schreyer v. Turner Flouring Mills*, 43 P. 719 (Oregon, 1896); *Weatherford R. R. Co. v. Granger*, 24 S. W. 795 (Texas, 1894); *Colorado Land & Water Co. v. Adams* (Colo. 1894); *Arapahoe Ins. Co. v. Platt*, 39 P. 584 (Colo. 1895); *Battelle v. Cement Co.*, 33 N. W. 327 (Mo. 1887); *McArthur v. Printing Co.*, 51 N. W. 216 (Minn. 1892); *Pratt v. Oshkosh Co.*, 62 N. W. 84 (Wisc. 1895); *Munson v. R. R.*, 103 N. Y. 58 (1886); *Burden v. Burden*, 4 N. Y. Supp. 499 (1896); *Touche v. Metropolitan Co.*, 6 Chan.App. 671 (1870); *Bommer v. American Spiral Hinge Co.*, 81 N. Y. 469 (1880); *Pa. Match Co. v. Hapgood*, 141 Mass. 145 (1886).

what is meant by the courts when they say that a corporation may adopt the contract and become bound thereby, that we must now proceed.

An examination of the cases would seem to indicate that the term has been used in two distinct senses. In some it has signified, as the word itself denotes, an adoption of a previously formed contract; the assumption by the corporation of the rights and liabilities created by a contract made between a promoter and a third person. In others, the Court has shown, either expressly or by implication, that it meant by "adoption" the making of a new contract with the same terms as the old.

The former of these conceptions was undoubtedly in the mind of the Court in the case of *Rogers v. Land Co.*¹

A number of persons holding a large tract of land agreed to form a company whose sole purpose should be the disposal of the land in question. Each should contribute his proportion of the land to the company, receiving in return script to represent shares in the company, which should be retired as fast as the company disposed of the land.

When the company was created, instead of paying off the script it declared a dividend to the scripsholders. The suit was brought by one of the scripsholders to compel the payment to be made to the retirement of the script.

Vann, J., held: "By accepting title to the land, it (the corporation) adopted and ratified the agreement entered into by all its stockholders and thereby voluntarily made itself a party thereto and became bound thereby," and the Court thereupon ordered that the agreement between the original owners was binding upon the company and that profits must therefore, be applied to retiring the script. See also²

When this is understood, by "adoption" it is manifest that there is little or no distinction to be drawn between it and "ratification" as the latter term is employed in this connection.

¹ 34 N. Y. 197 (1892); *Spiller v. Paris Skating Rink Co.*, 7 Ch. Div. 368 (1878); *Match Co.*, 62 N. W. 84 (Wisc. 1895); 15 Law & Eq. 596 (1852).

² *Oakes v. Cattaraugus Water Co.*, 143 N. Y. App. 430 (1894); *Pratt v. Oshkosh*, 62 N. W. 84 (Wisc. 1895); *Gooday v. Colchester & Stour Valley Ry. Co.*, 17 Beavan, 132 (1852); *Touche v. Metropolitan Ry. Co.*, 6 Ch. App. 671 (1870).

In their exact signification, adoption denotes the taking to one's self of that with reference to which there existed no prior relation ; ratification, the confirmation of an act done without due authority on behalf of an existing principal. But when the term ratification is made use of in a case in which no relationship of principal and agent exists, then, according to the definitions given, there is nothing left whereby to distinguish the two processes. Whatever constitutes a ratification in this sense constitutes also an adoption, and the terms may be used as synonymous. See¹

This conception seems to be open to the objection that the law of contract does not permit of a stranger substituting himself for one of the original parties to a contract except by an agreement between all of the parties concerned, based upon a sufficient consideration. This is on the familiar principle that liabilities cannot generally be assigned.²

Now, if we suppose a case in which the corporation has so acted after coming into existence, that under the decisions we are discussing a Court would say that there had been an adoption of the contract, would it not be a mere fiction unsupported by the facts for the Court to imply that the minds of the parties had met and agreed upon the substitution of the liability of the corporation for that of the promoter ?

Yet by such mutual agreement alone, according to the law of contract, can a substitution of liabilities take place.

But admitting that a Court would be justified in giving effect to such a substitution on the ground of an implied agreement between the parties to that effect, we are not aided in understanding these decisions, for in none of them does the Court seem to base its result on the reasoning indicated. Indeed, they appear to repudiate it, for such a substitution is, in the words of Anson,³ " the rescission by agreement of one contract and the substitution of a new one in which the same acts are to

¹ *Perry v. Little Rock R. R. Co.*, 44 Ark. 383 (1884); *Schreyer v. Turner Flouring Mills Co.*, 43 P. 719 (Oregon, 1896); *McArthur v. Times Printing Co.*, 51 N. W. 216 (Minn. 1892).

² Anson, Part III., Chapter II.

³ *Contracts*, p. 287.

be performed by different parties," but the cases under consideration all take the view that the contract binding the corporation is not a new one, but is the old agreement adopted, dating back and taking effect as of the time of the original contract.

A number of cases, however, expressly repudiate the idea and hold that there can be no adoption of the original contract or liability assumed by the corporation under it; and the view may be considered discredited.¹

§ 2. *The making of a new contract.*

The better opinion as to the nature of this so-called "adoption" is, that it is the making of a new contract between the corporation and the person with whom the promoter contracted, and since it is usually implied from the actions of the company with reference to the promoter's contract, it is generally found that it was the intention of the parties to follow the terms of the original agreement. Hence the rule laid down in the cases, that adoption, is "the making of a new contract with the same terms as the old."²

The distinctions taken between the theories of "ratification," "adoption" (understood in its *prima facie* significance), and "adoption" (understood as the making of a new contract), are rather of theoretical than of practical importance in the majority of cases. They become useful, however, wherever the Statute of Frauds or of Limitations is involved. An example of this is the case of *McArthur v. Times Printing Co.*³ That was an action for damages for breach of contract. Promoters of the company had employed plaintiff in behalf of the company as advertising agent for the period of one year from and after October 1st. Plaintiff commenced to render his services on that day, though incorporation was not complete. He

¹ *Abbott v. Hapgood*, 150 Mass. 248 (1889); *R. R. Co. v. Sage*, 65 Ill. 328 (1872); *Western Screw Co. v. Cousley*, 72 Ill. 531 (1874).

² *In re Empress Engineering Co.*, 16 Ch. Div. 125 (1880); *Northumberland Ave. Hotel Co.*, 33 Ch. Div. 16 (1886); *McArthur v. Times Printing Co.*, 51 N. W. 216 (Minn. 1892).

³ 51 N. W. 216 (Minn. 1892).

continued in the same employment for some time after the company was formed, but was discharged within the year. All the officers and directors knew the terms of the contract, and plaintiff had been paid accordingly, but no formal action had been taken by the company, recognizing the contract.

One of the grounds of defense was that the contract was void on account of the Statute of Frauds, there being no memorandum in writing, and performance not being provided for within the year.

Mitchell, J., held: "This Court, in accordance with what we deem sound reason 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, after its organization, make such engagements its own contracts, . . . What is called adoption in such cases is, in legal effect, the making of a contract of the date of the adoption, not as of some former date." Since the contract was adopted, and since it was not made by the corporation until October 16th, and was to last for one year from October 1st, according to the terms of the original agreement, it was to be performed (as far as the corporation was concerned) within the year, and the statute had therefore no application. See also¹

When it is said that the new contract is made with the same terms as the old, it is apparent that if we are dealing with an actual contract, implied from the circumstances of the case and based upon the intention of the parties, the statement must be taken to embody the results reached in the majority of cases and cannot be understood as a conclusion of law, universally applicable. Though the jury might find, in a given case, that the corporation had undertaken *in toto*, according to the terms of the promoter's contract, such a circumstance would be purely accidental.

In the case of *Standard Printing Co. v. Democrat Pub. Co.*,²

¹ In re Empress Engineering Co., 16 Ch. Div. 125 (1880); Howard v. Patent Ivory Mfg. Co., L. R. 38 Ch. Div. 156 (1888); Northumberland Ave. Hotel Co., 33 Ch. Div. 16 (1886); Battelle v. Cement Co., 33 N. W. 327 (Mo. 1887).

² 58 N. W. 238 (Wisc. 1894).

suit was brought by the latter for work done in publishing a paper for the former. The contention was as to the sum due. Plaintiff had previously done the work for former owners of the paper at a certain price. These proprietors had formed the defendant company and turned the paper over to it, the plaintiff continuing to do the work. Nothing was said as to the price. Plaintiff claims that the original agreement should be the measure of his recovery. The *Trial Court* found "that the work was done upon an implied promise that the plaintiff should be paid for it such sum as it should be reasonably worth."

Newman, J., held: "This (the original agreement) was but evidence, more or less persuasive, upon the question what was the agreement upon which the work was done for the defendant. And it was a serious question whether the Court ought to infer a promise by the defendant to abide by the previous contract of the promoters however clearly established."

The thought that circumstances may contradict the implication arising in any given case (that the corporation intended to contract according to the terms of the promoter's agreement,) was carried to a considerable length, *In re Northumberland Avenue Hotel Co.*¹ Lopes, J., there said: "No doubt the company, after it came into existence, might have entered into a new contract upon the same terms as the agreement of July 24, 1882, and we are asked to infer such a contract from the conduct and transactions of the company after it came into existence. It seems to me impossible to infer such a contract, for it is clear to my mind that the company never intended to make any new contract, because they firmly believed that the contract of July 24th was in existence and was a binding valid contract."

§ 3. *Formal requisites.*

As in those cases which proceed upon the theory of ratification, so in these dealing with adoption, it is held that only acts within the scope of the corporate powers, and such as are not

¹ 33 Ch. Div. 16 (1886).

against law or public policy, can be adopted;¹ and that the company must have had knowledge of all the facts before it will be bound.²

The question as to who may bind the company by adopting the contract is purely one of agency, to be decided in each case as it arises, and is dependent upon the character of the agreement and the purposes of the corporation.³

CHAPTER VI.

ESTOPPEL.

§ 1. *When applicable.*

Besides the theories which we have been considering, another doctrine, that of estoppel, has at times been employed in order to charge a corporation for work done and services rendered in its formation, or upon a contract made by its promoters.

That the liability of the corporation in such cases depended on estoppel was the thought of the Court in the case of *Grape Sugar & Vinegar Mfg. Co. v. Small*.⁴ That was an assumpsit brought by Small against the company on account of a balance due for work done and materials furnished to the appellant. It was shown that one Sim, acting as president of the company but before it was duly incorporated, had employed plaintiff to build and repair certain "tubs," the employment having lasted till after incorporation. The defendant asked the Court to charge "that plaintiff is not entitled to recover for the work done and material furnished prior to the day on which the certificate of incorporation was filed for record." This the Court refused to do, and there being a verdict for the plaintiff the company took an appeal.

¹ *Schreyer v. Turner Flouring Mills Co.*, 43 P. 719 (Oregon, 1896); *Munson v. R. R. Co.*, 103 N. Y. 58 (1886); *Burden v. Burden*, 4 N. Y. Supp. 499 (1896); *McArthur v. Times Printing Co.*, 51 N. W. 216 (Minn. 1892).

² *Schreyer v. Mills Co.*, 43 P. 719 (Oregon, 1896); *Weatherford R. R. v. Granger*, 34 S. W. 793 (Texas, 1894); *Huron v. Kittleson*, 57 N. W. 234 (S. Da. 1894); *Rogers v. Land Co.*, 134 N. Y. 197 (1892).

³ *McArthur v. Times Printing Co.*, 51 N. W. 216 (Minn. 1892).

⁴ 40 Md. 395 (1874).

The Court, in affirming the judgment, said: "If, after its incorporation was complete, the company accepted the work done under the contract, it will be estopped, both in law and equity, from denying its liability on account of the same. In other words, the appellant will not be permitted to accept the work done and material furnished by the plaintiff under a contract made prior to the recording of the certificate and, at the same time, deny its liability under it."

In *Weatherford, Etc., R. R. Co. v. Granger*¹ the Court, in referring to the corporation, uses the following language: "Having exercised rights and enjoyed benefits secured to it by the terms of a contract made by its promoters in its behalf, a corporation should be estopped to deny its validity." See, also, to the same effect:²

Now it will be noticed that, in the case of *Grape Co. v. Small*, just cited, the services of the plaintiff had been rendered partly before but partly after complete organization of the company. It had allowed the plaintiff to continue making and repairing its tubs, with full knowledge that he was doing so under the impression that the company would pay him *according to the terms of the contract*, not only for what he was now doing but for what he had already done. Under such circumstances the doctrine of estoppel might have a legitimate application.

§ 2. *When inapplicable.*

But it is submitted that the language used in *Weatherford R. R. Co. v. Granger* (and the other cases cited) is too broad, since it would include all cases in which benefits had accrued to a corporation, as well before as after it had come into existence. Now, as to all services rendered or goods bestowed upon a company before it is incorporated it would seem that, if any liability arises, it cannot be based upon the theory of estoppel, for the essential elements of an estoppel are absent.

The elements of an equitable estoppel, by conduct or in

¹ 24 S. W. 795 (Texas, 1894).

² *Joy v. Manion*, 28 Mo. App. 55 (1887); *Low v. R. R.*, 45 N. H. 375 (1864); *Thompson on Corp.*, § 490.

pais, are laid down in *Bispham's Equity*.¹ It is there said, "Equitable estoppel or estoppel by conduct has its foundation in fraud considered in its most general sense." There must be an intentional inducing of another to act, with a full knowledge of all the facts, and the other must have acted to his detriment.²

It would seem impossible to predicate fraud of a corporation in respect of benefits conferred upon it while in an inchoate condition, and before it had a legal existence.

Again, though the cases suggest that the fraud which estopped the corporation from denying its liability, consists in enjoying the benefits which it knows have been conferred in the expectation that they will be paid for, we have seen that to constitute an estoppel, the one alleging it, must have been induced to act to his disadvantage by the wrong of another, and it would seem to be a strained construction of the doctrine, to hold that a corporation, by merely making use of advantages of which it found itself in possession upon its birth, had induced the conferring of those advantages upon itself.

PART III.

THE BASIS OF CORPORATE LIABILITY FOR PROMOTERS ACTS.

CHAPTER VII.

WHERE THE BENEFITS HAVE BEEN CONFERRED AFTER INCORPORATION.

§ 1. *General considerations: A true contract possible.*

It is apparent from the foregoing examination of the cases that in theory, at least, the courts have differed widely as to the grounds of corporate liability. It has been alleged on the one hand and controverted on the other that a company comes into existence burdened with liabilities; the doctrines

¹ § 282.

² *Bispham's Equity*, Chap. IV.

of estoppel and of ratification have been suggested as theories upon which the corporation might be charged for the benefits received ; and, finally, it has been generally conceded that the company may assume liability by a process of adoption, though as to the full effect and meaning of " adoption " there is still some doubt.

Whatever the language used, however, it is clear that the courts have recognized the equity existing against a corporation in respect of advantages of which it has been the recipient under a contract made by its promoters. This equity is recognized in spite of the fact that on strict principle the promoter is the only one who can be liable on the original contract, in view of the non-existence of the corporation at the time the contract was made.

Notwithstanding the diversity in the terminology employed, there is a manifest uniformity in the major part of the results reached, which suggests that the underlying principles are the same in most of the cases.

It remains, then, to consider what are the underlying principles referred to, and how far they have been recognized by the courts. For the purposes of this examination all the cases may be divided into three classes :

First. Those in which the promoters have contracted for the corporation in respect of something to be done for it after it shall have been duly incorporated.

Second. Those in which the duties to be performed under the contract commence before, and continue after, incorporation.

Third. Those in which the contract has been fully performed and the corporation has received the benefit before it was legally *in esse*.

In cases of the first class where a corporation has been fully organized and, knowing the terms of a contract made between its promoters and a third party, allows the latter to render the services contracted for under the belief that the company intends to pay him for them, we have all the elements of a real contract ; a contract implied in fact. The consensus of opinion of all reasonable men would be that the company must have intended to contract according to the

terms of the former arrangement, and that in view of its conduct it could not be heard to deny that this was its intention. It is in such a case, and in such a case alone, that the doctrine of estoppel would be applicable.

§ 2. *The promoter's contract a continuing offer to the company.*

In these cases we should expect to find the courts acting on the hypothesis of a true contract and endeavoring to enforce an agreement corresponding to the intention of the parties. So it is usually held that a contract made with a promoter constitutes an open or continuing offer to the corporation, which that body may accept upon coming into existence.¹ Having accepted or adopted this offer either expressly or as is more generally the case, by implication, a contract is formed ordinarily of the same terms as the former one and binding upon the corporation.

As was said in *Penn Match Co. v. Hapgood*:² "The power of a corporation to make contracts can be exercised in accepting and adopting proposed contracts made in its name and behalf before incorporation. Such a contract must derive its vitality from the meeting of minds when both parties are in existence; until then it can be nothing more than an offer by one party."

The thought was expressed even more fully in *Weatherford R. R. Co. v. Granger*:³ "Again, where the promoters of a corporation have made a contract in its behalf to be performed after it is organized, it may be deemed a continuing offer on the part of the other party to the agreement, unless withdrawn by him, and may be accepted and adopted by the corporation after such organization; and the exercise of any right, inconsistent with the non-existence of such contract, ought to be deemed conclusive evidence of such adoption."

This fiction of the continuing offer would seem to be justifiable as an aid in giving effect to the intention of the parties.

¹ *Pratt v. Oshkosh Co.*, 62 N. W. 81 (Wisc. 1895).

² 141 Mass. 145 (1886).

³ 24 S. W. 795 (Texas, 1894).

That in these cases we are dealing with true contracts seems to be thoroughly established. In *Howard v. Patent Ivory Mfg. Co.*,¹ the company, being duly organized, received the transfer of a leasehold under an agreement made before its existence by its promoters. It knew the terms of the agreement and had passed a resolution undertaking to carry them out. It was argued that, according to an earlier case,² the terms of the original contract were not binding upon the company, though it might be liable to pay a reasonable sum for the use of the property.

Kay, J., said: "In the first place I must observe that the question whether there was a contract between this company and Mr. Jordan is a question not of law but of fact. Am I bound, because in one case the Court upon evidence before it came to the conclusion as a matter of fact that there was no binding contract, to hold that in this case there was no such contract?" and judgment was rendered for the plaintiff.

In *Oakes v. Cattaraugus Water Co.*,³ the promoters contracted with Oakes that the company should pay him \$1000 if he should render certain services. After incorporation the president, who was one of those who made the original agreement, requested Oakes to perform the services. Having done so, the company refused to pay the \$1000. The lower Court non-suited plaintiff when he sued for the contract price.

The Court, after suggesting that the parties could make a contract on the same terms as the original one if they were so minded, said: "Whether this was the intention and purpose of the president and of the defendant, and of the plaintiff, was under the circumstances of the case a question of fact which should have been submitted to the jury. Ratification or adoption, which in this case mean the same thing, is legally a question of intention to be determined from facts and circumstances as one of fact, and the Court was not warranted under

¹ L. R. 38 Ch. Div. 156 (1888).

² In re Northumberland Avenue Hotel Co., 33 Ch. Div. 16 (1886).

³ 143 N. Y. App. 430.

the circumstances in disposing of the question as one of law." Judgment was, therefore, reversed. See also¹

Since we are dealing with an obligation founded upon the intention of the parties, certain elements must be present before a jury would be warranted in finding that the undertaking had been entered into by the corporation. First of these is knowledge of the facts and circumstances attending the rendering of the services. This we have seen to be a prerequisite, while discussing the theories separately, and the same reason applies wherever there is a contract implied in fact, for it is impossible to say that one has either ratified or adopted a contract or accepted an offer, when he had knowledge neither of the one nor the other.²

If a case should arise in which benefits were conferred upon a corporation after due organization without its knowledge under a contract made prior to its formation, it would seem that on theory the only ground of recovery would be in quasi-contract. The point, however, has not so far arisen.

§ 3. *What constitutes corporate knowledge.*

It will be necessary in this connection to investigate briefly what is considered the knowledge of the corporation. In *Davis Wheel Co. v. Davis Wagon Co.*,³ it was said: "The authorities do not agree whether a corporation is to be held cognizant of facts which have come to the knowledge of an officer or director unofficially; but the better opinion would seem to be that if the officer or director is an active agent of the corporation in the transaction affected by his knowledge, it is not material how or when he acquired his information."

Taking the opinion here expressed to be the better one, it

¹ *Rogers v. Land Co.*, 134 N. Y. 197 (1892); *Penn Match Co. v. Hapgood*, 141 Mass. 145 (1886); *Pratt v. Oshkosh Match Co.*, 62 N. W. 84 (Wisc. 1895); *Standard Printing Co. v. Democrat Pub. Co.*, 58 N. W. 238 (Wisc. 1894); *Spiller v. Paris Skating Rink Co.*, 7 Ch. Div. 368 (1878); *Northumberland Avenue Hotel Co.*, 33 Ch. Div. 16. (1886).

² *Schreyer v. Mills Co.*, 45 P. 719 (Oregon, 1896); *Weatherford R. R. v. Granger*, 34 S. W. 793 (Texas, 1894); *Huron Co. v. Kittleson*, 57 N. W. 234 (S. Da. 1894); *Rogers v. Land Co.*, 134 N. Y. 197 (1892).

³ 20 Fed. Rep. 699 (1884).

is well settled that notice of facts to individual stockholders or incorporators is not notice to the corporation¹ of those facts. The same rule pertains as to a director.² Notice to an agent, however, whose duty it is to disclose his knowledge is notice to the company.³ The knowledge of the officers of a company is its knowledge.⁴

So, in *Rogers v. Land Co.*,⁵ the corporation had been formed by joint holders of land under an agreement among themselves, that the company should serve a certain purpose, the owners becoming officers and directors. The Court, in enforcing the agreement, said: "The corporation was charged by the knowledge of its directors, the source of its title, and the consideration paid for the land, with notice of the proceedings of the bondholders which led to its existence, as well as their object in causing it to be organized."

§ 4. *Where the promoter's contract would have been ultra vires or illegal if made by the corporation, the company not bound.*

It is also generally said that only acts within the scope of the corporate powers and such as are not against law or public policy can be adopted.⁶ In view of the fact that the basis of the obligation created by this so-called adoption is, as we have seen, an implied contract, this statement must be taken to mean, not that the jury would be unjustified in finding that the corporation had intended to make an *ultra vires* or illegal contract, but that the effect of such intention was a nullity, and that the purpose of the company, however clearly expressed by words or actions, was inoperative to create a valid contractual relation. The same thought is apparent in the cases employing the doc-

¹ *Housatonic Bank v. Martin*, 1 Met. (Mass.) 294 (1840).

² *Custer v. Tompkins Co. Bank*, 27 P. S. 132; *Weatherford R. R. Co. v. Granger*, 24 S. W. 795 (Texas, 1894).

³ *Burt v. Batavia Paper Co.*, 86 Ill. 66 (1877).

⁴ *McDermot v. Harrison*, 9 N. Y. Supp. 184 (1890); *Bommer v. Spiral Hinge Co.*, 81 N. Y. 469 (1880).

⁵ 134 N. Y. 197 (1892).

⁶ *Munson v. R. R.*, 103 N. Y. 58 (1886); *McArthur v. Times Printing Co.*, 51 N. W. 216 (Minn. 1892); *Schreyer v. Turner Mills Co.*, 43 P. 719 (Oregon, 1896); *Burden v. Burden*, 4 N. Y. Supp. 499 (1896).

trine of ratification, and was noticed under that head.¹ Again, wherever a formal action by the board of directors, or other corporate officers, is required by statute or the corporate charter, in order to bind the company if it were acting in the first instance, a like formality must have taken place before the company is bound.² The whole question belongs rather to the law of *ultra vires* acts of corporations than to that of contracts.

Malcolm Lloyd, Jr.

¹ See ante.

² *McArthur v. Times Printing Co.*, 51 N. W. 216 (Minn. 1892); *Schreyer v. Turner Mills Co.*, 43 P. 719 (Oregon, 1896).