THE PRINCIPLES OF THE LAW RELATING TO CORPORATE LIABILITY FOR ACTS OF PROMOTERS.

CHAPTER VIII.

WHERE THE PROMOTER'S CONTRACT PROVIDES FOR THE RENDERING OF SERVICES PARTLY BEFORE AND PARTLY AFTER INCORPORATION.

§ 1. A contract implied in fact.

The second class of cases to be discussed comprises those in which the employment or benefits rendered by the plaintiff, and on account of which he is suing, were so rendered partially before and partially after incorporation, in compliance


2 See ante.

with the terms of a contract made with the company's promoters; the company accepting that part rendered after incorporation with full knowledge of the terms of the contract.

As to the services rendered after organization, there are here, as in the former cases, all the elements of an implied contract. The question which arises, is as to whether there can be implied from the action of the company in accepting such services, a promise to pay not only for them but for those rendered before incorporation.

It would seem that since, by supposition, the corporation knew that the benefits which it accepted were rendered in compliance with the general terms of an arrangement under which former benefits had been conferred, it would not be a strained construction of its conduct to imply a promise on its part to pay for all. The only other question, therefore, would be as to whether, granting the promise, there was an adequate consideration to make it binding. And since the benefits rendered after incorporation would not have been conferred, except for the existence of the contract and the belief that compensation was to be made according to its terms, i.e., for all the benefits rendered, there would seem to be a sufficient consideration moving to the corporation to support the implied promise to fulfil the promoter's engagement in all its particulars. In other words, the rendering of the services after incorporation is the consideration for the promise to pay for those formerly rendered.

In McArthur v. Times Printing Co., suit was brought for damages for breach of contract in discharging the plaintiff contrary to the terms of an agreement made by the promoters. Plaintiff had been employed before incorporation to solicit advertisements for the company, and after the charter was granted the company, knowing that the engagement had been for the term of a year, continued to make use of the plaintiff's services and to make him payments on account as required by the contract. The plaintiff was discharged without cause within the year.

1 51 N. W. 216 (Minn. 1892).
The Court held that the jury were justified in finding that the corporation had adopted the contract, explaining that by adoption was to be understood the making of a new contract of the date of the adoption, and the plaintiff was awarded damages for breach of contract.

Such a result could not be reached except upon the hypothesis that the implied contract created by the act of the company was of the same terms as that made by the promoters, and if so, included an undertaking to pay for services rendered before incorporation, as well as for those rendered afterwards, and to continue to employ the plaintiff during the term of one year. See also 1

§ 2. A limitation of the rule.

In Weatherford R. R. v. Granger, 2 the action was brought upon account for services rendered before organization in procuring a bonus for the company, and also for services rendered subsequent thereto, as attorney. There was a judgment for the plaintiff for the whole amount. On appeal the Court decided that there could be no recovery for the services rendered prior to organization, though stating that "the evidence was sufficient to sustain a recovery by plaintiff for the value of his services rendered after the corporation was created." As the Court below had failed to find separately the reasonable worth of such services, the entire judgment was reversed.

Here there was no single contract regulating the terms upon which the plaintiff's services were rendered, and in fact there had been no agreement as to the compensation to be charged. A jury would not have been warranted in finding that because the company knowingly accepted the benefits rendered after incorporation it had thereby intended to promise payment for those rendered prior thereto. The case suggests the limitation, therefore, that in order to charge the corporation for benefits conferred before incorporation, by reason of

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1 Arapahoe Investment Co. v. Platt, 39 P. 584 (Colo. 1895); Grape Sugar Co. v. Small, 40 Md. 395 (1874).
2 24 S. W. 795 (Texas, 1894).
its acceptance of benefits rendered after incorporation, the services must have been given in respect of the same contract or employment; of which the company must have had knowledge.

CHAPTER IX.

WHEN THE SERVICES HAVE BEEN RENDERED BEFORE INCORPORATION.

§ 1. Elements of a true contract absent.

The third class of cases to be discussed comprises those in which the contract between the promoter and the one now suing the corporation has been fully executed by the latter before the company came into existence.

Under such circumstances the elements of a true contract are wanting. Even if the corporation makes use of and enjoys the fruits of the promoter's contract, (since it came into existence with these advantages already conferred upon it), it is impossible to say that, judged by the standards of reasonable men, its conduct in so doing must be intended to imply a promise to pay for them.

The moment the corporate body became instinct with life (by no voluntary act of its own), it was vested with the benefit of all the services rendered in its formation, with all the goods which had accrued to it in its inchoate condition. It is therefore impossible to make use of the fiction of the continuing offer, or to predicate an acceptance of an offer whose terms have been fulfilled.

Even if the corporation should expressly promise to pay, it would seem that the promise could not be enforced against it on the ground of lack of consideration, for it is a familiar principle of contract law that a past consideration is insufficient to create a binding obligation. The only exception to the rule last stated occurs where a prior request has been made, after which, if services are rendered, a subsequent promise to pay will be enforced. But here we have no prior

1 Eastwood v. Kenyon, 11 Ad. & El. 438; Anson, p. 102.
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request, for unless the promoters can be treated as agents (a view long since discarded), they could have no more authority to make a request in behalf of the corporation than to bind it absolutely by contract. Such a power would impute privity between the promoters and the corporation, which does not seem to exist.

It may, nevertheless, be manifestly equitable in a large number of cases to charge a corporation for the money, time and labor expended in the necessary and reasonable measures preliminary to its organization, and this in spite of the fact that on the contract under which the work was done or the money expended, the promoters are primarily liable. It is equitable not only because the party contracting relied on the corporation for his compensation for the services rendered to it (and not upon the promoter who may have been but a man of straw), but also on account of the promoter himself who would be held personally liable if the corporation did not pay, and who has acted bona fide in its behalf and to its advantage.

§ 2. The obligation, if any exists, is quasi-contractual.

Under such circumstances we have not the elements of a true contract, but such an equitable claim against the corporation as the law is accustomed to enforce under the designation of a contract implied in law or a quasi-contract. This claim is based on the theory that, did not the corporation pay for the services rendered, it would be unjustly enriched at the expense of the plaintiff; and that the law will not permit such unjust enrichment, is an established doctrine.¹

In speaking of the cases in which the doctrine is applied, Mr. Keener says:² "As the question to be determined is not the defendant's intention, but what in equity and good conscience the defendant ought to do, the liability while enforced in the action of assumpsit is plainly of a quasi-contractual and not contractual nature." The same writer says in a later

¹ Keener on Quasi-Contracts, p. 19.
² Quasi-Contracts, p. 20.
passage: ¹ "Where the benefit for which the plaintiff seeks a recovery was conferred without the assent of the defendant there can of course be no contract, and unless the facts would establish a liability in tort, the plaintiff must proceed on the theory of quasi-contract."

If what has been said is true, the results which we may expect to find among the cases dealing with corporate liability for services rendered or benefits conferred before incorporation can be summed up as follows:

1. No true contract can be implied against the company.
2. There can be no express contract without a new consideration.
3. There may be a contract implied in law if the facts of the particular case would warrant the Court in finding that there would otherwise be an unjust enrichment of the defendant at the expense of the plaintiff. . . .
4. Unless the Court takes the view that it is unjust to the stockholders and against good policy to imply a contract in such case, under which view no recovery is possible.

§ 3. No contract implied in fact.

First, then, as to whether there can be a contract implied in fact where the services have been rendered before incorporation. The case of Rockford R. R. Co. v. Sage² was an assumpsit against the company for money paid and surveying done during the organization of the road. The Court said: "We are disposed to deny the right of recovery for such services and expenses upon any implied promise resulting from the facts, although the case cited by appellee's counsel of Low v. The R. R. Co.³ seems to sanction such a right of recovery." This decision has been expressly followed in the late Illinois cases.⁴

It is to be noted that Low v. R. R. Co., " cited by appellee’s-

¹ Quasi-Contracts, p. 24.
² 65 Ill. 388 (1872).
³ 45 N. H. 375 (1864).
⁴ Western Screw Co. v. Cousley, 72 Ill. 531 (1874).
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...counsel," treated of a contract implied in law,¹ and is not in conflict with this opinion, in that respect, as was supposed by the Court. It did not decide that a true contract could be implied under such circumstances.²

In *R. R. Co. v. Ketchum*,³ the appellee had rendered services in the formation of the road, and in acknowledgment thereof the company when formed had voted him a free pass. This they subsequently revoked, and he continued to ride in the company's cars, refusing to pay on the ground that the pass had been given in return for his services, and constituted an irrevocable contract. The determination of the question, whether such a contract had been made and whether there had been any consideration moving to the company on which to base it, was therefore necessary to the decision. Ellsworth, J., said: "We are aware that it is no uncommon practice for corporations to assume and pay these preliminary and antecedent charges after the company has been organized, but we do not see how the company, if it should object, could be compelled to pay them, and in some cases it would be most inequitable to require it..." "It is soon enough for corporate bodies to enter into contracts encumbering their property when they are duly organized according to their charters, and have their chosen and impartial directors to conduct their business."

This case, while clearly deciding that no contract is created by implication from the circumstances, seems to go further and incline to the opinion that neither could there be a recovery on any grounds.

There are a number of cases which take this view, the reason of which will be discussed later,⁴ but for the present it is only necessary to say that all of them support the proposition here contended for (*i. e.*, that there can be no contract implied in fact when it appears merely that a corporation has been benefitted by services rendered before complete organization), for

¹ See *infra*.
² See *infra*.
³ 27 Conn. 170 (1858).
⁴ See *Infra*.
they hold that such circumstances give rise to no legal obliga-
tion whatsoever.¹

A contrary opinion, however, seems to have been entar-
tained in some cases.

In *Paxton Cattle Co. v. Bank,*² the corporators having a
preliminary organization, bought a ranch and gave a note-
therefor purporting to be a corporate obligation, and upon
which suit is now brought. The Court said: "The company
through its officers and manager has retained the possession
of the property in Chase County, both real and personal, for
which the said note was given. This, under the authority of
the foregoing cases (*Low v. R. R. Co.* and *Bell's Gap v.
Christy*),³ is the turning point in the case, and I think the
conclusion is inevitable, granting the entire want of power on
the part of the officers and promoters of the corporation to act
as such at the date of the note, that the retaining possession of
the consideration by the corporation after its organization is a
ratification of the contract with all of its terms and obligations."

The meaning of the Court is by no means clear in this
decision, but it must be taken to intend one of two things. In
refering to *Low v. R. R. Co.*, the Court had in mind a case in
which it was said that "the contract is implied by law," and in
saying that the retention of the benefit was the turning point.,
the Court may have meant that a quasi-contractual obligation
was thereby created.

In saying, however, that the retention of the consideration
"is a ratification of the contract," the Court would seem to
infer that a jury would be justified in finding that it was the
intention of the corporation to adopt or ratify the contract.
In other words they base the obligation with which they
charge the company upon intention, and not upon an implica-

¹Weatherford R. R. Co. v. Granger, 24 S. W. 795 (Texas, 1894); Mel-
bado v. Porto Alegre Co., L. R. 9 C. P. 503 (1874); Western Screw Co. v.
Cousley, 72 Ill. 531 (1874); Rockford R. R. Co. v. Sage, 65 Ill. 388
(1872); Franklin Fire Ins. Co. v. Hart, 31 Md. 60 (1869); Marchand v.
Loan & Pledge Assn., 26 La. Ann. 389 (1874); Abbott v. Hapgood, 150
Mass. 248 (1889).

²21 Neb. 621 (1887).

³*infra,* § 6.
tion of law. If such was the thought of the Court, it is respectfully submitted that it is not in conformity with the authorities already considered, nor does it rest on sound principle.¹

§ 4. An express promise not enforcable without a new consideration.

The second conclusion which seemed probable, according to the discussion in the earlier part of this chapter, was that even if there should be an express promise on the part of the corporation to pay for the services rendered before its incorporation, such promise could not be enforced except on the basis of a new consideration; the benefit being past.

In Melhado v. Porto Alegre R. R. Co.,² the declaration counted for a breach of contract, and set forth that plaintiff had at the instance of the promoters of the company expended £2000 in necessary preliminary expenses. That the articles of association provided for the payment of all such expenses (if the directors should subsequently approve of them), and that the directors of the company had expressly ratified his expenditures.

Coleridge, J., refused to allow a recovery in spite of the formal action of the board of directors after the company was formed; thus denying that a binding contract had been created.

In Empress Engineering Co.³ the board of directors after incorporation passed a resolution “that the agreement of purchase be ratified.” Jessel, M. R., however, refused to hold the corporation bound by the action of the board.⁴

The contrary conclusion, however, has been suggested in some Illinois cases, though the point was not squarely decided. It was said in Rockford R. R. Co. v. Sage:⁵ “For services

¹ See, however, to the same effect, Buffington v. Bardon, 50 N. W. 776 (Wisc. 1891).
² L. R. 9 C. P. 503 (1874).
³ 16 Ch. Div. 125. (1880).
⁴ See also Abbott v. Hapgood, 150 Mass. 248 (1889).
⁵ 65 Ill. 388 (1872).
and expenses before the organization of the company which subsequently the company accepts and receives the benefit of and promises to pay for, we will not say a party might not recover in virtue of such express promise;” but none such appeared in the case.

Following this suggestion, the dictum was repeated in *Western Screw Co. v. Cousley*,¹ where it was said: “This Court has decided that a corporation, after its organization, is not liable for the payment of debts contracted previously thereto, at least, without an express promise to pay them after acceptance and receipt of the benefit of that for which they were incurred.”

As before said, the point was not necessary to either of these decisions, nor does it seem to have been duly considered or the objections thereto brought forward, so that the suggestion may safely be ignored, and as far as these cases are concerned, the rule stands as stated, i.e., that even an express promise to pay for services rendered before incorporation does not bind the company without a new consideration.

Rather more difficulty, however, is occasioned by the case of *Stanton v. N. Y. & Eastern R. R. Co.*² The case was this: There having been a preliminary organization of the company, the plaintiff had entered into a contract with the *pro tempore* directors, agreeing to purchase the rights of way necessary for the road, according to certain stipulations. He did so. After organization the company passed a resolution that “the foregoing contract is ratified and declared to be a binding contract upon the parties.” But the road failed and could not pay. The receiver appointed disallows the claim, and the plaintiff appeals from his report, which the lower Court had accepted. The Court said: “The corporation, by its ratification of the contract previously made by its promoters, became liable for everything that had been done pursuant to it. . . . The directors acted with full knowledge of all the facts and with such knowledge they ratified the contract. . . . Ratification relates back to the execution of the contract and renders it

¹ 72 Ill. 531 (1874).
² 59 Conn. 272 (1890).
obligatory from the outset. By the nature of the act, the party ratifying becomes a party to the contract and is on the one hand entitled to all its benefits and on the other is bound by its terms. The lower Court was reversed and the Court indicated that the plaintiff was entitled to recover for his time, money and labor expended; and damages for breach of the contract.

This decision is to be explained on the ground that the Court was clearly of opinion that in such cases the technical doctrine of ratification is applicable. However much the soundness of this view may be questioned, it may be taken as settled that, wherever this doctrine of ratification is employed, no new consideration is needed to make the promise binding, for no new contract is made. As was said by Sharswood, J., in *Negley v. Lindsay,* in reference to the doctrine of ratification: "The party confirming becomes a party to the contract, he that was not bound becomes bound by it; he accepts the consideration of the contract as a sufficient consideration for adopting it and usually this is quite enough to support the ratification."

In all those cases, therefore, where the technical doctrine of ratification is made use of or in which the Court says that there may be an actual adoption of the original contract, there being no new contract made, the corporation may be bound either expressly or impliedly without a new consideration.

But for this reason the cases are not authority against the general proposition that the company may not bind itself for benefits antecedent to incorporation, without a new consideration.

§ 5. The doctrine of quasi-contract.

We now come to consider the cases in which it is held that the law will impose an obligation to pay, where the corporation has been benefited unjustly at the expense of the plaintiff.

As has been said, the basis of this quasi-contractual obligation lies in the injustice of the defendant's enrichment at the

1 See ante.
2 67 Pa. 218.
expense of the plaintiff. As to what constitutes "injustice," no rules of law can be laid down. Its presence or absence in any case must be determined by the circumstances of the particular transaction, viewed with reference to that standard of fairness and "good conscience" existing in the mind of the average reasonable man.

The position in which a corporation finds itself when confronted with a claim for services rendered before incorporation has this peculiarity. Not only were the services rendered without its request, but it never had an opportunity to refuse to accept them, and what is more it cannot return them. Under such circumstances, if the law is to impose an obligation upon the corporation to compensate the plaintiff, the most rudimentary conceptions of justice would dictate that the services or benefits, for which the claim is brought, must have been necessary to the formation of the company, and reasonable in view of the purposes for which it was to be created. Were either of these elements absent, the company would be compelled to pay for that for which it neither sought nor was in need.

Again, the services must have been of value to the corporation; for no matter how strenuously the plaintiff has labored or how much time and money he has expended, (if he has not succeeded in giving to the corporation that of which it stood in need), he has no equity to require payment therefor, since it is to be remembered that he has acted either at his own instance or at the instance of those who had no authority to bind the company.

It would also appeal to the common sense of justice that where the plaintiff has not contracted in reliance on the corporate credit, but depending upon the promise of the promoter, and he has received all that he contracted for, viz, a right of action against the said promoter, he should not be allowed to have more than his bargain, by holding the company liable.

In a general way, these are some of the thoughts which in any given case would effect the question of the justice or injustice of allowing a recovery against a corporation.¹

¹Keener's Quasi-Contracts, Chaps. VI. and VII.
§ 6. The doctrine as applied in the cases.

Bearing these thoughts in mind, let us consider how far the doctrine of "unjust enrichment" has been recognized, by an examination of the cases.

In re Empress Engineering Co.\(^1\) was a suit by an attorney for £63 for services rendered in procuring the charter of the defendant corporation. The articles of association provided for the payment of that sum, and the board of directors had expressly ratified the agreement after incorporation. The plaintiff brings his suit as upon an express promise.

Jessel, M. R., in denying a recovery, said: "There is another ground suggested, namely, that as the company has had the benefit of the registration they ought to pay for it. But the answer to that is, that that was not the claim brought forward. The claim brought forward was for an agreed sum of £63, and any order we may make will not prejudice that claim, which is merely for an amount due for services, the benefit of which has been taken by the company."

In Low v. R. R. Co.,\(^2\) Bellows, J., said: "We are inclined to think, however, that it is no violation of settled principles to hold that a suit at law may be maintained to enforce the obligation to pay for services rendered in the manner described (under a contract with a promoter before incorporation), and of which the corporation after its organization has taken the benefit. If it were true that, at the time the services were rendered, the corporation had no capacity to make a contract, which is by no means clear after the charter has been accepted, still if the service were rendered for the corporation upon the promise of the corporators that they should be paid for by it when its organization was perfected, and after that the corporation had adopted the contract and received the benefit, we think that upon the maxim that a subsequent ratification is equivalent to a prior request, it may well be held that a promise to pay will be implied. Upon this principle a person may sue on a contract made in his name by one assuming to have authority

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\(^1\) L. R. 16 Ch. Div. 125 (1880).
\(^2\) 45 N. H. 375 (1864).
but having none in fact. . . . *But the promise is implied by law* from the fact that the party, when it had capacity to contract, has taken its benefits and, therefore, must be deemed to have taken its burdens at the same time, and he is estopped to controvert it either by showing a want of capacity to make a contract or that none in fact was made." . . . "Indeed, it would be immaterial whether such services were rendered by a corporator or another, because the subsequent ratification is equivalent to an antecedent request; but we think that without such ratification, either express or implied, from taking the benefits of such services, the law would raise no such promise to pay, from the mere fact that the plaintiff was requested to render them by one of the original corporators or associates."

This amounts to a statement that, unless the corporation received benefit from the services, it would not be unjustly enriched at the expense of the plaintiff, and therefore no recovery could be had on that ground; and when the Court says that since the corporation would not be bound by the act of one of the promoters only, unless benefit had accrued to the corporation, it intimates that it would be bound in spite of the fact that *no* benefit accrued, if all the corporators had assumed to bind it.

That these two possibilities were before the mind of the court is apparent from the statement that it is not at all clear that the corporation is not sufficiently *in esse* to be bound by the acts of its officers after it has received a charter, though no organization has taken place. The thought is, first, that the corporation is *in esse* and may be bound; and, second, apart from that "if the services were rendered . . . and the corporation . . . received the benefit . . . a promise to pay will be implied."

In this case all the elements of a quasi-contract or a contract implied in law are present. Reasonable and necessary services had been rendered to the corporation, at the instigation of the promoters, of which the company had had the benefit, and for which they refused to pay. There was an unjust enrichment at the expense of the plaintiff. Indeed, the express language of the Court is to the effect that the contract so called is
implied by law. No doubt whatever could exist, were it not that the doctrine of ratification is dragged in and the statement made that the promise will be implied "upon the maxim that a subsequent ratification is equivalent to a prior request," and that "upon this principle a person may sue on a contract made in his name by one assuming to have authority but having none in fact." In other words, the Court makes use of the technical doctrine of ratification in order to charge the company, and must therefore have been of opinion that the intention of the corporation to be bound was necessary in order to create a contract implied in law. Now it is respectfully submitted not only that the doctrines of agency and of ratification have no connection whatever with the quasi-contractual obligation which the Court in fact imposed, but that the intention of the corporation to be bound is also entirely unnecessary in order that such obligation should be created. As said by Mr. Keener,1 in relation to the term "contract implied in law," "It is a term used to cover a class of obligations where the law, though the defendant did not intend to assume an obligation, imposes an obligation upon him, notwithstanding the absence of intention on his part, and in many cases in spite of his actual dissent."

It would seem, then, that while the Court in this case recognized that the obligation to be enforced against the defendant was quasi-contractual rather than contractual, it did not have clearly in mind the elements of such quasi-contractual obligation, and considered that there must be something in the nature of a ratification or an expression of willingness to be bound before the company could be charged. They also intimate that the mere passive retention of the benefits would be a sufficient circumstance from which a so-called ratification could be implied.

Now it is to be noted that if the facts were sufficient to give rise to an implication that the corporation had intended to pay, then a true contract would have existed between the parties, and it is believed that the law will never imply a contract.

1 Quasi-Contracts, p. 5.
where one already exists in fact, for its primary aim is to give
effect to the intention of the parties.

Again, if the obligation were dependent upon an implication
from the facts, it is submitted that the Court erred in consider-
ing that, from a mere passive retention of the benefits, it
could be inferred, as a matter of fact, that the corporation had
promised to pay for them. The benefits referred to were ser-
vice rendered in the formation of the company and the
procuring of the charter. They were intangible and impossi-
able of restitution. The corporation could not have refused to
accept them since it came into being involuntarily, nor could
it have refunded them, nor failed to use them without ceasing
to exist. Under such circumstances it is submitted that a jury
would have been utterly unjustified in finding any expression
of intention on the part of the corporation. In all such cases,
if the facts give rise to an equitable claim against the company,
the remedy must be in quasi-contract, and if the Court shall
determine in any case that there has been an unjust enrich-
ment at the expense of the plaintiff, it is unnecessary for it to
go further and attempt, as here, to find some expression of
willingness to be bound.

This being the primary cause of confusion in the case, it is
also to be remembered that the Court intimates, as an entirely
distinct proposition, that a charter having been granted, the
company was in esse and could be bound by the action of a
majority of the corporators, as it could be by its regularly
constituted officers.

The Pennsylvania case of Bell's Gap R. R. Co. v. Christy was
decided on the authority of this case. That was an as-
sumpsit for services rendered and money expended in procuring
the charter of the defendant company. Those present at a
meeting before the charter, authorized plaintiff to do the work,
and promised that he should be paid.

Paxson, C. J., said: "This lacks all the elements of a con-
tract express or implied." In Low v. R. R. Co., it was held

1 Keener, p. 328.
2 79 Pa. 54 (1875).
that "where, after the charter and before the organization of a corporation, services are rendered which are necessary to complete that organization, and after it has been perfected the corporation elects to take the benefit of such services, knowing that they were rendered with the understanding that compensation was to be made, it will be held liable to pay for the services upon the ground that it must take the burden with the benefit; but that 'no promise to pay would be implied from the fact that such services were rendered at the request of any number of the corporators, less than a majority.'"

"It may very well be that where a number of persons not incorporated are yet informally associated together in the pursuit of a common object, and with the intent to procure a charter, in the furtherance of their design, they may authorize certain acts to be done by one or more of their number, with an understanding that compensation shall be made therefor by the company when fully formed. And if such acts are necessary to the organization and its objects, and are subsequently accepted by the company and the benefits thereof enjoyed by them, they must take such benefits cum onere and make compensation therefor. But the projectors or promoters of the enterprise within the meaning of the rule referred to, evidently must be a majority, at least, of such persons. Such minority can have no more authority to bind the association or corporation in its incipient or inchoate condition than they would have to bind it if fully organized." . . . "In the absence of any such authority and of any satisfactory proof that the result of the plaintiff's labor and expenditures was accepted and enjoyed by the corporation," . . . the defendant is not liable.

As we have seen the Court, in Low v. R. R. Co., suggested two theories, on either of which that case might have been rested; the first, that the charter having been granted the corporation was in esse and could be bound by the acts of the corporators (in which case of course a majority must act); the second, that the company might become bound on a contract implied in law.

Now, the Court while purporting to quote from Low v. R
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*R. Co.*, uses language not to be found therein,¹ but which appears only in the syllabus of that case, and the statement as transcribed by the reporter is without any regard to its connection in the opinion. By adopting the words of the syllabus in *Low v. R. R. Co.*, the Court confuses the two grounds of action referred to, and while treating of the obligation as quasi-contractual, comes to the anomalous conclusion that not only must the corporation have been unjustly enriched, but the services must have been induced by a majority of the corporators before a recovery can be had against it. That the obligation is conceived of by the Court as resting in quasi-contract rather than contract is apparent from the following language: "And if such acts are necessary to the organization and its objects, and are subsequently accepted by the company and the benefits thereof enjoyed by them, they must take such benefits *cum onere* and make compensation therefor." Nothing is said about intention, and the Court wisely avoids the confusion of the suggested "ratification" of the *Low* case, and rests the duty of the corporation to pay, on the firm ground of the unjust enrichment which would occur in the event of its being permitted to refuse to compensate the plaintiff. Unfortunately, however, through the misinterpretation referred to, the conclusion reached, is undoubtedly, that the elements of a quasi-contract being present, the law will not enforce the obligation unless in addition the services were rendered at the request of a majority of the corporators. There is neither authority nor apparent reason to support such a rule.

This mistake led to confusion in the later Pennsylvania case of *Tift v. Bank.*² That was an assumpsit for services rendered after preliminary, but before final organization, in procuring subscriptions to stock at the request of a promoter. After organization was completed, Tift applied to the promoter (who was now president of the bank) for payment. The president promised that he should be paid, and subsequently laid the

¹ See portion of opinion in italics.
² 141 Pa. 550 (1891).
matter before the directors who made no objection but took no action on the matter. This evidence was refused admission as immaterial and judgment rendered for the defendant.

On appeal the Court said: “It is true it was said in Bells Gap R. R. Co. v. Christy, that where a number of persons not incorporated but associated for a common object, intending to procure a charter, authorized acts to be done in furtherance of their object by one of their number with the understanding that he should be compensated; if such acts were necessary to the organization and its objects, and are accepted by the corporation and the benefits enjoyed, they must be taken cum onere and compensated for. But it was also said that the promoters of the enterprise must be a majority. In the case in hand, the promise was made by a single promoter and there is no evidence of a subsequent ratification by the corporation.” Judgment for defendant affirmed.

It has already been suggested that it would be a possible view to take of these cases, that in spite of the possibility that a corporation might be unjustly enriched at the expense of one who has rendered it material services before incorporation, a recovery should not be allowed in any event on the ground that the rights of shareholders who bought stock without knowledge of the services, would in some cases be impaired. If recovery is to be permitted at all, however, it would seem that in all justice it should be allowed in a case such as the one under discussion. No question was raised by the defendant as to the value, the reasonableness, or necessity of the services rendered. The plaintiff acted under a contract made on behalf of the company by the promoter chiefly interested in the scheme, and with the expectation that the company would pay him when it came into existence. The plaintiff has been injured and the defendant benefitted. The elements of the quasi-contractual obligation are all present; and yet, as we have seen, the Court denies a recovery on the ground that a prerequisite is still lacking in that all of the promoters did not join in requesting the services. The reason given for the

1 79 Pa. 54 (1875.)
result reached is, it is submitted, inadequate and based as has been shown on a misinterpretation of authority.

In a recent New York case, the quasi-contractual nature of the remedy seems to be recognized though the opinion is too short to be very satisfactory.

The action was brought against the company for work done before incorporation at the request of a promoter and which, as the declaration alleged, went to the benefit of the company. The Court contented itself with saying: "The work was evidently done in contemplation of the corporate formation and it went to its benefit. Mr. Hazard, who ordered the work, seems to think he should not pay for it because the corporation got the benefit of it, and the corporation thinks it ought not to pay for the work because Hazard ordered it. This may sound well to all concerned except the plaintiffs who are entitled to their earnings." Judgment was rendered for the plaintiff. See also

§ 7. The reasons urged against permitting a recovery in quasi-contract.

It has been frequently indicated throughout the foregoing discussion that a view prevails in certain jurisdictions that, as regards these services rendered antecedent to the formation of the company, the circumstances can give rise to no true contract based on the intention of the parties, nor will the law imply an obligation on the part of the company to compensate those who rendered them. These cases proceed upon the ground that it is unjust to stockholders to subject their property to the payment of claims in whose creation they took no part and whose legitimacy, therefore, they had no voice in determining.

The objection does not appear to be altogether well founded in this respect. Since the obligation rests on the doctrine of unjust enrichment, it only arises where the corporation (and therefore the stockholders) has received an actual benefit, for

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which it is unjust that it should refuse to compensate the plaintiff. We have seen that, in the cases in which the doctrine has been employed, it has been uniformly held that the company was not unjustly enriched unless the benefits received were reasonable and necessary to the formation of the company. Now, under this rule, it would seem that it is no hardship to charge the stockholders for what was necessary to the corporate existence.

Another safeguard against undue recoveries against a corporation lies in the rule that the plaintiff must have relied upon the credit of the defendant; for if he acted upon some other consideration the benefit accruing to the corporation is purely incidental, and it is no injustice to refuse compensation therefore.1

Again, the plaintiff is bound to take himself out of "the well established rule that no one has a right to force himself upon another as his creditor."2 So, in any case in which the Court should be satisfied that the plaintiff had acted at his own instigation for the purpose of subsequently charging the company, it would seem that there could be no recovery. He must show that the services were rendered bona fide at the request of those interested in the formation of the corporation.3 And finally a recovery on the quasi-contractual obligation does not follow the terms of the original agreement between the plaintiff and the promoter, but is measured by the amount by which the defendant has been unjustly enriched.4

Under these circumstances it seems highly improbable that the rights of stockholders would be infringed in any considerable number of instances, and it is submitted that this would be a lesser evil than to refuse compensation, in any event, to those who have bona fide expended time, labor and money in the creation of a corporation.

1 Wilbur v. N. Y. Co., 12 N. Y. Supp. 456 (1891); Little Rock R. R. Co. v. Ferry, 37 Ark. 185 (1881); Weatherford v. Granger, 24 S. W. 795 (Texas, 1894); Keener, pp. 350, 361.
2 Keener, p. 341.
4 Keener, Chap. VII.
§ 8. The cases denying such a recovery.

A considerable number of cases, however, take a contrary view. The leading case in America is *R. R. Co. v. Ketchum,*\(^1\) which has already been considered at length. It will be recalled that the Court there used the following language in regard to allowing a recovery for expenses antecedent to incorporation. "This would be a breach of faith towards honest and unsuspecting stockholders who pay the charter price for their stock and expect to take it clear of all incumbrances. The getters-up of projects to be carried by such means may well be supposed, as is generally the fact, to be influenced by a view to their own special benefits, for certainly they do not act in behalf of the corporation itself. . . . It is soon enough for corporate bodies to enter into contracts incumbering their property when they are duly organized according to their charters and have their chosen and impartial directors to conduct their business."

Though the language of the Court is sufficiently broad to include all antecedent expenses, it was not necessary to the decision of the case, for the evidence was not clear that the services had been rendered with the primary intention of benefitting the intended corporation. In such a case the benefit is merely incidental, and falls within the rule that the law will not imply a promise to pay for incidental benefits conferred by one acting primarily upon some other consideration.

The same thought appears in *Rockford R. R. Co. v. Sage,*\(^2\) where the Court says, "A right of recovery against a corporation for anything done before it had a proper existence does not appear to rest on any very satisfactory principle. It appears more reasonable to hold any services performed or expenses incurred prior to organization to have been gratuitous, in view of the general good or private benefit expected to result from the object of the corporation," and the decision is rested on the case above cited.

\(^{1}\) 27 Conn. 170 (1858).
\(^{2}\) 65 Ill. 388 (1872).
The English authority on the subject is *Melhuish v. Porto Allegre Co.*[^1] The plaintiff declared for breach of contract in the sum of £2000 expended by him in necessary preliminary steps in the formation of the company. The articles of association directed the company to pay the same.

Coleridge, C. J., after explaining that the doctrine of ratification was inapplicable, said: "Then it was suggested that, by taking advantage of their work and expenditures and coming into existence through them, the company gave rise to an implied contract to remunerate them. It seems to me that the defendants' counsel gave the right answer to this suggestion when he said that, if that were so, promoters might in all cases sue the company for expenses of promotion. I apprehend that all the decisions on this subject show that they cannot do so."

It has been attempted to be shown that the result feared by the learned judge, is not one to be dreaded from an application of the doctrine of quasi-contract to these cases. The law does not imply the promise *eo instanti* a plaintiff shows that he has conferred a benefit upon the defendant company, but he must first show that the company has been *unjustly* enriched at his expense. It is only when there is a real equity against the company that the obligation can be enforced, and in such a case the reasoning of the Court would seem inadequate.

One of the latest of the American decisions upon this point, and a case in which the whole subject of corporate liability on account of the acts of promoters is carefully discussed, is *Weatherford, M. W. & M. R. R. Co. v. Granger,*[^2] decided by the Supreme Court of Texas in 1894.

A preliminary organization of the railroad company having taken place, the then officers promised that if a bonus should be raised by subscription the road should run between certain towns. One Anderson, the chief promoter of the scheme, was commissioned by the members of the organization to raise the bonus, and for his services in so doing he was promised $1000.

[^1]: L. R. 9 C. P. 503 (1874).
[^2]: 24 S. W. 793.
Anderson, on his own authority, promised the plaintiff that if he would assist in procuring subscriptions to the bonus, the company would pay him. The bonus was raised, through the joint efforts of the plaintiff and Anderson, and the company was formed. The plaintiff now sues the company for recompense, for his services which the company had refused on the ground that its only contract was with Anderson. The plaintiff had also rendered services as attorney.

Gaines, J., held: "Now, when it is said that when a corporation accepts the benefit of a contract made by its promoters, it takes it _cum onere_; it is important to understand distinctly what is meant. There is, so far as this matter is concerned, a radical difference between a promise made on behalf of the future corporation in the contract itself, the benefits of which the corporation has accepted, and the promise in a previous contract to pay for services in procuring the latter to be made. This is well illustrated by the facts of the present case. Here a proposition was made on behalf of the company by its promoters, that if a bonus should be subscribed and paid to it, it would build its road between certain points and would carry coal at a certain stipulated rate. By accepting the bonus the company became bound to fulfil the stipulations of the contract. That was the burden which it took with the benefit of the agreement. But it also appears that one of the promoters promised the plaintiff that if he would assist in procuring subscribers to the bonus, the company would pay him for his services. This was no part of the contract, the benefits of which were taken by the defendant. The benefits of a contract are the advantages which result to either party from a performance by the other, and in like manner its burdens are such as its terms impose. A more accurate manner of stating the nature of the plaintiff's demand is, to say, that the defendant has accepted the benefit of the plaintiff's services and should pay for them. It is true in one sense that the company has had the benefit of plaintiff's services, and it is equally true that it would have had the benefit if the services had been rendered under an employment by the subscribers to the bonus; and yet in the latter case it could not be claimed
that the company would be liable for such services unless payment for them by the company were made one of the terms of the contract between the company and the subscribers. *In re Rotherham*, in the opinion of one of the justices, this language is used: 'It is said that Mr. Peace has an equity against the company because the company had the benefit of his labor. What does that mean? If I order a coat and receive it, I get the benefit of the labor of the cloth manufacturer, but does any one dream that I am under any liability to him? It is a mere fallacy to say that because a person gets the benefit of work done by somebody else he is liable to pay the person who did the work.' There is more doubt as to the plaintiff's right to recover for his legal services in advising as to the articles of incorporation and in correcting and preparing this paper. Such services are usually necessary, and it would seem that the corporation should pay for them. Such payment is frequently provided for in the act of incorporation or in the articles when the incorporation is effected under a general law. When such is the case, persons who take stock in the company are chargeable with notice that a liability for this purpose has already been created and it is proper for the corporation to discharge it. But in the absence of such provision in the statute or in the articles, it may be unjust to shareholders to charge the corporation with liabilities of which they had no actual knowledge at the time they accepted the shares. We, therefore, hold with some hesitation that claims for the necessary expenses of the organization under our statute should not be excepted from the general rule applicable to contracts made before the corporation has come into legal existence.' See, also, to the same effect.¹

The opinion of the learned judge is divided into two parts. In the first, he treats of the plaintiff's services in raising the bonus; in the second, of the services rendered as attorney. As to both classes, the conclusion reached is that there can be no recovery, but the results are based upon different grounds.

¹ Western Screw Co. v. Cousley, 72 Ill. 531 (1874); Marchand v. Loan & Pledge Assn., 26 La. Ann. 189 (1874); Franklin Fire Ins. Co. v. Hart, 31 Md. 60 (1869).
I. As to the first the Court says: "A more accurate manner of stating the nature of the plaintiff's demand is to say that the defendant has accepted the benefit of the plaintiff's services and should pay for them. It is true, in one sense, that the company has had the benefit of plaintiff's services and it is equally true that it would have had the benefit if the services had been rendered under an employment by the subscribers to the bonus." A clearer exposition of the nature of the quasi-contractual obligation could not be had. The Court acknowledges that the company has received a benefit at the hands of the plaintiff, but denies a recovery. Why? Is it not because there has been no unjust enrichment of the defendant? The services were, indeed, rendered at the instance of a promoter, and with the expectation that they were to be paid for by the corporation. But as far as the corporation is concerned, it has already paid for them under its contract with Anderson. In view of such payment to Anderson, the plaintiff's services were not necessary and the corporation is not in "equity and good conscience" bound to remunerate the plaintiff. There has been no "unjust" enrichment, and the Court is clearly right in refusing a recovery.

The same reason underlies those cases in which it is held that, if an owner of property incurs debts in improving it and then conveys to a corporation which he is instrumental in organizing, the company is not liable for the debts so incurred. The plaintiff urges that his money has gone to the benefit of the corporation and the law should create an obligation to see him paid; but the short answer is that the law is not called upon to make the company disgorge, for it has not been unjustly enriched.1

2. As to the plaintiff's labors as attorney, though the elements of the quasi-contractual obligation are present, a recovery is refused on the distinct ground that otherwise the rights of shareholders would be infringed.

In so deciding, the Court undoubtedly followed eminent

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1 Ruby Chief Mining Co. v. Gurley, 29 P. 668 (Colo. 1892); Little Rock R. R. Co. v. Perry, 37 Ark. 164 (1881); Paxton v. Bacon Mill Co., 2 Nev. 257 (1866).
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authority, though, as has been suggested, the view might, perhaps, be entertained that since the shareholders are the real parties in interest, and since no recovery can be had, save where the corporation (and, therefore the shareholders themselves) has been unduly benefitted, it is no hardship upon the latter to allow the recovery.

CHAPTER X.

CONCLUSION.

It will be sufficient to say, in conclusion, that while there has been a very considerable difference of opinion among the Courts as to the grounds upon which a corporation is liable for benefits received under a promoter's contract after incorporation,¹ that this difference of theory has not led to any great divergence in the conclusions arrived at in the cases; for whatever the theory, the prerequisites to a recovery have been essentially the same in all Courts. The discussion given this question, therefore, must be justified rather as being in the interests of an exact use of legal terminology than as touching fundamental principles.

As regards the subject latterly considered, however, i. e., as to the liability of a corporation for services rendered before incorporation, it has been seen that the decisions are squarely in conflict. Those denying a recovery have upon their side, perhaps, the weight of authority; while those permitting it have not applied uniformly and consistently² the principles of quasi-contract upon which it is contended such a recovery is based. It may be fairly said that both sides generally admit that if there can be a recovery under any circumstances, the foundation thereof must lie not in contract but in an obligation imposed by the law.

The thought of the writer has been that, in many instances it would be but just and right that the law should create a

¹ See Part II.
² See Low v. R. R. Co., 45 N. H. 370 (1864); Bell's Gap v. Christy, 79 Pa. 54 (1875).
liability on the part of a corporation to pay for expenses preliminary to its organization; that the conflict of authority has, perhaps, arisen from a failure on the part of some of the courts to recognize the grounds upon which such an obligation rests; and I have, therefore, made free use of the thoughts contained in Mr. Keener's work on Quasi-Contracts, wherein the bases of this obligation are so ably considered.

Malcolm Lloyd, Jr.