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Liabilities Under Promoter's Contracts

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Joint tenants. Special problems have arisen where plural renters contract for a single safe-deposit box. Breach by the deposit company of a provision that the bank will give access to the renters only jointly and not individually may render the company liable for the contents removed from the box.\(^4\)

Whether the renters are joint tenants with rights of survivorship in the contents has been answered in line with the current disfavor of joint survivorship, by refusing to find a joint tenancy in the absence of a clear intention disclosed by the terms of the instrument.\(^4\)

C. B. F.
W. T. S.

LIABILITIES UNDER PROMOTER'S CONTRACTS.—It is often necessary in the organization of a corporation for those persons promoting the organization to make contracts with outsiders on behalf of the proposed corporation before its organization is completed. The necessity for such contracts raises many problems with regard to the liabilities of the promoters, the corporation, or both. Before an understanding of these problems is possible, it is necessary to ascertain just exactly what a promoter is. "A promoter is a person who brings about the incorporation and organization of a corporation, and who brings together the persons who become interested in the enterprise, and who aids in procuring subscriptions and sets in motion the machinery which leads to the formation of the corporation."\(^1\) A promoter is not the agent of the corporation and cannot contract for it.\(^2\) This is because the organization of the corporation has not been completed and thus there is no principal in existence. Several West Virginia cases have spoken of the promoters as agents although it seems that the court did not actually treat them as such.\(^3\)

It has been held throughout the United States that a corporation is not liable upon contracts made on its behalf by its promoters before incorporation unless after incorporation it expressly

\(^{4}\) First National Bank v. Fite, 131 Tex. 523, 115 S.W.2d 1105 (1938).

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\(^{2}\) Clifton v. Tomb, 21 F.2d 893 (4th Cir. 1927); BALLANTINE, MANUAL OF CORPORATION LAW & PRACTICE 155 (1930).
or impliedly makes itself a party to the contract.\(^4\) This rule is followed in West Virginia.\(^5\) The reason for the rule is that the corporation was not in existence at the time the contract was made, and thus was not originally a party to the contract. The English rule is that the corporation cannot make itself a party to the promoter's contract in any manner even after incorporation.\(^6\) However, in the United States the corporation can make itself a party to the contract after its organization, either expressly or impliedly.\(^7\) The corporation cannot adopt the contract unless it is a contract that the corporation could have made in the first place.\(^8\) After its organization, a corporation cannot make itself a party to a contract which is ultra vires or illegal. Providing that the contract is an adoptable one, the courts find corporate liability under four theories: ratification, adoption, continuing offer, or novation.\(^9\) The ratification theory is criticized on the ground that a party cannot ratify who was not in existence when the contract was made. It is well settled in West Virginia that the corporation can become liable on the promoter's contract,\(^10\) but it is difficult to determine upon which of the above theories the liability is founded. Several earlier cases seem to find the liability under the adoption theory,\(^11\) while several later cases speak in terms of ratification\(^12\) without discussing the technical criticism of that theory.

Whatever theory is used there is the additional question of what acts are necessary to imply liability where the corporation has not expressly made the contract its own. Such liability can be implied from any conduct which shows an intention to be bound by the contract.\(^13\) The most frequent example of such conduct is acceptance of the benefits with knowledge of the terms of the contract. There are several West Virginia cases holding the corpora-

\(^4\) BALLANTINE, \textit{op. cit. supra} note 2, § 46.
\(^5\) Ramsey v. Brooke County Bldg. & Loan Ass'n, 102 W. Va. 119, 135 S.E. 249 (1926); Clifton v. Tomb, 21 F.2d 893 (4th Cir. 1927).
\(^6\) BALLANTINE, \textit{op. cit. supra} note 2, at 156.
\(^7\) Ramsey v. Brooke County Bldg. & Loan Ass'n, 102 W. Va. 119, 135 S.E. 249 (1926); Wallace v. Eclipse Pocahontas Coal Co., 83 W. Va. 321, 98 S.E. 293 (1919); McCullough v. Clark, 81 W. Va. 743, 95 S.E. 787 (1918); Richardson v. Graham, 45 W. Va. 134, 30 S.E. 92 (1898); Clifton v. Tomb, 21 F.2d 893 (4th Cir. 1927); BALLANTINE, \textit{op. cit. supra} note 2, at 157.
\(^8\) FLETCHER, \textit{Cyclopedia Corporations} 208 (1931).
\(^9\) Clifton v. Tomb, 21 F.2d 893 (4th Cir. 1927); BALLANTINE, \textit{op. cit. supra} note 2, at 158.
\(^10\) Ramsey v. Brooke County Bldg. & Loan Ass'n; Wallace v. Eclipse Pocahontas Coal Co.; McCullough v. Clark; Richardson v. Graham, all \textit{supra} note 7.
\(^12\) Cases cited note 5 \textit{supra}.
\(^13\) BALLANTINE, \textit{op. cit. supra} note 2, at 157.
In the case of Ramsey v. Brooke County Building & Loan Ass'n, it was held that the corporation was liable for attorney fees for services procured by the promoter. This indicates a departure in West Virginia from the rule stated above as in this case the court stated that the corporation would be liable for the reasonable value of the attorney fees without even indicating an intention to be bound. In other words, the law implies a contract that the corporation pay the attorneys the reasonable value of their services. However, it is submitted that this departure from the general rule only applies to the circumstances of that particular case, and that in other situations the corporation will have to show by conduct an intention to be bound. Then the corporation will be liable on the contract rather than quasi-contractually as in the Ramsey case.

Before adoption can be implied from the conduct of the corporation, it must be shown that the corporation had full knowledge of the facts concerning the contract. Question has been raised as to just what constitutes full knowledge of the facts. In Wallace v. Eclipse Pocahontas Coal Co., it was stated that notice to the promoters of the corporation of the provisions of a contract made for and on behalf of the corporation is notice to the corporation which accepts the benefits of the contract. In Clifton v. Tomb, a federal case involving a West Virginia corporation, the court held, however, that the knowledge of the promoter could not be imputed to the corporation. It is submitted that the holding in the latter case is the proper rule, and that the statement in the Wallace case is merely a dictum because the facts of the case clearly show that there was a stockholders' meeting at which the contract was discussed, and therefore all the stockholders present had knowledge of the contract. Thus, it was not really necessary for the court to impute the knowledge of the promoter to the corporation in order to find that the corporation had knowledge of the terms of the contract.

Another major question is as to the liability of the promoter under these contracts made with third parties on behalf of the corporation. To some extent his liability depends on the wording
of the agreement and the understanding of the parties.\textsuperscript{20} If the agreement is worded so that it is merely an offer or an option which can later be accepted by the corporation, the promoter is not liable at all.\textsuperscript{20} On the other hand, he may accept liability with the clear stipulation that he be released after acceptance by the corporation.\textsuperscript{21} This is an express novation. The promoter may, by the agreement, assume personal liability. In that event, he will not be released from liability even though the corporation adopts the contract as its own. He remains personally liable unless it can clearly be shown that the parties intended a novation.\textsuperscript{22}

Many times nothing is said in the agreement. There is merely a contract between the promoter and the third party on behalf of the corporation. In these cases the liability of the promoter will depend to a large extent on the theory used to hold the corporation liable. Under the continuing offer theory, the promoter is not liable at all as there is merely an offer which can be accepted by the corporation after its incorporation. Under the implied novation theory, the promoter is liable at the outset, but is released from liability when the corporation assumes liability. The liability of the corporation is substituted for that of the promoter. Neither the continuing offer theory nor the novation theory have ever been applied in West Virginia. Under the adoption or ratification theories, the promoter remains liable even after the corporation has made itself a party to the contract unless it is clearly shown that a novation was intended so that the corporate liability is substituted for that of the promoter.\textsuperscript{23} West Virginia purports to follow either the adoption or ratification theories and the cases indicate that the promoter is liable on his contracts on behalf of the corporation with third parties,\textsuperscript{24} and that he remains liable even after the corporation adopts the contract.\textsuperscript{25}

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\textsuperscript{19} BALLANTINE, op. cit. supra note 2, at 162.
\textsuperscript{20} Ibid.
\textsuperscript{21} Ibid.
\textsuperscript{22} Ramsey v. Brooke County Bldg. & Loan Ass'n, 102 W. Va. 119, 135 S.E. 249 (1926); Wallace v. Eclipse Pocahontas Coal Co., 83 W. Va. 321, 98 S.E. 293 (1919); McCullough v. Clark, 81 W. Va. 743, 95 S.E. 787 (1918).
\textsuperscript{23} BALLANTINE, op. cit. supra note 2, § 47a.
\textsuperscript{24} Ramsey v. Brooke County Bldg. & Loan Ass'n, 102 W. Va. 119, 135 S.E. 249 (1926).
\textsuperscript{25} Cases cited note 3 supra.