CORPORATE RIGHT OF ACTION FOR PROMOTERS' FRAUD

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INTRODUCTION

In this phase of our commercial development and mining exploitation, the writing of a paper on the legal aspects of a corporate action for promoters' fraud comes as a timely piece of work connected with the internationally famous Philippine Gold Rush. Inseparable with the modern commercial advancement and the formation of mining corporations is the work of promoters. Hard it is to conceive of the progress in the science of commerce and industry without linking it with the aid contributed by the promoters in the hastening of commercial advancement. To the promoters then the commercial world owes something.

This business of promotion is almost as old as society itself. I can imagine the prehistoric men transacting business in the crudest of manners through the means of mediators. From this system of trading, the word promoters has evolved. The use, however, of the word promoter is only of comparatively recent origin. It all began with the joint stock companies of England, where by law they were called partnerships. Subsequently, when the era of railroad building began in that country, the business of promoting the organization of such companies assumed definite shape. The ordinary proceeding was this: The promoter introduces the enterprise to the notice of persons of wealth in the locality through which the line of the road is proposed to be located, informing them of its nature and prospects, furnishing an estimate of its probable cost. These persons are solicited to aid by their influence or subscriptions, or both. Enough persons were secured to constitute a provisional committee, and then this committee appoints from their number a managing committee, who issue a prospectus, announcing the nature and probable profits of the scheme, the proposed means to carry it out, the amount of capital required, the number and price of the shares and other details, to which is generally attached the names of promoters, with references to the names of those persons constituting the provisional committees. If all these re-

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sulted in fair probabilities of success, application was then made to parliament for a bill of incorporation. If the scheme failed, the expenses incurred gave rise to litigation, and many questions as to the liability of these committees and of the promoters were determined. If the incorporation was secured by the action of parliament, then another class of questions arose as to what acts resulted to the benefit of, the incorporation, and many others growing out of the condition of affairs. That has no resemblance to our method of organizing corporations. But it is of great interest to learn the similarity of the work of the promoters then as they are now. Fundamentally, their work does not vary greatly with the present system of promoting corporations, except only with the prominent distinction of the manner by which the corporation is called into being as a legal entity. The same questions of law arise nowadays with respect to the rights of the promoter and the corporation after it has been successfully organized, or the liability of promoters to unsuccessful abortive corporations which never are recognized to have existed at all.

But side by side with the promotion of the legal entities lamentably comes the result of human weakness manifested flagrantly in the fraudulent transactions of the promoters. Many a good future of embryo corporations has been destroyed by scrupulous promoters endowed with get-rich-quick ideas at the expense of subscribers who have trusted their contributions to this class of swindlers.

What rights has the newly organized but weak infant corporation against these promoters, is the epochal question.

WHO ARE PROMOTERS

In general.—Before discussing the corporate right of action for promoters' fraud, it is but proper to know who are promoters. In its general sense, according to the Corpus Juris Vol. IV, page 251, " a promoter of a corporation is one who alone or with others takes it upon himself to organize a corporation: To procure the necessary legislation, where that is necessary to procure the necessary subscribers to the articles of incorporation, where the corporation is organized under general laws; to see that the necessary documents is presented to the proper officer of the state to be recorded and the certificate of incorporation, and generally to "float the company." In its comprehensive sense, according to the case of Old Dominion Copper Mining

Company v. Bigelow, 203 Mass. 159", promoter includes those who undertake to form a corporation and to procure for it the rights, instrumentalities and capital by which it is to carry out the purposes set forth in its charter and to establish it as fully able to do its business.

Commencement.—Usually, persons who act as promoters are considered such from the moment they perform acts the object of which is the organization of a corporation. There are, however, several opinions and theories relating to the question as to the time of commencement of the duties of promoters. "As the Acts of Promotion are usually a series of acts embracing things done both before and after incorporation, it becomes important to determine as to what point of time a person becomes a promoter and ceases to be such. The answer to the question depends on whether at the time of the transaction complained of, the party was acting for the proposed corporation as in the organization thereof, so as to occupy a fiduciary relation toward it or toward the subscribers." (Pittsburg Mining Co. v. Spooner, 42 NW 259.)

Termination.—As a general rule promoters cease to be such from the moment a corporation is formed; that is from the moment the promoters have validly organized said corporation and turned over to its directors the business and management of the firm. Or promoters may cease to be such without doing any of the acts mentioned, in other words some persons may cease to be promoters before the corporation has been formed by resignation, and this can only be accomplished by notifying the other parties. But we must bear in mind that promoters may continue its duties in spite of the existence of a corporation, in which case the agents of the corporation are but passive instruments of the promoters.

LIABILITY

In General.—Since the promoters of a corporation are not in any legal sense its agents before it becomes into existence, it is a well settled rule that a contract made by them, even though it may be made for and in the name of the proposed corporation, is not binding on the corporation when formed, unless it is made by the charter or statute, or unless it is expressly or impliedly adopted by the corporation after it has come into existence. (C. J. 14-254), The acts of the promoters can only be considered

as acts of the corporation after the ratification. But how can or in what cases can the acts of the promoters ratified by the corporation? "By the great weight of authority a contract made by the promoters of a corporation before it was formed becomes the contract of the corporation, so that it is both entitled to the benefit thereof and liable thereon, it is expressly or impliedly ratified and adopts the same as its own or, in most jurisdictions ratifies it, after it comes into existence, provided it is a contract which the corporation has the power under its charter to make". (Whitney v. Wyman, 101 U. S. 392.)

When Liable.—There are several instances where promoters are held to be personally liable. The first illustration is the personal liability for torts. According to the case of Wiser v. Lawler (189 U. S. 260) if the promoters of a corporation put forth a fraudulent prospectus or otherwise make fraudulent representations, whereby persons are induce to become subscribers to the shares of the projected company or to invest in its securities, by reason of which they sustain damages, they have, under the principles of the common law, a direct action against those who have been guilty of the fraud, to recover the damages which they have thereby suffered. They are also held liable for contracts made by them which do not assume the existence of a corporation. Of course promoters of a corporation are personally liable on contracts which they have entered into personally, even though they have contracted for the benefit of the projected corporation, and although the corporation has been formed and has received the benefit of the contract, and they are not discharged from liability by the subsequent adoption of the contract by the corporation when formed, unless there is a novation or other agreement to such effect. (Queen City Furniture Co. v. Craufurd, 30 SW 163.)

When Not Liable.—But on the other hand promoters can not be held liable for contracts assuming existence of corporation, "It is the general rule that the promoters of a corporation are personally liable for debts or obligation which they assume to contract in its name and behalf, before it has acquired a de facto organization such as cannot be attached except by the state, unless the circumstances are such as to raise an estoppel to deny corporate existence; and in the absence of such estoppel if the governing statute prescribes conditions precedent to corporate existence, such as filing of articles of incorporation, they

are personally liable for engagements which they have assumed to make in the name of the supposed corporation before the conditions have been fulfilled, to such an extent at least as to create a de facto corporation. So if they assume to make contracts in the name of the proposed corporation and then voluntarily abandon their purpose of forming it, they become personally liable to make good those contracts and each becomes liable to make good such as he has directly or indirectly authorized or ratified. (14 CJ. 271-272.)

Rights, Duties, and Liabilities as Between Promoters and Corporation

Rights.—Ordinarily, services performed by a person for the benefit of another are compensated some way or another. However, there are different views gathered from different authorities as to the right to compensation of promoters for services performed by them for the benefit of the corporation they are organizing. It has been held, that a promise exists on the part of the corporation to compensate the promoter for the services performed by them in creating the corporation and the accomplishment of their objects. "A corporation is, by an implied contract liable for such or any services rendered for the use of the corporation as are necessary to its formation, or may be necessary to be done by it, after its incorporation, in furtherance of its corporate business. * * * No person would render the services, or pay another to do so, however essential it be to the organization, if there was no obligation to pay by the corporation after it is brought into existence." (Farmer's Bank of Vive Grove v. Smith, 49 SW 810.)

But the generally accepted principle is to the effect that the corporation cannot be held to be liable for services performed by the promoters unless there is an express contract to that effect, or when the charter or the general laws so impose. In the case of Ritchie v. McMullen, (79 Fed. Rep. 522) the court in holding that the corporation is not liable for the compensation due the promoters because of service it held that under any theory with respect to this question, in order to bind the corporation for such services, they must have been necessary and reasonable and must have been performed under a contract with the promoter or promoters, assuming to act in behalf of the future corporation, or under an agreement between the promoters,

with the intention and expectation that they should be paid for by the corporation, and should not be mere gratuitous. In the case of Rockford, R. I. and St. L. R. Co. v. Sage (16 Am. Rep. 587) the court held: "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 legal principle. It appears more reasonable to hold any services performed or expenses incurred prior to the organization of a corporation, to have been gratuitous in view of the general good or private benefit expected to result from the object of the corporation. It seems unjust to stockholders who subscribe and pay for stock in a company, that their property should be subject to the incumbrance of such claims, and which they had no voice in creating." So that we can safely say that with regards to services of promoters, the corporation can not be held liable unless there is a contract between said corporation and promoter.

CONVEYANCE BETWEEN PROMOTERS AND CORPORATION

There is nothing in the relation between the promoters of a corporation and the corporation to prevent contracts and conveyance between the promoters or one or more of them and the corporation when formed, provided, as a general rule, the promoters are not also acting for the corporation in the transaction and provided there is a full and fair disclosure of all material facts, so that there is no fraud or breach of trust. Of course contract between a promoter and the corporation when formed, even when fairly and legally entered into must be supported by a sufficient consideration, and are subject to all the other principles which apply to contracts generally; and they must not be ultra vires. If the contract is illegal because in violation of a constitutional or statutory provision, or is involving a breach of trust and a fraud on the corporation, it is void and no action can be maintained therein against the corporation. And a conveyance or transfer from a promoter to the corporation may be attacked by creditors of a promoter as made with intent to hinder, delay, and defraud the creditors, if the corporation is not a bona fide purchaser for value. (14 C. J. 284.)

SECRET PROFITS

Promoters are generally considered trustees of the corporation. Because of the fiduciary relation existing between the

promoters and the corporation, the rules regarding the relation of agent and principal can also be applied here. It has always been held that promoters cannot be permitted to retain secret profit made out in their transaction with and in behalf of the corporation. Secret profit, is meant as such profit as is made without the disclosing the same to the real parties in interest and obtaining their express or implied consent thereto.

When Accountable.—There are many ways by which promoters can make secret profits, and this is so because, said promoters can do several acts for the creation of the corporation. The following are some of the examples of acts of the promoters, which the courts uniformly held that the promoters are accountable for the secret profits. In the case of John K. Hayward v. Joseph R. Leeson (176 Mass. 370) the court in holding the promoters accountable for the secret profits obtained by them held that promoters of a corporation, who before any capital stock has been issued to the public, cause to be issued to themselves, as a remuneration for their services as such promoters, by the vote of all the persons who then had any interest in the corporation, they being the promoters, one third of the capital stock, and then issue a prospectus to the public inviting subscriptions to the stock without disclosing that fact are guilty of a fraud, and are liable to a suit in equity, which should be brought in the name of the corporation and not in that of the receiver, to account for the net profit received by them, less the expenses of the formation of the corporation paid by them, the plaintiff having the option to follow the shares or the proceeds or to recover damages, and not being obliged to tender back the lands acquired by the corporation under a contract executed in pursuance of the vote above named.

Another good illustration of the liability of the promotion for the fraud committed by them is the following illustration: B and C as promoters of a projected corporation, negotiated an agreement between the owners of certain patents, and the corporation to be formed, by which B and C were to receive 3,850 shares of the capital stock of the new company less 63 shares which they were to assign to P. B and C purchase of the patents and that a portion of the stock was to be issued to the former owners in part payment, but not informing purchasers that they were to have stocks in any different terms or conditions. It was further agreed that B should be president and C

treasurer of the corporation and they were so elected, and place a large amount of stock at seven dollars a share, obtaining their own stock for nothing. This facts and transactions were considered fraudulent and in so holding the court said that as promoters of the new company, they occupied a fiduciary relation towards it, and had no right to derive any advantage over other stock holders without a full and fair disclosure of the transaction, and that any secret profits made must be refunded to the company.

In such a case the corporation has a right to elect (1) whether the share should be transferred back to it, or (2) if the shares have been sold, their entire profits made by the sale should be turned over, or (3) that it should be paid the sum lost by reason of being deprived of the right to place such shares with other persons at seven dollars per share. (Chandler v. Bacon, et al., 30 Fed. Rep. 538.) A corporation may recover the secret profits made by some of its promoters without the knowledge of their associates in the purchase of a tract of land for the proposed corporation and may require them to surrender for cancellation the share of stock issued to them for their services as promoters although such recovery may inure to the benefit of the guilty as well as to the innocent. (Norman H. Davis v. Las Ovas, 227 U. S. 80.)

RATIFICATION OF CONTRACTS MADE BY PROMOTERS

The relation of the promoters as stated above is very peculiar. Although the promoters act for the corporation, the corporation can not be held liable for their acts until after ratification. The question is whether the corporation can be forced to ratify contracts made by the promoters.

Views as to Ratification.—"The doctrine of the some recent English cases seems to be that, in the absence of a charter or statutory provision, a contract made by the promoters of a corporation on its behalf before incorporation is a nullity, and that the corporation cannot adopt or ratify it, and thus become bound by it, after incorporation, although an action quasi ex-contractu may be maintained against the corporation, if it accepts the benefit of such contract. * * *

"'The courts of other states have repudiated the English doctrine and held that a contract made by the promoters of a corporation on its behalf may be adopted or ratified by the corpora-

tion when organized, and that the corporation is then liable both at law and in equity, on the contract itself, and not money for the benefits which it has received. In accordance with this view bonds issued by promoters in the name of the corporation before its organization, may be adopted or ratified by its directors after its organization, and in such a case they will become the valid bonds of the corporation." (Fletcher, Cyclopedia Corporations, Vol. I, pages 310-314.)

When Ratification not Valid.—By the weight of authority, it seems to be the rule that corporations can ratify the acts or contracts of the promoters. But ratification can only be valid if the contracts entered into by the promoters for the corporation are contracts which the corporation itself can validly do. So that not all contracts made by the promoters can be ratified or adopted by the corporation, and that those contracts which the charters of the corporation precludes it from entering cannot be ratified, because of the rule that acts that persons cannot do directly cannot be done indirectly. And this principle led us to the conclusion that if the contracts so entered are ultra vires and therefore invalid, ratification of the same will have no effect because it is also ultra vires. In the case of McArthur v. Times Printing Co. (51 NW 216) the court held that the right of the corporate agents to adopt an agreement originally made by the promoters depends upon the purposes of the corporation and the nature of the agreement. Of course the agreement must be one which the corporation itself could make, and one which the usual agents of the company have express or implied authority to make.

Effect of Contract when Ratified.—Assuming that the corporation can ratify contracts made by its promoters, the question is whether the corporation will automatically become liable for acts done by promoter before its existence from the unauthorized acts or from the moment of ratification. The better view is that the corporation does not become liable after its creation by ratification," as the term is ordinarily understood, because ratification presumes ability to contract at the time the unauthorized contract was made. Where there is no corporation in fact, there cannot be any agent; hence the liability which the corporation incurs by adopting a contract made for its benefit before it had legal existence does not relate back to the

unauthorized act, and make a contract as of that date, but the contract dates from the adoption of such act." (Bodger Paper Co. v. Rose, 70 NW 302.)

CORPORATE RIGHT OF ACTION

It has already been mentioned that contracts made by promoters once ratified by the corporation becomes valid and binding. So that promoters who made such contracts can no longer be held liable but the corporation which ratified said contracts. As also mentioned above, ultra vires contracts made by the promoters cannot be ratified, and if ratified, the ratification of the corporation cannot make the ultra vires contract valid. There are courts which decide that transactions made by the promoters and later ratified by the corporation binds the latter, while other courts, although admitting the fact that ratification of acts performed by promoters binds the corporation, still the promoters can be held liable for their acts, and this can only be accomplished by giving the *corporation a right of action.*

This case happens when a group of persons with intent to defraud the public organize a corporation and because of some clever advises or machination, these promoters succeeds, and through the commission of the fraud, innocent stockholders are prejudiced. Will the law and equity permit these unscrupulous promoters enrich themselves at the expense and prejudice of the stockholders? Will the law permit the promoters continue such schemes unapprehended or unchecked?

Leading Cases.—There are two leading cases, one for and one against the corporate right of actions for the fraud of the promoters. Because of the importance of the principles enunciated by these two cases, it is but proper to make a comparison and decide which of the two cases is in accord with the intention of the law. The two leading cases are the "Old Dominion Copper Mining and Smelting Co. v. Lewisohn," (210 U. S. 206) and the same case decided by another court and reported in (203 Mass. 15). Because of the importance of these two cases, and because of their having the same facts it would be better to mention the facts of these cases.

These cases are bills in equity brought by the Old Dominion Copper Mining and Smelting Co. against Bigelow and Lewisohn separately to rescind a sale to it of certain mining rights and land by the defendants' testor or in the alternative to recover damages for the sale.

The facts alleged in the case are as follows:

"The property embraced in the plan was the mining property of the Old Dominion Copper Co. of Baltimore, and also the mining rights and land now in question, the latter being held by one Keyser for the benefit of himself and of the executors of one Simpson, who, with Keyser, owned the stock of the Baltimore Co. Bigelow and Lewisohn, in May and June, 1895, obtained options from Simpson's executors and Keyser for the purchase of the stock and the property now in question. They also formed a syndicate to carry out their plan, with the agreement that the money subscribed by the members should be used for the purchase and the sale to a new corporation, at a large advance, and that the members, in the proportion of their subscriptions, should receive in cash or in stock of the new corporation the profit made by the sale. On May 28, 1895, Bigelow paid Simpson's executors for their stock on behalf of the syndicate, in cash and notes of himself and Lewisohn and in June, Keyser was paid in the same way.

On July 8, 1895, Bigelow and Lewisohn started the plaintiff corporation, the seven members being their nominees and tools. The next day the stock of the company was increased to 150,000 shares of $25 each, officers were elected, and the corporation became duly organized. July 11, pursuant to instructions, some of the officers resigned, and Bigelow and Lewisohn and three other absent members of the syndicate came in. Thereupon an offer was received from the Baltimore company, the stock of which had been bought, as stated, by Bigelow and Lewisohn, to sell substantially all its property for 100,000 shares of the plaintiff company. The offer was accepted, and then Lewisohn offered to sell the real estate now in question, obtained from Keyser, for 30,000 shares to be issued to Bigelow and himself. This also was accepted and possession of all the mining property was delivered the next day. The sales "were consummated" by delivery of deeds, and afterwards, on July 18, to raise working capital, it was voted to offer the remaining 20,000 shares to the public at par, and they were taken by subscribers who did not know of the profit made by Bigelow and Lewisohn and the syndicate. On September 18 the 100,000 and 30,000 shares were issued, and it was voted to issue the 20,000 when paid for.

The bill alleges that the property of the Baltimore company was not worth more than $1,000,000, the sum paid for its stock, and the property here concerned not over $5,000, as Bigelow

and Lewisohn knew. The market value of the petitioners stock was not less than par, so that the price paid was $2,500,000, it is said, for the Baltimore company's property, and $750,000 for that here concerned. Whether this view of the price paid is correct, it is unnecessary to decide.

Of the stock in the petitioner, received by Bigelow and Lewisohn on their Baltimore corporation, 40,000 shares went to the syndicate as profit, and the members had their choice of receiving a like additional number of shares of the repayment of their original subscription. As pretty nearly all took the stock, the syndicate received about 80,000 shares. The remaining 20,000 of the stock paid to the Baltimore company, Bigelow and Lewisohn divided, the plaintiff believes, without the knowledge of the syndicate. The 30,000 shares received for the property now in question they also divided. Thus the plans of Bigelow and Lewisohn were carried out." (Old Dominion Copper Mining and Smelting Co. v. Lewisohn, et al., 210 U. S. 206.)

Difference of Holdings.—In the Lewisohn case, the United States Supreme Court in holding that the corporation cannot bring the action said that, it has assented to the transaction with the full knowledge of the facts, and that the plaintiff cannot recover without departing from the fundamental conception embodied in the law that created it,—the conception that a corporation remains unchanged and unaffected in its identity by changes in its members. Another reason given by the U. S. Supreme Court is that substantial justice would not be accomplished, but rather a great injustice done, if the corporation were allowed to disregard its previous assent in order to charge a single member with the whole results of a transaction to which 13/15 of its stock were parties, for the benefit of the guilty, if there was guilt in anyone, and the innocent alike.

But the Supreme Court of Massachusetts in the case of Bigelow—the same facts as the Lewisohn case, allowed recovery. The reason given is that promoters while occupying a fiduciary relation to the corporation which he creates cannot make secret profits in the sale of their own property to the corporation. The court in admitting the fiduciary relation of promoters to the corporation held that the contract may be absolutely binding provided that one of the following conditions exists: (a) He may provide an independent board of officers in no respect directly or indirectly under his control, and make full disclosure

to the corporation through them. (b) He may make a full disclosure of all material facts to each original subscriber of shares in the corporation. (c) He may procure a ratification of the contract after disclosing its circumstances by vote of the stockholders of the completely established corporation. (d) He may be himself the real subscriber of all the shares of the capital stock contemplated as a part of the promotion scheme.

But none of these conditions exists. The point to be determined then according to the court is whether the promoter is immune from liability if he and his associates are owners of all the issue stock at the time of the act complained of, although intending as a part of their plan the immediate issue of further stock to the public without disclosure, and whether while a substantial portion of the stock intended to be issued to the public remains unissued, a vote of ratification of the board of trust will protect him. The court however said that there is a liability of the promoter to the corporation when further original subscribers to capital stock contemplated as an essential part of the scheme of promotion came in after the transaction complained of, even though that transaction is known to all the stockholders, that is to say to the promoters and their representatives. The court continued by saying that the corporation admits that it assented to the transaction with knowledge of the facts, *But it has not assented when it stood where it could act independently. That the assent to the wrongful act of the promoters was given and at the behest and by vote of the promoters themselves, while still occupying the position of protectors to their own creature, while it was bound hand and foot by them and prevented from taking any action except through them as a step in its further exploitation and while their trust was uncompleted.* This kind of assent was compared by the court to the assent of a minor under guardianship to the breaches of trust of his guardian, which is of course, of no effect.

WRITER'S OPINION

The U. S. Supreme Court's decision is supported by many authorities and cases decided in different courts of America and that of England. Likewise, the Massachusetts decision is also supported by authorities and other decisions. However, majority of the courts of the United States are of the opinion that the corporation has a right of action for promoters fraud, which is in line with the Massachusetts decision. The Massachusetts

decision is more reasonable and just because the allowing of the corporation to bring the action against the promoters is the most convenient and simple way of getting redress against the wrong-doer, and that it will avoid multiplicity of suits.

According to some of the courts, the corporation can bring many kinds of remedy. The corporation may restore, or offer to restore what it has received, and sue to set the transaction made by the promoters fraudulently and recover what it has given. (Burbank v. Dennis, 35 Pc. 444) "If at the time when a fraud is discovered, which was perpetuated by the promoters in a sale to the corporation of property owned by them, the property is no longer in the condition in which it was when the company took it, the company may, keeping the property, sue the promoters for the secret profits which it was their duty not to make without notifying the company thereof". (Hayward v. Leeson, 176 Mass. 310).

Another interesting case is that of Yeiser v. United States Board and Paper Co. (107 Fed. 340) in which the court said that when the promoters sells property to a corporation and said promoters obtain secret profit in the form of stock, and that there can be no rescission without gross injustice to the parties wronged, and that the property cannot be restored without serious prejudice to the interest of the corporation, and at the same time the promoters have no equity to have it restored, a suit to annul the promoter's title to the stock will be an appropriate remedy. When the promoters of a corporation, after its creation, and while they were the sole stockholders, voted to issue its stock to themselves in payment for services rendered in securing options on land, while they assigned to the corporation, the stock so issued being equal to the estimated profits to be derived from such options, and afterwards invited the public to subscribe to the stock, without disclosing such facts, it was held that they were guilty of a fraud, and that the company could, without returning the lands acquired under the options, maintain an action to recover such stock, or damages for the loss thereof. (Hayward v. Leeson, 176 Mass. 310.)

The decision of the Massachusett's case as it is, seems to solve the problem or the difficulty that occurs when the corporation assents to the act of the clever promoters in their dealings with the corporation they are creating. But this is not all. Although the decision in the Bigelow case is followed by many courts, there are still many criticisms, and as a matter of fact

the highest court of the United States gave a different view. (Old Dominion Copper Mining & Bigelow) However, the writer is of the belief that the decision of the Massachusetts case solves the difficulty of the problem which arises in cases when clever promoters defraud the corporation and its stockholders. "Where the obtaining of a secret profit by promoters is a wrong done to the corporation as such rather than to the stockholders individually, the right of action arising therefrom is in the first instance, in the corporation, and the action is properly brought by it in its corporate name, against one or all of the promoters who shared in the profits." (Davis v. Las Ovas Co., 227 U. S. 80.)

CONCLUSION

Because of the importance of the decision given by the Massachusetts Supreme Court in the Bigelow case, and because of the fact that many courts have adopted same rule, and have applied it uniformly, it seems as if the holdings to the contrary has given way. The necessary result of the Bigelow case is the abrogation of the rule adopted by the United States Supreme Courts. Because of the Massachusetts decision the contention that once a corporation ratifies the acts of its promoters although during the ratification said corporation is under the control of the promoters, said corporation loses its right to bring an action, seems to have disappeared.

This decision is in all angles in conformity with law and equity. But although how reasonable and effective it may be, other jurisdiction cannot be bound by it.

The soundness of the decision that a corporation has a right of action for promoters fraud cannot be questioned. Weighing the two decisions, the Bigelow case is in conformity with the rules adopted in many courts of the United States.

So that in order to prevent the illegal practice of the promoters and to protect the corporation and its stockholder, the best solution therefor in the question of the right of a corporation to bring an action against the promoters for their fraud after ratification, is by *Statutory Regulation*, which should be in conformity with the decision of the Bigelow case.