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SUMMARY OF ARTICLES

DAS ANERBENRECHT IN WÜRTTEMBERG (S. 1–S. 48)

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Zur Frage, ob man in Japan das Anerbenrecht einführen soll, möchte der Verfasser untersuchen, was die geschichtlichen und sozialen Voraussetzungen des deutschen Anerbenrechts ausmachen. In dieser Hinsicht hat der Autor schon „das Anerbenrecht im Schwarzwald" geschrieben (The Hokkaido Law Review, Vol. X, March 1960). Er möchte auch in diesem Aufsatz die Entwicklung und den Inhalt des Anerbenrechts in Württemberg ins klare setzen. Er bemerkt, daß in Neu-Württemberg die Grundherrschaft bis in die erste Hälfte des 19. Jahrhunderts eine große Rolle spielte, und daß diese Tatsache neben den klimatischen und wirtschaftlichen Verhältnissen eine Ursache des Anerbenrechts in Württemberg bildete. Trotzdem kann man in der württembergischen Anerbensitte Elemente der Freiheit und Gleichheit der Bauern erblicken ; z.B. die Stellung des Anerben ist keineswegs absolut, er erbt den Hof nicht immer naturgemäß, sondern durch „Kindskauf", hier herrscht also das Vertragsprinzip. Die weichenden Erben sind abfindungsberechtigt, sie sind also *rechtlich* gleichberechtigt mit dem Anerben, obwohl die Abfindung *tatsächlich* manchmal nicht verwirklicht wird.

Der Verfasser fragt weiter, wovon diese Freiheit und Gleichheit, auch wenn sie nicht vollkommen sind, trotz der Herrschaft des Grundherrn gekommen sind. Er deutet darauf hin, daß die Grundherrschaft, die die Form der Vererbung des Grundbesitzes bestimmte, das Rechtsverhältnis der Miterben nicht berühren konnte, da ja auch andere mannigfache Herrschaften vorhanden waren, und daß das Christentum, das auf Gleichheit der Menschen beruht, auf das Leben des Bauern einen großen Einfluß ausgeübt hat.

PROMOTERS' CONTRACTS (pp. 49–75)

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CHAPTER I. INTRODUCTION

I. Conditions precedent to incorporation

Japanese Commercial Code requires issuance, at the time of incorporation, of the number of shares stated in the articles of incorporation, which should not be less than a quarter of "the total number of shares to be issued by the corporation" which is provided in the articles of incorporation. There are two cases where the promoters subscribe for "the total number of shares to be issued at the time of incorporation" which is provided in the articles of incorporation, and where they subscribe for only a part of it and raise subscriptions for the remainder. The former case is called as "founding by promoters", "simultaneous founding" or "simple founding" (Simultan- oder Einheitsgründung) and the latter is called as "founding by subscribers", "gradual founding" or "complicated founding" (Sukzessiv- oder Stufengründung).

In both cases, promoters decide the articles of incorporation to establish the fundamental rules of the corporation, and determine the particulars necessary for issuance of shares and subscribe for shares for themselves.

(a) In cases of founding by promoters, promoters subscribe for the total number of shares to be issued at the time of incorporation and then they pay the whole consideration for the issuance of shares, and besides, they elect directors and auditors in order to constitute the organs for corporate activities. Thus, the corporate entity is substantially completed.

(b) In case of founding by subscribers, promoters invite applications for the remaining shares and assign them for applications, thus, the subscriptions for shares become definite. Then, after payment of the whole consideration for the issuance of shares, promoters call the organization meeting of subscribers where the

process of organization is inspected and directors and auditors are elected. Thus, the corporate entity is substantially completed.

Then, in both cases, founding of corporation is finally entered in a register and the procedure of incorporation is finished and the corporation comes into existence as a legal person.

II. Meaning of promoter

In our country, a "Hokkinin" (promoter) ("Hokkinin" might be better translated in English as incorporator) is only a person who signs the articles of incorporation as promoter. The word "Hokkinin" (promoter), as recognized by the Japanese precedents and the prevailing opinion of scholars, is a formal conception and it does not make any difference whether or not he actually takes part in the promotion of corporation. In other words, a person who does not sign, is not a promoter, even if he actually takes part in the promotion and engages in founding businesses; while a person signs only for the purpose of lending his name to the project and does not actually participate in it at all, still he is a promoter.

Seven promoters or more are required for incrporation (Commercial Code § 165).

III. Position and power of promoter

In our country, a corporate entity is organized not after it is incorporated through authentication of articles of incorporation by a notary public but, on the contrary, it is incorporated through register after the substantial corporate entity is fully organized by means of performing the procedure necessary for incorporation, which begins with authentication of articles of incorporation and subscriptions for shares by promoters. Such an entity which exists before incorporation, is a "corporation coming into existence" or a "corporation in process of founding" (entstehende oder werdende Aktiengesellschaft) and is identified with a corporation which will afterwards come into existence, and a promoter is its executive organ. Therefore, a promoter's act within his authority has an effect on the *corporation coming into existence*, accordingly on the corporation. It is generally recognized that such a *corporation coming into existence* is born when articles of incorporation are made by promoters and at least a share or more are subscribed for by them.

Before birth of a *corporation coming into existence* and afterwards, there is a promoters' association and a promoter is a member of it. The purpose of this association is to promote a corporation, in other words, to make a plan and originate a *corporation coming into existece* and foster the growth of it into incorporation. This association is a partnership in Civil Code (Gesellschaft im BGB) and is a different existence from the *corporation coming into existence.*

When a promoter transacts as a promoter of corporation and not privately, it comes into question whether he does it as an executive organ of, that is, in the name of *corporation coming into existence,* or he does it as a member of, that is, in the name of promoters' association. But unless expressly or impliedly shown, it is generally construed that he does it as a member of promoters' association before birth of *corporation coming into existence,* but as an executive organ of a *corporation coming existence* after its birth, since, after its birth, the leading role for performing the procedure of incorporation is supposed to be played by its executive organ.

CHAPTER II. PROMOTER'S TRANSACTIONS WITH AUTHORITY

In our country, since a promoter has a position of executive organ of a *corporation coming into existence,* a *corporation coming into existence,* accordingly, a newborn corporation acquires rights and is bound by duties created by transactions of a promoter as such an organ, provided such transactions are within the scope of his authority.

I. Transactions necessary for organizing corporation

It is clear under the provisions of the Commercial Code that a promoter, as executive organ, has the authority to raise subscriptions for shares, to claim payment from subscribers, to call an organization meeting of subscribers and so on, in order to meet the conditions precedent to incorporation. It is disputed, however, whether he has the authority to do other transactions which are actually necessary for the organizing corporation. According to the leading opinion, he has the authority to do all of

such transactions.

It is supposed that there are some cases where it is not necessarily clear whether a particular transaction is necessary for the organizing corporation. For example, a lease of office, employment of office clerk or borrowing money, and so forth, may be done in its nature, by a promoter as necessary for the organizing corporation as well as preparatory for the commencing business. Furthermore, it may be done by him for his private use. In such cases, it should be objectively decided whether such a transaction falls within the scope of his authority, upon the circumstances including his representation, express or implied, that he is doing it as necessary for the organizing corporation, at the ime of the transaction, and not upon his subjective motive of the transaction.

A *corporation coming into existense*, accordingly a newborn corporation acquires rights and incurs correlative obligations to the other parties of the transactions done by promoters within their authorities, and it is liable to fulfill the obligations to the other parties. Since it is benefited by these transactions, it might be reasonable that it bears all of the expenses of fulfilling the obligations. Nevertheless, the expenses should be borne by promoters so far as the expenses exceed the amount of "expenses of organization" (the Commercial Code § 168, I, (7)) which is stated in the articles of incorporation and meets other requirements provided by the Commercial Code.

Thus, the financial conditions of the corporation are protected from danger which might be caused by authorizing promoters to do all of the transactions which are necessary for the organizing corporation.

II. Transactions preparatory for commencing business

Does a promoter have an authority to do not only transactions necessary for organizing corporation but also transactions preparatory for commencing business? We can find only the provisions concerning "preincorporation contracts to obtain properties" (Sachübernahmen) (the Commercial Code § 168, I, (6)) in this respect. They are preincorporation contracts made by promoters for the corporation in order to obtain specific properties on condition of its incorporation, for the purpose of preparing its postincorporation

business, and are not necessary to organize the corporation.

Evidently a promoter is authorized by provisions of the Commercial Code to make such contracts when they are stated in articles of incorporation and meet other requirements, while, according to the prevailing opinion of scholars and the precedents, he has no authority to do any transactions preparatory for commencing business without stating them in articles of incorporation and meeting other requirements. There is divergence of opinions, however, about the ground of the provisions.

According to the majority opinion, the authority of a promoter as an executive organ, should be restricted in its nature to transactions which are necessary to organize a corporation, since the purpose of a *corporation coming into existence* is to organize a corporation. Therefore, he should not be authorized to do transactions which are preparatory for its postincorporation business and not necessary for the organizing a corporation. Nevertheless, the Commercial Code allows a promoter to have an authority to do such transactions out of actual necessity, under the severe conditions. From this point of view, the provisions concerning "preincorporation contracts to obtain properties" (Sachübernahmen) should be strictly construed and a promoter would be authorized to make such contracts in a way of sale, exchange and so on only when a corporation will obtain properties by means of these contracts.

The purpose of a *corporation coming into existence*, however, is not only to organize a corporation, but to grow up into a corporation in order to enter on business. Therefore, the authority of a promoter as its executive organ, in its nature, should not be limited to transactions necessary for the organizing a corporation, but should cover preincorporation transactions which would be necessary for the corporation to enter on business as soon as it is incorporated, except business transactions which are not conditioned on its incorporation. But since the organization of *corporation coming into existence* is not completed yet and the activities of promoters can not be well controlled by its autonomy, it is supposed that, if promoters are authorized without restrictions, the financial conditions of corporation might be endangered by unduly disadvantageous contracts made by promoters, for instance,

in a way of unfair estimation of properties. Thus, it should be understood that the Commercial Code limits the promoters' authorities and provided severe requirements for doing transactions which are preparatory for the commencing business and not directly necessary for the organizing a corporation.

From this point of view, the provisions concerning "preincorporation contracts to obtain properties" (Sachübernahmen) need not be construed so strictly as construed by the majority opinion, and if a promoter satisfies the severe requirements and there is possibly no chance for abuse of his authority, he may be authorized to make contracts of lease of properties, supply of products to be produced, employment of workers, loan of funds and so on. Therefore, a promoter is authorized to do any kind of transactions for a corporation on condition of its incorporation so far as they are stated in articles of incorporation and meet the severe requirements for "Sachübernahmen".

Apart from the problems of promoter's authority, who should bear the expenses which will be incurred by transactions preparatory for the commencing business? There is no direct provision in the Commercial Code concerning this kind of expenses, not as concerning "expenses of organization". Because a corporation is benefited by these transactions, it might be reasonable that it should bear all of these expenses. But it should be necessary to provide strict requirements, since its financial conditions might be endangered as much as in the case of "expenses of organization" if it should bear them without restriction. Since the preparatory transactions for the commencing business, however, should be stated in articles of incorporation and meet other requirements in order to authorize promoters to do them for a corporation, its financial conditions are supposed not to be endangered by bearing the expenses which are incurred by such transactions. Therefore, the provisions of the Commercial Code concerning "Sachübernahmen" are construed not only to limit the scope of promoters' authority but also to limit the amount of expenses which could be borne by a corporation, and promoters should bear the expenses if they have not satisfied the requirements for "Sachübernahmen" in the prosess of incorporation. Promoters can, however, ask a corpo-

ration to reimburse the expenses which they payed, if it ratifies their unauthorized transactions after its incorporation as explained afterewards.

CHAPTER III. PROMOTER'S TRANSACTIONS WITHOUT AUTHORITY

I. Ratification of unauthorized transactions

If a newborn corporation wants to ratify the transactions which have been done by promoters without authority, it should do it in the same way as required for its same transactions after incorporation. In order to protect the financial conditions of corporation against the danger which might be incurred, for instance, by paying unduly expensive considerations of contrancts which are made after its incorporation to obtain properties, in spite of that these properties existed before its incorporation, for the purpose of evading such strict requirements for "preincorporation contracts to obtain properties" (Sachübernahmen) as stating them in articles of incorporation, inspection by an inspector appointed by a court and others, the Commercial Code provides a provision (§ 246) concerning "postincorporation contracts to obtain properties which existed before incorporation" (Nachgründung) and requires a special resolution of shareholders' meeting of a corporation for making a contract to obtain properties within two years after its incorporation, which existed before its incorporation, by paying considerations equivalent to a twentieth of the amount of capital or more, in order to use them continuously for its business. Therefore, in order to ratify a promoter's unauthorized transaction, it should be done upon a special resolution of shareholders' meeting when the transaction costs a twentieth of the amount of capital or more while it may be done upon a resolution of board of directors when it costs less than a twentieth of the amount of capital.

It may be asserted, however, that the ratification of such a transaction should not be allowed even when it satisfies the requirements for "Nachgründung", because, if it should be allowed, it would result in allowing the transaction to be done without meeting the requirements for "Sachübernahmen" and

consequently in permitting the evasion of the law[1]. But the evasion of the law should be disallowed because of that the purpose of the provisions concerning "Sachübernahmen" would be substantially ignored and the idea would be in vain, and not because of such a mere formality that the provisions would be formally evaded.

The Commercial Code provides the strict requirements for "Sachübernahmen", as already mentioned, in order to protect the financial conditions of a corporation against a danger which might be incurred by promoter's abuse of their authorities to do preincorporation transactions, presupposing that a danger would not be usually incurred if such strict requirements should be satisfied. The Commercial Code provides the requirements for "Nachgründung" in order to protect the financial conditions of a corporation against a danger, as in the case of "Sachübernahmen", which might be incurred by directors' contrancts, if directors should be authorized to make them, without restictions, shortly after its incorporation, to obtain properties which existed before its incorporation, because promoters usually become directors or, if not, they have strong influences upon directors. Therefore, even though a corporation can decide autonomously after its incorporation without an inspection by an inspector appointed by a court, the Commercial Code requires a special resolution of shareholders' meeting of a corporation for making such contracts, presupposing that a danger would not be usually incurred if this requirement should be satisfied. So far as contracts are of small amount, it does not provide any special requirement to satisfy, presupposing that it is enough to pursue the way of regular business management in order to make such contracts.

Consequently, if a newborn corporation ratifies the "Sachübernahmen" done by promoters without authority, in other words,

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1) The Supreme Court held that it was possible to make a new valid contract by satisfying the requirements for "Nachgründung" but, because a "Sachübernahmen", which had not been stated in articles of incorporation authenticated by a notary public, was void, it could not be validated by a special resolution of shareholders' meeting which recognized it (Dec. 3, 1953, Civil Reports, Vol. 7, No. 12, p. 1299).

without satisfying the statutory requirements, upon its own judgment satisfying the requirements for "Nachgründung", the financial conditions of corporation would equally not be endangered as in the case where it makes a new contract of "Nachgründung". Even if there might be some dangeres when the ratification is allowed, because it results in evading an inspection by an inspector, there is no difference from the "Nachgründung" where such an inspection is not required, so far as the danger is concerned. Besides, a corporation can not only make a new contract after its incorporation, which is just the same as the "Sachübernahmen" made by a promoter, but also can buy a property from a promoter, which he privately bought in advance; hence we can find no reason for disallowing only the ratification. Furthermore, the ratification should be allowed for the benefit of a corporation, because, if it can ratify a preincorporation contract as well as make a new one, it can select the best way upon its own judgment, while the ratification can not be against the interest of the other party of the preincorporation contract.

Thus, it should be concluded that a corporation can ratify a promoter's preincorporation transaction, even if it results in a formal evasion of the provisions concerning "Sachübernahmen". The ratification is not required to be done expressly but may be done impliedly when it is not required to be done upon a special resolution of shareholders' meeting[2].

When a promoter makes a contract, pretending as if he were an executive organ of a *corporation coming into existence*, before its birth, he acts as an agent for an inexistent principal. Formerly in our country, as in the United States, it was generally held that a principal could ratify an unauthorized transaction done by his agent only when he could have done it by himself at the time of the transaction done by his agent, in other words, only when the transaction done by his agent met every of requisite of agency except authorization and it could have an effect on the principal

2) Tokyo High Court held that a newborn corporation acquired rights and was bound by duties when it continued to use a building after its incorporation, which a promoter had rented without authority (March 20, 1958, Inferior Courts Civil Reports, Vol. 9, No. 3, p. 457).

by his ratification retroactively to the time when it was done by his agent. Accordingly, it was generally held that a principal could not ratify a transaction which had been done by his agent before he came into existence.

It is not necessary, however, to hold the retroactivity essential to a ratification of unauthorized transaction (cf. The Civil Code, § 116). The essential point is that a transaction becomes to have an effect on a principal afterwards, in spite of that it had not effect on him at the time when it was done by his agent. So far as the reason for having no effect on a principal at the time of the transaction is concerned, there is no essential difference between that a principal, who had already existed, did not yet authorize his agent by that time, and that a principal himself did not yet come into existence by that time. Consequently, the idea of agency for a future principal should not be disregarded but he should be permitted to ratify a transaction which has already been done in his name when he comes into existence and becomes able to do the same transaction by himself; this is the recent leading opinion. Therefore, a newborn corporation can ratify a transaction which was done by a promoter before the birth of a *corporation coming into existence* if it satisfies the requirements for "Nachgründung", and a *corporation coming into existence* can also ratify it if it is within the scope of promoter's authority. Such a transaction becomes to have an effect on the corporation by its ratification retroactively to the time when the *corporation coming into existence* was born.

Thus, since the idea of agency for an inexistent principal is recognized and the ratification is permitted, it is not necessary, as in the United States, to invent a theory of adoption in order to explain how a principal can acquire rights and can be bound by duties upon such transactions. And when a promoter makes a contract in the capacity of promoter, it may not be impossible to construe that he makes the contract not in his capacity of executive organ, which is accompanied by a precontract of novation with a *corporation coming into existence* which is expected to be born, and the parties may adopt this way if they specifically want to do so. But because it is not usual that a promoter makes

a contract for himself until the *corporation coming into existence* will want to do the novation, the fiction that the parties adopted this way, should not be forged against their intention, since the ratification is permitted. It may also be possible that a promoter takes a continuing offer for a *corporation coming into existence* which is expected to be born and the offer, being accepted by it afterwards, becomes a contract. A promoter may take this way if he wants not to be liable as an unauthorized agent until the ratification; but this way is, as explained afterwards, practically not so useful.

When a promoter makes a contract, pretending as if he were a representative director of a corporation already born, before its incorporation but after the birth of a *corporation coming into existence*, it is not an agency for an inexistent principal, because a *corporation coming into existence* is already born, which is identified with a newborn corporation. But, because such a contract is not made on condition of its incorporation, the contract is, in its nature, what a promoter a can not be authorized to do as an executive organ of a *corporation coming into existence*, and is not a preparatory transaction for the commencing business which a promoter may be authorized to do by satisfying the requirements for "Sachübernahmen". Therefore, a ratification by a *corporation coming into existence* is, of course, impossible, but a newborn corporation can ratify it after its incorporation if the requirements for "Nachgründung" is satisfied[3].

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3) The Supreme Court held as follows in a case where a baseball corporation (the plaintiff and the appellee) sued a promoter (the defendant and the appellant) of a textile corporation, who had made a contract in the capacity of representative of an inexistent corporation, for a liability similar to that of unauthorized agent, because the promoter had made a contract with the baseball corporation to have it play a baseball match, pretending as if he were a representative director of a corporation already born, during the process of incorporation for the purpose of advartising the corporation to be organized, but the reward, expenses and others as contracted were not payed to the baseball corporation in spite of that it had played the match:

"Because this contract is not a transaction for the organizing the corporation, it should not have an effect automatically on the corporation after its incorporation. Consequently, the contract is similar to a transaction which is made by the appellant as unauthorized agent. Although the

II. Liabilities of promoters

If a *corporation coming into existence* or a newborn corporation does not ratify an unauthorized transaction done by a promoter, he would be liable for the transaction as unauthorized agent. Accordingly, if the transaction is not conditioned upon its incorporation, promoters' liabilities would become definite when a *corporation coming into existence* fails to be incorporated before its ratification. On the contrary, if the transaction is conditioned upon its incorporation, the condition precedent is ascertained not to be realized and a promoter is not held liable when a *corporation coming into existence* fails to be incorporated.

If a promoter makes a contract without authority in the capacity of executive organ of a *corporation coming into existence*, the other party can not generally hold him liable as unauthorized agent, since the other party should be able to know that the pro-

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Civil Code § 117 is originally a provision concerning a case where an agent makes a contract for an existent principal and the appellant who made a contract in the capacity of representative of a corporation which was not yet existent in this case, is not an unauthorized agent as in its original meaning, it is properly construed that the appellant should be held liable on the contract which he made as a representative of the corporation, by analogical application of the provision, since the purpose of the provision is solely to protect the other party who made a contract with him because he believed that he was an authroized agent, and the contract in this case and a contract made by an unauthorized agent are in the similar situation."

Of course, I agree with this judgment as far as the following three points are concerned: (1) the contract in this case was not for the organizing the corporation. (2) the contract should not have an effect automatically on the corporation after its incorporation because he had not been authorized to make it. (3) the construction of the Civil Code § 117. In this case, however, though the textile corporation had not yet come into existence at the time when the contract was made, the construction of "an agency for an inexistent principal" is not justifiable, since the *corporation coming into existence* had been already born at that time. And further, though the contract was construed as a transaction preparatory for the commencing business, a contract of this kind should be construed as a business transaction or an incidental transaction to a business and not as a transaction preparatory for the commecing business which a promoter may be authorized to do if the requirements for "Sachübernahmen" are satisfied, because the contract was not made on condition of its incorporation. It may be ratified, however, by the corporation after its incorporation.

moter is not authorized to make the contract, except under such circumstances that he is deceived by the promoter (the Civil. Code § 117, II.) because a contract within the scope of a promoter's authority is, as already mentioned, always to be either a contract which is objectively recognized as necessary for organizing a corporation according to the circumstances at the time when the contract is made, the circumstances which include the promoter's indication, express or implied, whether he makes it for the organizing the corporation or not; or a contract which meets such a requirement, among others, for "Sachübernahmen" as stating the other party's name in the articles of incorporation.

On the other hand, when a promoter makes a contract in the name of already born corporation as its representative director, the other party generally can not know that the promoter is not authorized to make the contract. It may be asserted that the other party should also be able to know that the promoter is not authorized, because the fact that a corporation has not been entered in a register, generally presumes the public knowledge of its non-existence. But if a promoter deceives the other party as if a corporation were already born by assuming the title of its representative director, he should be estopped to assert that the other party knows or does not know by his negligence that he is not authorized. Therefore, in this case, a promoter should be liable as unauthorized agent to the other party, if it is not ratified.

If a promoter makes a contract as executive organ of a *corporation coming into existence* before it is born, he is an unauthorized agent because of absence of the principal, and he should be liable for the contract against the other party so far as it is not ratified by a *corporation coming into existence* or a newborn corporation. Previously, it was held that an agent was not liable for a contract as unauthorized agent if a principal could not ratify it, in other words, if a principal could not make the contract by himself at the time when it had been made by an agent, and that an agent was liable under the Civil Code § 117 only when a contract was legitimately made by him satisfying every requirement for agency except authorization and it could have an effect on the principal retroactively to the time when it

had been made by him being ratified by the principal; and that an agent was, consequently, not liable when a contract was made for an inexistent principal. It should be allowed, however, to ratify an unauthorized agency for an inexistent principal, as already mentioned. Moreover, anyone who makes a contract, ought to be liable in principle for his contract, and only in a case where he shows that he makes the contract for another person (principal) at the time when he makes it and he can make it to have its effect on the principal, he need not be liable for the contract in spite of that he makes it by himself. Accordingly, so far as he can not make it to have its effect on the principal, he ought to be liable for it but the other party can not hold him liable if the other party should be able to know that it can not have its effect on the principal. Therefore, though the provision of the Civil Code § 117 originally expects an unauthorized agency for an existent principal, it should be applied to an agency for an inexistent principal by analogy. A promoter should be liable as unauthorized agent[1].

CHAPTER IV. TRANSACTIONS DONE BY PROMOTERS NOT AS ORGAN

Is it possible that a *corporation coming into existence* or a newborn corporation acquires rights and is bound by duties caused by transactions which have been done by promoters not as its executive organ? Any right or duty caused by a transaction which has been done by a promoter in his name, is naturally the promoter's, and it is beyond question that it can not become a right or a duty of a *corporation coming into existence* or of a newborn corporation by its ratification.

A promoter can freely assign a right, which he has acquired by his contract, to a newborn corporation if the corporation satisfies the requirements for "Nachgründung", irrepective of the time when the promoter's contract was made whether before or after birth of a *corporation coming into existence* or whether before or after its incorpsration. But he can not be

1) Cf. op. cit. the Supreme Court, Oct. 24, 1958.

discharged from his liabilities except when a newborn corporation undertakes his obligations with the consent of the other party. A newborn corporation can acquire the same rights and duties as his by making a new contract of novation with the other party, and the rights and the duties upon the old contract are extinguished thereby, and the promoter is consequently discharged. If a pre-contract of novation was already made when a promoter made a contract with other party, the newborn corporation can complete the contract of novation without a further consent of the other party. The corporation can also acquire the same rights and duties as the promoter's by means of making a new contract which is the same as a contract made by the promoter, but the promoter is not discharged unless the other party exempts him from his duties.

The same argument is possible concerning a *corporation coming into existence* so far as the contracts are made by promoters before its incorporation and fall within the scope of promoters' authorities as exective organ.

It is, of course, also possible that a promoter makes a "contract for the third party" for a *corporation coming into existence* or for a corporation to be organized. In this case, the corporation can acquire the rights upon the contract by showing his intention of receiving the benefits to the other party, but the promoter is not discharged unless the other party exempts him from his duties.