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SUBSCRIPTIONS.

ONE cannot expect, within the limits of a single article, to exhaust the law relating to Subscriptions. But within the limits assigned, I propose to consider some portions of the law relating to this subject, which seem to me to be of sufficient interest and importance to merit attention in these pages. The subject of Subscriptions is seemingly a narrow one, and yet it has given rise to very considerable litigation, and out of it have come many interesting questions, upon the determination of which large pecuniary interests have oftentimes depended, especially in the case of Stock Subscriptions.

*Consideration for Voluntary Subscriptions.*—In Professor Parsons' work on Contracts is an intimation that the promise of one subscriber to pay money cannot be a sufficient consideration for a similar promise by another: 1 Pars. on Cont. 378. But this intimation cannot be accepted as an accurate statement of the law governing voluntary subscriptions. It can be true at the most only in a qualified sense, and is believed to have been applied only in cases where no person was designated to receive the funds subscribed, and who was bound to expend them for the purpose for which they were subscribed: *Underwood v. Waldron*, 12 Mich. 89; *Farmington Academy v. Allen*, 14 Mass. 172; *Boutell v. Cowdin*, 9 Id. 254. In cases where the difficulty above alluded to has not existed, voluntary subscriptions for educational, charitable, religious and other like purposes, have been sustained and enforced, as being founded on a sufficient consideration. In the case of voluntary

subscriptions, the cases may be classified under three heads, so far as the doctrine of consideration is concerned.

1. One class of cases recognises the doctrine that the consideration upon which the promise of each subscriber is founded, is the promise of the others to contribute to the same object: *Watkins v. Eames*, 9 Cush. (Mass.) 537; *Trustees v. Stetson*, 5 Pick. (Mass.) 506; *Congregational Society v. Perry*, 6 N. H. 164; *Stewart v. Trustees of Hamilton College*, 2 Denio (N. Y.) 403; *Comstock v. Howd*, 15 Mich. 237, 244; *Allen v. Duffie*, 43 Id. 4; *Lathrop v. Knapp*, 27 Wis. 214; *Edinboro' Academy v. Robinson*, 37 Penn. St. 213; *McDonald v. Gray*, 11 Iowa 508; *Twin Creek, &c., Turnpike Rd.*, 79 Ky. 552; *Petty v. Trustees*, 95 Ind. 278.

2. The second class of cases maintain the doctrine that the obligation of the promisee to apply the money subscribed for the purposes for which it was subscribed, is a sufficient consideration for the promise of the subscriber. And that subscriptions in favor of persons or corporations legally bound to make such an application of the funds, needs no acceptance or further action to make them binding on the subscribers. *Troy Academy v. Nelson*, 24 Vt. 189; *Amherst Academy v. Cowsls*, 6 Pick. 427; *Trustees v. Stetson*, 5 Id. 506; *Underwood v. Waldron*, 12 Mich. 90; *Collier v. Baptist Educational Society*, 8 B. Monr. (Ky.) 68. And see *Maine Central Institute v. Haskell*, 73 Me. 140.

3. And a third class of cases assert the doctrine, a doctrine nowhere disputed, that a subscription is in the nature of an offer, which becomes binding where accepted by the promisee, and that when work has been done or expense incurred in consequence of such subscriptions being authorized by a fair and reasonable dependence upon the subscription, the liability is fixed: *Ryerss v. Congregation of Blossburg*, 33 Penn. St. 114; *Farmington Academy v. Allen*, 14 Mass. 172; *Gittings v. Mayhew*, 6 Md. 115; *Wesleyan Seminary v. Fisher*, 4 Mich. 524; *Ives v. Sterling*, 6 Met. (Mass.) 310; *White v. Scott*, 26 Kans. 476; *Presbyterian Church v. Baird*, 60 Iowa 237; *University of Des Moines v. Livingston*, 57 Id. 307; *Williams v. Rogan*, 59 Texas 438; *Wright v. Irwin*, 35 Mich. 347; *Wayne, &c., Collegiate Institute*, 36 Barb. (N. Y.) 576; *Eycleshimer v. Van Antwerp*, 13 Wis. 548; *Baptist Education Society v. Carter*, 72 Ill. 247; *Trustees v. Garvey*, 53 Id. 401; *McAuley v. Billenger*, 20 Johns. (N. Y.) 89.

In *Stevens v. Corbitt*, 33 Mich. 458, 461, an action was brought

to enforce a voluntary subscription in aid of a railroad, and in the course of the opinion, the doctrine of consideration is referred to as follows by Justice MARSTON: "The fact that a company was organized to build the road at the time the promise was made, or that even in the absence of such a promise the road would have been built, would not be sufficient to defeat it; the mere fact that a company is organized to build a road does not necessarily insure the work being done, or so make it the duty of the company to commence work, or complete the road, that a promise to assist by voluntary contributions would necessarily be without consideration and void."

In some of the early Massachusetts cases will be found a statement that "it is a sufficient consideration that others were led to subscribe by the very subscription of the defendant." But in *Cottage St. M. E. Church v. Kendall*, 121 Mass. 528, that statement is said to have been in each case but *obiter dictum*, and is pronounced inconsistent with elementary principles. We think this is true, and that the position taken by the court in this case is the only sound position which can be taken on this question. Courts are not to enforce gratuitous promises, and such subscriptions are simply gratuitous promises until the offer of the subscriber has been accepted by assuming some liability or obligation, legal or equitable. See also, *University of Des Moines v. Livingston*, *supra*; *Beach v. F. M. E. Church*, 96 Ill. 179; *Lathrop v. Knapp*, 27 Wis. 214, 236, per COLE, J.

*Whether a Payee must be named.*—In *Comstock v. Howd*, *supra*, a case of a voluntary subscription, objection was made to a recovery on the subscription on the ground that there was no payee named therein, and that therefore there was no promise in law. The plaintiff claimed that he had been designated as the proper person to raise the money by subscription, and to thereafter disburse it for the purpose for which it was subscribed, all of which had been agreed to by the subscribers, the defendant included, and that he, the plaintiff, had acted in accordance with such designation. This, the court held, constituted a valid contract, and that the designation of the plaintiff as the person to raise and disburse the funds placed the subscription on the same ground as if his name had been inserted in it as the payee.

In *Allen v. Duffie*, *supra*, the same subject was considered under the following circumstances. A clergyman stated to his congre-

gation the necessity of raising money by subscription to purchase a house of worship. Many persons thereupon offered sums which they specified; there was a subscription paper whereby these persons promised to pay the sums set opposite their names. This paper was not produced on the trial, having been lost or destroyed, and no one could testify that it named any payee or any object; but it appeared that the persons subscribing well understood the object, and that the purchase was to be for the society then assembled. The suit was brought by the trustees of the society to recover on a subscription thus made. The court held they might recover, and Justice COOLEY in delivering the opinion of the court said: "There is no doubt that the trustees of any unincorporated society, which is organized for a lawful purpose, may receive gifts or promises on its behalf, and a mutual subscription may be supported, even though no payee be named, provided the object is made definite and certain, as it unquestionably was in this case."

When no payee is named the difficulty is to ascertain the promisee in whose name suit can be brought to enforce the promise. Such promises must be construed to have legal effect, according to their purpose and intent, and the practical necessity of the case, "as a contract with the common representation of the several associates." See *Athol Music Hall Co. v. Carey*, 116 Mass. 473; *Carr v. Bartlett*, 72 Me. 120; *Western Development Co. v. Emery*, 61 Cal. 611.

*Withdrawal of Subscription.*—So far as the right to withdraw a voluntary subscription is concerned, it has been laid down, and with undoubted correctness, that until the persons designated to receive the money assume their duties—or, where none are designated, until some person incurs expense or liability in fair reliance on the subscriptions—the offer of the subscribers may properly be regarded as liable to withdrawal. *Underwood v. Waldron*, 12 Mich. 90. See *Stokes' Estate*, 14 Phil. (Pa.) 251; *Pratt v. Elgin Baptist Society*, 93 Ill. 475; *Beach v. F. M. E. Church*, 96 Id. 179.

Of course when the liability once becomes fixed, as when work has been done or expense or liability incurred in reliance upon the subscription or promise, the person making the same cannot be permitted to thereafter withdraw his offer. *Stevens v. Corbitt*, 33 Mich. 458, 461; *Gittings v. Mayhew*, 6 Md. 114.

In *Beach v. F. M. E. Church*, *supra*, after stating that a subscription is a mere offer, and that it may be revoked at any time

before it has been acted on, it is laid down that the death or insanity of the promisor, occurring before the offer has been acted on, works a revocation of the offer, and avoids the subscription. And see *Pratt v. Elgin Baptist Society, supra*.

*Church Subscriptions made on Sunday.*—In *Catlett v. Trustees of the M. E. Church*, 62 Ind. 365, it was ruled that a subscription to a church, made on Sunday, was void, and that a subsequent acknowledgment of such subscription with promise to pay the same, but supported by no consideration, did not amount to a ratification, which was binding on the subscriber. We think the court was in error in assuming that such a subscription was void, because made on Sunday. A much better considered case on the same subject, is that of *Allen v. Duffie, supra*. In this case, an action was brought on a subscription made on Sunday, for the purchase of a house of worship for a religious society. Mr. Justice COOLEY wrote the opinion of the court, which holds that the support of public worship is a work of charity that may properly be done on Sunday, and that an action can be maintained on subscriptions taken for that purpose, from a congregation assembled for religious worship on the Sabbath day.

*Whether Subscription is Joint or Several.*—When a subscription is made in the following terms: “We, the undersigned, promise to pay the following subscription set opposite our names;” it is evident that the contract is several, and that each subscriber is liable only for the amount set opposite his name: *Erie, &c., Rd. v. Patrick*, 2 Abb. App. Cas. 72; s. c. 2 Keyes (N. Y.) 256; *Connecticut, &c., Rd. v. Bailey*, 24 Vt. 465.

In *Landwerlen v. Wheeler*, 106 Ind. 523, the promise was in these words: “We, the undersigned, promise to pay the following subscriptions, &c.” It was claimed that the promise was joint, and that all the subscribers should have been made defendants in the action. The claim was a groundless one, and was not sustained. “The paper and the manner of the subscriptions as clearly indicate the intention by all the parties that each subscriber should be liable, and only liable, for the amount by him subscribed, as if the words, ‘opposite each of our names’ had been used.”

*How Subscriptions to Stock should be made.*—The manner of subscribing to stock is usually prescribed by law. When a corporation is already in existence, a subscription to its capital stock

is a transaction between the person subscribing and the corporation, and the rule is, that the obligation of the subscriber can only be sustained by the corresponding obligation of the other. The transaction is without validity, unless both parties to it are bound. The criterion of the subscriber's liability is said to be whether any act has been done by which the corporation is forced or liable to receive the subscriber as a member. Angell & Ames on Corporations, § 527.

In *Carlisle v. Saginaw Valley & St. Louis Rd.*, 27 Mich. 315, the doctrine is stated to be that no person can obtain rights of membership in a corporation, except in compliance with its charter or governing law, and that if that prescribes any conditions or special methods of becoming a member, the law is imperative; that while there may be cases of mutual dealing which will estop both parties, yet no contract or subscription can be valid unless it conforms to the statute or charter. Under the law as it stood at the time the subscription in question was made, subscriptions to capital stock of a railroad corporation could only be made "in the manner to be provided by its by-laws." It was held in the case above referred to, that a subscription made before any by-laws were adopted, gave no rights to either party, and nothing having been done to create an estoppel, that the subscriber was not bound by a by-law made afterwards adopting his subscription.

In *Howard's Case*, L. R., 1 Ch. App. 561, a person had subscribed conditionally for certain shares of stock. It seems that the power of allotting shares, was, in that case, in the directors, and that the board, instead of themselves assenting to the conditions, had left the matter to two of their number and to the manager of the company, who had allotted the shares. It was held that he was not a shareholder, as the board of directors could not delegate their power of allotting shares.

A consideration of the authorities shows that "a mere verbal agreement to take stock in a company whose promoters are engaged in securing the amount of stock required before it can organize, does not constitute the promisor a member of such corporation, and is without a sufficient consideration to support it:" *Fanning v. Ins. Co.*, 37 Ohio St. 339; *Vreeland v. N. J. Stone Co.* 29 N. J. Eq. 191; *Pittsburgh & Connellsville Railroad v. Clarke*, 29 Penn. St. 146; *Pittsburgh, &c., Rd. v. Gazzam*, 32 Id. 340. *Thames Tunnel Co. v. Sheldon*, 6 Barn. & Cress. 341. In the

New Jersey case above referred to (29 N. J. Eq. 191), the court noticed the fact that the charter authorized the incorporators to open books of subscription for capital stock, and declared that the charter evidently intended the subscriptions to the stock should be made by writing only.

*Subscription Dependent on Total Amount being Subscribed.*—The general rule is, that there is no liability on a subscription to the stock of a corporation, the amount of whose capital stock is fixed, until the whole amount of stock has been subscribed. The law holds it to be an essential condition of such subscriptions, that the whole stock shall be subscribed before any “call” on the subscribers can lawfully be made. And the reason for this rule is founded in good sense and in sound policy, to say nothing of its being “sanctioned by every dictate of justice.” If the capital stock is fixed at \$100,000, it is because it is thought that the enterprise in question cannot be carried on successfully with a less amount; and one who subscribes to the stock cannot, therefore, be considered as agreeing to enter upon the enterprise with a capital of any less amount, with a twentieth, a tenth, or any amount less than the whole: *Stoneham & Branch Rd. v. Gould*, 2 Gray (Mass.) 277; *Salem Mill Dam Co. v. Ropes*, 6 Pick. (Mass.) 23; s. c. 9 Id. 187; *Sedalia, &c., Rd. v. Abell*, 17 Mo. App. 649; *Hale v. Sanborn*, 16 Neb. 1; *Hughes v. Antietam Manf. Co.*, 34 Md. 318; *Temple v. Lemon*, 112 Ill. 50; *Allman v. Havana, &c., Rd.*, 88 Id. 521; *Cabot & West Springfield Bridge v. Chapin*, 6 Cush. (Mass.) 50; *Worcester, &c., Rd. v. Hinds*, 9 Id. 110; *Somerset, &c., Rd. v. Cushing*, 45 Me. 524; *N. H. Central Rd. v. Johnson*, 30 N. H. 390; *Burt v. Farrar*, 24 Barb. (N. Y.) 518; *Shurtz v. Schoolcraft, &c., Rd.*, 9 Mich. 269, 274; *Topeka Bridge Co. v. Cummings*, 3 Kans. 76; *Hendrix v. Academy of Music*, 73 Ga. 438; *Memphis, &c., Rd. v. Sullivan*, 57 Id. 240; *Peoria, &c., Rd. v. Preston*, 35 Iowa 118; 61 Me. 384. While the general rule is that liability does not arise on a subscription until the whole stock has been subscribed, yet a subscriber may become estopped by his conduct from alleging that the whole amount of stock has not been taken. Thus in *Pitchford v. Davis*, 5 M. & W. 2, it appeared that a plan had been formed to establish a company for the manufacture of sugar from beet root, and the prospectus stated the proposed capital to consist of 10,000 shares of 25l. each. The directors

had put up the works and commenced the manufacture and sale of sugar. But only 1400 out of the 10,000 shares were taken. It was held that a subscriber who had taken shares and paid a deposit on them was not liable *unless* he knew that the directors were carrying on the undertaking with a less capital, and had acquiesced in their doing so. And so, in a recent case in Maine, *Rockland v. Mt. Desert & S. S. B. Co. v. Sewall*, 12 Am. & Eng. Corp. Cas. 87 (S. Ct. of Me. 1886), the court, after stating the general rule, says: "This rule may be changed by a provision in the articles of subscription; or if a subscriber, with a full knowledge of the want of the requisite amount of subscriptions, attend meetings of the corporation, and co-operate in such of its acts as could only be properly done on the assumption that the subscribers intended to proceed with the stock partially taken up, he might be estopped from setting up such defence." And see *Sedalia, &c., Rd. v. Abell, supra*, *Hoagland v. Rd.*, 18 Ind. 455; *Jewett v. Rd.*, 34 Ohio St. 607; *Emmitt v. Rd.*, 31 Id. 26; *Rensselaer, &c., Plank Road Co. v. Barton*, 16 N. Y. 457.

*Subscription Independent of Amount Subscribed.*—The terms in which a subscription is made may be of such a nature, however, as to render the subscriber liable to take and pay for the stock subscribed even though the total amount is not subscribed for. In *Skowhegan & Athens Rd. v. Kinsman*, 77 Me. 370, the charter of the company provided that its capital stock was to be not less than 750 shares of \$50 each. Before the amount of the stock was fixed by the directors, the defendants, with others, signed the following subscription list. "We, the undersigned, hereby agree to take, and hereby subscribe for the number of shares of stock in said railroad company, hereunto by each of us placed opposite our names in the following list, said shares to be fifty dollars each. And we agree to pay the par value of the same." The defendant claimed he was not liable to pay for the shares thus subscribed for, because the amount of the capital stock had not been fixed, and because the minimum number of shares named in the charter had not been subscribed for. The court held him liable, and said that while he might not be liable to pay in such case, if he were a mere subscriber for stock, or if the action had been brought for legal assessments, yet, in addition to his subscription for shares, he had expressly promised to pay fifty dollars each for them, and the action was on this express promise to pay, and not on any promise implied



by law. His promise being an unconditional one, he was not allowed to invoke conditions.

In *Kennebec & Portland Rd. v. Jarvis*, 34 Me. 360, a subscriber was held liable, although the total amount had not been subscribed for, he having expressly promised to pay, not legal assessments, but "at such times, to such persons, and in such instalments, as shall be hereafter required by a vote of said company."

*Subscriptions to Stock and Proposals to Take Stock.*—A subscription paper may bind the subscriber as a subscription to stock, or it may amount simply to a proposal to take stock. The distinction will be understood by a reference to two recently decided cases.

In *Twin Creek, &c., Turnpike Road v. Lancaster*, 79 Ky. 552, the agreement signed read as follows: "We, the undersigned, \* \* promise and agree to subscribe the amounts set opposite our respective names to the capital stock of a company to be organized for that purpose, and to pay the same in such instalments as may be called for by the proper officers of such company, and we further agree that our said subscriptions may be subject to a call of ten per cent. as soon as such a company or corporation is completed or organized." It was held that this was not in fact an agreement to subscribe, but that it was a subscription without any other condition than the organization of the corporation "There was no other condition annexed, and when the articles of incorporation were completed, the company organized, and a call made in pursuance of the agreement and charter, it was the duty of the subscribers to pay the call. The right to collect was contingent only on obtaining the act of incorporation, and when this was done the agreement to pay was no longer conditional, but absolute." The contract, the court said, was made with the individual subscribers, and not with the corporation, but it bound the subscribers to pay the corporation when created.

In *Tilsonburg Agricultural Manufacturing Co. v. Goodrich*, 8 Ontario, Q. B. Div. 565, the defendant, among others, signed a stock list, which read as follows: "We, the undersigned, hereby subscribe for the number of shares, of the value of one hundred dollars each, set by us opposite our respective signatures hereon, of the capital stock of the Tilsonburg Agricultural Manufacturing Co., to be incorporated under the provisions, &c. \* \* \* And agree to pay for the said shares, as provided in the said act and the by-laws of the company." The company became thereafter

incorporated, the defendant not being one of the incorporators. The defendant did not subsequently to the incorporation subscribe to the stock, but expressly repudiated the agreement above referred to. And the question was, whether his subscription of stock made in the manner stated was available to the company in the same manner as if it had been subscribed after incorporation, or whether it was to be considered as a mere proposal to take stock after the company should be formed. The court took the latter position, holding that the defendant was not a stockholder, and therefore was not liable for calls on the shares which he purported to have subscribed for. There is no statute in that country, as in England and in some of our states, providing that a subscriber of a memorandum of association shall be bound to take from the company as many shares as he has subscribed for.

The action was brought by the company for calls on his shares of stock. The court said: "The defendant cannot, I think, be held to have subscribed stock in the capital of a company which, at the same time, was not in existence, nor can it be said that he made a contract with the company which bound him to take stock *in futuro*. \* \* The company and the stock were only *in prospectu* and not *in esse*; and how can this company then only *in posse* be a party to, and stock not *in esse* be the subject of a contract *in presenti*?"

The court declined to express any opinion whether or not the co-subscribers on the stock list could effectually institute proceedings against the defendant to compel specific performance, contribution, or for any other purpose in relation to the company.

*Failure to Make Part Payment at Time of Subscription.*—It is sometimes the case that the law or charter of a corporation may require a certain per cent. to be paid at the time of subscription, and in case this provision is not complied with, the question arises concerning the effect which such failure has upon the validity of the subscription. The cases on this subject may be classed under different heads. (1) The first class comprises those cases in which the law provides merely that a certain per cent. shall be paid at the time of subscribing, without expressly declaring that the subscription shall be void if such payment is not made. It is believed that in these cases the failure to make the payment will constitute no defence to an action brought to recover the price of the shares

subscribed. It was so ruled in *Minneapolis & St. Louis Ry. v. Bassett*, 20 Minn. 535. In that case it is held that the provision in question is for the benefit of the corporation, and that it may waive the privilege thus conferred. If it sees fit to accept the subscription without payment, it is a waiver of immediate payment, and a waiver to which the subscriber assents and agrees by the act of subscription, without concurrent payment. And see *Wight v. Shelby Rd.*, 16 B. Monroe (Ky.) 7; *Henry v. Vermilion & Ashland Rd.*, 17 Ohio 191.

(2) The second class of cases comprises those in which the law expressly forbids payment to be taken without payment of a certain per cent. When the statute or law under which a subscription is made, not only requires a certain amount to be paid, but actually forbids the subscription to be received without such payment, a subscription in violation of the law is not binding. It has been so held in *Jenkins v. Union Turnpike Co.*, 1 Caines's Cases in Error 86; *Highland Turnpike Co. v. McKean*, 11 Johns. 98; *Crocker v. Crane*, 21 Wend. 211; *Charlotte, &c., Rd. v. Blakely*, 3 Strobbart (S. C.) 245; *McRea v. Russel*, 12 Iredell's (N. C.) Law 224. But it does not follow that the payment of a certain per cent on the amount of the subscription must be made in cash at the time of subscribing, to make the subscription valid. An interval may elapse between the subscribing and the payment of the money. "The subscription one day, with payment the next, would satisfy the statute; and so would actual payment at any period after subscription, with intent to effectuate and complete the subscription:" *Beach v. Smith*, 30 N. Y. 130; *Black River & Utica Rd. v. Clarke*, 25 N. Y. 208.

In *Hibernia Turnpike Co. v. Henderson*, 8 S. & R. (Pa.) 219, certain commissioners were empowered by act of the legislature to open books and receive subscriptions, the act containing the following proviso: "Provided always, that every person offering to subscribe in the said books, in his own, or any other name, shall previously pay to the attending commissioners, the sum of five dollars, for each and every share to be subscribed," &c. The court held that the commissioners could not dispense with the previous payment of five dollars, and that if they permitted a subscription to be made without such payment, the contract was void and the company could not enforce payment thereof. "A corporation, being the mere creature of law, can act in no other manner than the law

prescribes, and must not be permitted to enter into a contest with the legislature.”

When the law required a certain per cent. to be paid in money at the time of subscription, it was ruled in *Leighty v. Susquehanna, &c., Turnpike Co.*, 14 S. & R. (Pa.) 434, that giving a promissory note for the sum required was not a payment of money within the meaning of the law. In *People v. Chambers*, 42 Cal. 201, it was held that payment by a check on a bank, drawn by a person who had not on deposit funds sufficient to meet it, was not such a payment as the law required, even though it appeared that such check would have been paid if it had been presented. In this case the court reserved its opinion on the question whether a payment in good faith by checks payable *in presenti*, and drawn against a sufficient sum on deposit, to meet them, would be a sufficient payment. But this question was answered by the court in the affirmative in the subsequent case of *People v. Stockton & Visalia Rd.*, 45 Cal. 306. To same effect, *Matter of Staten Island, &c., Rd.*, 37 Hun (N. Y.) 422. Attention is called to *The Vermont Central Rd. v. Clayes*, 21 Vt. 30, where a note was given in payment and enforced, the note having been received by the commissioners and accepted by the corporation.

(3) There is another class of cases represented by *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491. In that case, an article in the by-laws of a corporation provided as follows: “Ten per cent. shall be payable upon subscription, or the subscription shall be void.” A person had subscribed without paying anything at the time of subscription or afterwards, and the action was brought to enforce payment. The court held that such subscription was not void, but at the most, only voidable, at the election of the corporation. “The requirement,” said the court, “is not that the ten per cent. should be actually paid, but only that it should thereupon become payable; that it is due and liable to be called for at any time.”

The case of *Erie & Waterford Plank Road Co. v. Brown*, 25 Penn. St. 156, will show that there is a solid distinction existing between subscriptions received by commissioners under statutes and prior to the organization of a corporation and those which are received by the corporation itself after its organization.

Judge THOMPSON, in his work on the Liability of Stockholders, sect. 107, expresses the opinion that it seems to be firmly settled that a person cannot discharge himself of the responsibilities of a

stockholder by showing that he never paid the deposit or first instalment required of every subscriber by the charter, the articles of association, the deed of settlement, or the general law. This is a broad and sweeping statement, and brushes one side the decisions of the New York and Pennsylvania courts, in which the learned judge states that he perceives "no sense." But with all due deference the writer thinks that it must depend on the circumstances of the case whether a subscription without part payment can be considered valid or not. If the statutes of a state declare that no subscription can be taken without part payment, and, if so taken, shall be void, it is difficult to see just where a court derives its power to enforce a contract made in violation of such an express legislative enactment. But if part payment is required by some rule adopted by the corporation, then no reason is perceived why the corporation should not be allowed to hold the subscriber in cases where both the corporation and the subscriber have assented, as in the New Hampshire case, to waive the condition.

*Promise to Pay Amount Subscribed.*—One who subscribes for stock is liable to pay for the same without a promise to do so being made in so many words. In *Rensselaer, &c., Plank Road Co. v. Barton*, 16 N. Y. 460, the court declared: "Whatever may be the form or language of a subscription to the stock of an incorporated company, any person who, in any manner, becomes a subscriber for or engages to take any portion of the stock of such company, thereby assumes to pay according to the conditions of the charter."

In *Nulton v. Clayton*, 54 Iowa 425, the paper subscribed declared that "the number of shares held by each are as follows;" then followed names and amounts, and one of the signers claimed that this did not amount to a valid subscription to stock, nor is an agreement to take stock. The court was of opinion that the paper in question was designed as a subscription, and it was held to be no matter that the writing was informal, if the intent could be collected from it. The signers of the paper were held liable to pay for the number of shares set opposite their names.

In *Hartford, &c., Rd. v. Kennedy*, 12 Conn. 500, the court said: "It is true a promise to pay in precise terms does not appear to have been made. The defendant has not affixed his signature to the words, 'I promise to pay,' but he has done an equivalent act." In that case, the word "subscriber" was used in a subscription to

stock, and he was held liable to pay for the number of shares subscribed.

And see *Spear v. Crawford*, 14 Wend. 20; *Hartford, &c., Railroad v. Croswell*, 5 Hill (N. Y.) 384; *Dayton v. Borst*, 31 N. Y. 437.

*Effect of Misrepresentations on Subscriptions.*—As a general rule, misrepresentation made prior to the formation of a contract, and not constituting a term in the contract, does not affect its validity. But misrepresentations, made at the time of entering into the contract, may affect its validity in certain special cases, even though they do not, strictly speaking, form a part of the contract. The contracts so affected are sometimes said to be *uberrimæ fidei*. Such contracts are:

1. Contracts of marine and fire insurance.
2. Contracts for the sale of land.
3. Contracts for the purchase of stock in corporations.

In these three classes of contracts it so happens that one of the parties must, from the very nature of the contract, rely upon the representations made by the other party to the contract, being placed at a certain disadvantage as regards his means of acquiring knowledge upon the subject. Anson on Contracts, p. 140.

A case which is frequently referred to as showing the applicability of this doctrine to contracts for the purchase of stock is that of *New Brunswick & Canada Ry. v. Muggerridge*, 1 Dr. & Sm. 381. In the judgment pronounced in that case by Vice-Chancellor KINDERSLEY, it is said: "Those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact, that which is not so, but to omit no one fact within their knowledge, the existence of which might in any degree affect the nature, extent, or quality of the privileges and advantages of which the prospectus holds out as inducement to take shares."

It is clear that misrepresentations made by the corporation will avoid the subscription: *Ayre's Case*, 25 Beavan 513.

But the courts make a distinction between misrepresentation made by the corporation, and those made by an agent of the corporation, holding that a corporation is not liable for the frauds of

its agents. See *Holt's Case*, 22 Beavan 48; *Barrett's Case*, 3 De G., J. & S. 30.

In *Custar v. Titusville Gas and Water Co.*, 63 Penn. St. 386, Mr. Justice AGNEW has well stated the rule which should be applied in cases of this kind. He says: "The principle of the cases would seem to be this, that when representations made by an agent to obtain subscriptions, are a part of a scheme of fraud participated in by the officers authorized to manage its affairs, or where they are such as the agent may reasonably be presumed, by the subscriber, to have the authority of the corporation to make them, his representations may be given in evidence to show the fraud by means of which the subscription was procured. But when there is no reasonable presumption of authority, and no actual authority to make them, the corporation should not be prejudiced by the unauthorized acts of the agent."

(1) The right to rescind or avoid the subscription may be lost by a failure to exercise the right within a reasonable time, or before the corporation becomes insolvent. In the leading case of *Oakes v. Turquand*, L. R., 2 H. L. 325, it was determined that a person induced by fraud to take shares in a corporation, could not repudiate those shares after the company had been ordered to be wound up by the court, or subject to its supervision, provided that at the time of repudiation there were any debts of the company unpaid. In a subsequent case in the Court of Appeals (*Stone v. City and County Bank*, L. R., 3 C. P. Div. 282), counsel undertook to maintain that that principle did not apply when the winding up of the company was purely voluntary. But the court declared it to be impossible to hold that the right of members to rescind their contracts with the company, could depend on whether the company was being wound up in one way rather than in another, provided the company was insolvent. The rights of creditors must be as strong in the one case as in the other. These decisions go upon the ground that the existence of creditors prevents a subscriber, although he has been induced to take his shares by fraud, from rescinding his contract after the commencement of proceedings to wind up the company.

In *Upton v. Tribilcock*, 91 U. S. 54, the principle is laid down that one who claims to have been drawn into a fraudulent purchase, must exercise care and vigilance to discover the fraud, and must be prompt in repudiating his contract.

(2) A subscriber may be estopped by his conduct from disputing the validity of his subscription. This may be illustrated by a reference to some of the cases.

(a) When a subscriber had transferred his stock to another he was held to be estopped from denying the validity of the subscription. *Everhart v. West Chester, &c., Rd.*, 28 Penn. St. 339.

(b) Attending meetings of the company and taking part in its proceedings, also amounts to an estoppel. *Chaffin v. Cummings*, 37 Me. 76.

(c) Paying calls has the same effect. *Frost v. Walker*, 60 Me. 468.

(d) And acting as a director. *Schenectady, &c., Co. v. Thatcher*, 11 N. Y. 102.

(e) Participation in the profits of the corporation by receiving dividends will create an estoppel. *Gouthwaite's Case*, 3 DeG. & Sm. 258; *Sanger v. Upton*, 91 U. S. 56.

(3) It is elementary law, that one who contracts with a corporation cannot allege the irregularity of its organization as a defence in an action brought by the corporation upon the contract. And this principle applies to subscriptions to capital stock, the subscriber not being allowed to resist payment of his subscription by showing that the organization had irregularly created itself into a corporation: *Methodist Episcopal Church v. Pickett*, 19 N. Y. 482.

The same principle applies where an existing and regularly organized corporation undertakes to increase its capital stock. In *Chubb v. Upton*, 95 U. S. 665, it was held that a subscriber to an increase of stock could not resist payment by alleging irregularities and informalities on the part of the corporation in the proceedings taken to increase the stock. The duty and the necessity of performing the contract of subscription were said to be the same as in the case of an original stockholder.

(4) The case of *Sanger v. Upton*, *supra*, establishes an important principle concerning the liability of subscribers to stock when sued by the assignee of the insolvent company. The bankrupt court had made an order that the amount unpaid on the capital stock of the corporation should be paid by the subscribers on or before a given date, and notice of the order was given by publication, and by mailing a copy with demand of payment to each subscriber to the stock. The order further provided that in default of payment, the assignee was to collect the amount due by suit. The defendant



was sued to recover some sixty per cent. of her subscription, which she had failed to pay. The court decided that the order of the bankrupt court was conclusive as to the right of the assignee to bring suit to enforce payment. "The plaintiff in error could not, in this action, question the validity of the decree; and for the same reasons she could not draw into question the validity of the order. She could not be heard to question either, except by a separate and direct proceeding had for that purpose."

*Release of Unpaid Subscriptions.*—The directors of a corporation have, as a general rule, no power to release subscriptions to capital stock. They have no authority "to give away its funds, or deprive it of any means which it possesses to accomplish the purposes for which it was incorporated. The stock subscribed is the capital of the company, its means for performing its duty to the Commonwealth, and to those who deal with it." The Supreme Court of the United States in *Burke v. Smith*, 16 Wallace 395, from which the above quotation is made, accordingly declares that the directors of a company are incompetent to release an original subscriber to its capital stock, or to make any arrangements with him by which the company, its creditors, or the state shall lose any of the benefit of his subscription. Such an arrangement is regarded not only as *ultra vires*, but as a fraud upon the public, the creditors and the other stockholders. The authorities following clearly show that the law is settled to the effect that directors cannot release a subscriber from his liability on unpaid subscriptions: *Rider v. Morrison*, 54 Md. 430; *Bedford v. Bowser*, 48 Penn. St. 37; *The Chouteau Insurance Co. v. Floyd*, 74 Mo. 286; *Gill v. Balis*, 72 Mo. 424; *Upton v. Tribilcock*, 91 U. S. 45; *Vick v. La Rochelle*, 57 Miss. 602; *Peychaud v. Hood*, 23 La. Ann. 732.

If the rights of creditors will not be impaired by the release of a subscriber, then there may be no objections to his release, provided all the subscribers assent thereto. In *Hughes v. Antietam Manufacturing Co.*, 34 Md. 316, it appears that a subscriber to capital stock can neither withdraw nor be released without the consent of all the subscribers, the directors having no general power to release.

A power to cancel stock subscriptions exists, however, in cases where the subscription has been obtained by such fraud as entitles the subscriber to avoid the contract. This is illustrated by a case decided not long since in Ontario. In *Wheeler & Wilson Manufacturing Co. v. Wilson*, 6 Ontario Rep., C. P. Div. 421, it ap-

peared that a joint-stock company, through its secretary, had published a statement, setting forth that the company was in a flourishing condition, earning a ten per cent. dividend, and that on the faith of this statement the defendant, who was an original stockholder in the company, subscribed for new shares. The defendant, not long after, suspecting the statement to be incorrect, threatened to institute legal proceedings to compel the cancellation of the stock. In this state of affairs a resolution was passed directing the books to be examined, when it was found that the statement was false and the company insolvent. A meeting of shareholders was thereupon called, and a by-law passed cancelling the stock. The question for the court was, whether there was power to cancel the stock, and it was decided that, under the circumstances named, the power existed. In delivering his opinion, Chief Justice HAGARTY said: "I think the company had the power to cancel when they found how the parties had, by representations, binding on them, been deceived or entrapped into taking stock. I do not think they were bound to wait for the judgment of a court compelling them to do right." In reviewing this opinion Mr. Justice ROSE pointed out that no authority had been cited, and that he did not think any could be found to support the proposition that, where a company had obtained a contract to take shares by such fraud as entitled the subscriber to avoid the contract, the company had no power to cancel the shares at the demand of the subscriber. He added, "If the contract is voidable at the election of the subscriber, it becomes void when he so elects, and it, indeed, would be anomalous if the directors had not the power to cancel the shares which the subscribers had the power to hand back, and as to which all liability ceased to exist."

*Sale of Stock for Less than Par.*—We have seen that the directors of a corporation have no power to release subscriptions to capital stock. It is equally true that a corporation cannot sell its stock for less than its par value, treating the same as fully paid up; and if a corporation makes such a sale its creditors may call upon the purchaser to make good, so far as may be necessary to pay their claims, the difference between the par value of the stock and the price at which the stock was sold, as for an unpaid subscription. The theory is that the capital stock is a trust fund for the payment of creditors, and that persons trusting it have a right to assume that the amount of stock which it has issued indicates the amount of actual assets in its hands or subject to its call. This doctrine has equity and

public policy and the weight of authority on its side: *Scovill v. Thayer*, 105 U. S. 143. But as between the corporation and the subscriber there is nothing to prevent a sale for less than par value: *Harrison v. Ark. Valley Co.*, 4 McCrary (U. S. C. C.) 266.

And the principle has been held inapplicable to the case of mining corporations where there is no subscribed stock. *In re South Mountain Consolidated Mining Co.*, 8 Sawyer 366, it was held, there being no subscribed stock, that stockholders in mining corporations in California were not liable to pay the nominal par value of their stock, even though the nominal value had not been paid in. Such corporations are said to be *sui generis*, being organized and carried on upon principles wholly different from banking, railroad, insurance and like commercial corporations having a *subscribed* capital stock. In the course of his opinion Judge SAWYER said: "Recent decisions of the courts in the Eastern states in relation to commercial corporations having a *subscribed* stock, organized and carried on upon different principles, have suggested to creditors the application of the remedy to mining corporations. So far as my knowledge extends, this is the first instance in this state of any attempt to enforce a remedy, which could not have been contemplated by the creditor of this or any other mining corporation when the indebtedness was contracted." The attempt accordingly failed. And see *In re South Mountain Mining Co.*, 7 Sawyer 30.

A similar decision has recently been made in Minnesota in reference to the liability of stockholders in mining corporations organized under the laws of the state: *Ross v. Silver and Copper Island Mining Co.*, 29 N. W. Rep. 591 (1886).

In *Clarke v. Lincoln Lumber Co.*, 59 Wis. 655, it was decided that where a statute prohibits the issue of stock for less than par value, a subscriber for stock under an agreement that it shall be issued to him for less than par value cannot recover back money paid under such an agreement.

*Conditions Precedent to Recovery on Subscriptions.*—In *St. Paul &c., Rd. v. Robbins*, 23 Minn. 439, the fact is pointed out that a distinction exists between subscriptions made prior to and for the purpose of effecting corporate organization, and those made after such organization has been completed. In the case first named, a subscription gives to the subscribers an interest in the corporation and the right to take part in organizing it, and this affords a sufficient consideration to support his promise. But in the latter case,