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HART *v.* TICHNOR.[1] SUPREME COURT OF MINNESOTA.

Contract of Subscription—Prospectus.

In order that a prospectus of a proposed publication may become a part of the contract of a subscriber for the work to be published, it must appear that the contents of the prospectus were communicated to him, so that he may be supposed to have been influenced thereby; and if this is not proved, his liability cannot be relieved by the fact that the published work does not conform to the prospectus.

LIABILITY OF THE SUBSCRIBER ON A CONTRACT OF SUBSCRIPTION.

In general terms a subscription is one of a number of mutual promises to contribute to the carrying out of some common enterprise of either public or private interest or advantage by the promisee, or some third person for whose benefit the promise is made. This third person may be, and, in fact, usually is, a corporation; and it is not necessary that it be *in esse* at the date of the subscription, but it would seem to be the better opinion that it must be in contemplation, for otherwise the element of privity between it and the subscribers would be lacking.

Subscriptions fall naturally into two classes, according to the nature of their objects. The first is that of subscriptions to corporate stock, with which may well be classed all other subscriptions, such as those to newspapers, books and other publications, which promise a private gain to the subscriber, and in return for which he receives a supposed equivalent in the shape of a chattel interest of more or less value; the second is that of subscriptions to charitable objects, which offer no pecuniary return, and with which may be classed subscriptions to establish industries and business enterprises in a particular locality, given simply in expectation of the general benefit that will accrue to the subscriber in common with all the other inhabitants. The former may, in some respects, be considered as founded on a valuable consideration, while the latter are purely voluntary; but when we reflect that so long as the intended corporation is unformed, there is nothing at all on the other side of the contract, it is clear that all subscriptions to corporations merely in prospect rest on the same basis, and need a

[1] Reported in 54 N. W. Rep., 369.

consideration before they can be supported.

It has been claimed, even in comparatively recent cases, that the mutual promises of the subscribers were the consideration for each other, but this is in most a mere dictum, there being other sufficient consideration, and is besides a manifest absurdity. For, if this were true, the contract would be complete at the moment of signing the list, and a failure to carry out the incorporation of the company would not release the subscribers, who would still be liable to the promoters of the scheme, supposing the contract to have been made with them. The weight of authority, as well as of reason, is opposed to this view: Am. L. Reg., Sept., 1877; N. S., Vol. 16, p. 546; and it is accordingly held that so long as the proposed corporation has not applied for its charter, the subscriber may withdraw his subscription: Hudson Real Est. Co. *v.* Tower (Mass.), 30 N. E. Rep., 465; Phipps *v.* Jones, 20 Pa., 260; R. R. *v.* Echternacht, 21 Pa., 220; Academy *v.* Robinson, 37 Pa., 210; Shober *v.* Lancaster Co. Park Assn., 68 Pa., 429; Garrett *v.* R. R., 78 Pa., 465; Traction Co. *v.* De La Green (Pa.), 429; S. C. 13 Atl. Rep., 747; Auburn Bolt & Nut Works *v.* Schultz, 22 Atl. Rep., 904; S. C., 143 Pa., 256. But as soon as some action has been taken in furtherance of the common object on the faith of the subscriptions by expending labor or money, or incurring liability, a consideration is raised, and the liability of the subscribers is fixed; and the mere application for a charter would seem to be sufficient in this regard: Com'r's *v.* Perry, 5 Ohio, 57; Holmes *v.* Dana, 12 Mass., 190; Bryant *v.* Goodnow, 5 Pick. (Mass.), 228; Peirce *v.* Ruley, 5 Ind., 69; Bort *v.* Snell, 39 Hun. (N. Y.), 388; Fremont Bridge Co. *v.* Fuhrman, 8 Neb., 99; Homan *v.* Steele, 18 Neb., 652; Carr *v.* Bartlett, 72 Me., 120; Haskell *v.* Oak, 75 Me., 519; Church *v.* Kendall, 121 Mass., 528; James *v.* Clough, 25 Mo. App., 147; G. C. & S. F. Ry. *v.* Neely, 64 Tex., 344; Twin Creek and Colemansville Turnpike Co. *v.* Lancaster, 89 Ky., 552. This rule would seem not to apply to an incorporated company for profit, where the issuance of the stock would doubtless be held a sufficient consideration; but it holds good with regard to all charitable subscriptions, whether made to an incorporated or unincorporated association, and such a subscription, therefore, until there has been an acceptance of it by the promisee or beneficiary, and work done, money expended, or liability incurred, on the faith of it, is a mere offer and may be revoked at any time; but if any of these is done it becomes binding: Robinson *v.* March, 3 Scamm, 198; Pryor *v.* Cain, 25 Ill., 292; Griswold *v.* Trustees, 26 Ill., 41; Thompson *v.* Supervisors, 40 Ill., 380; McClure *v.* Wilson, 43 Ill., 356; Trustees *v.* Garvey, 53 Ill., 401; Snell *v.* Trustees, 58 Ill., 290; Trustees *v.* Carter, 72 Ill., 247; Hall *v.* City of Virginia, 91 Ill., 535; Whitsitt *v.* Trustees of Preëmption Pres. Ch., 110 Ill., 125; Friedlim *v.* Board of Trustees, 23 Ill. App., 494; Trustees *v.* Stetson, 5 Pick. (Mass.), 506; Trusteet of Amherst Coll. *v.* Cowls, 6 Pick. (Mass.), 427; Trustees of Williams Coll. *v.* Danforth, 12 Pick. (Mass.), 541; Thompson *v.* Paige, 1 Metc. (Mass.), 565; Watkins *v.* Eames, 9 Cush. (Mass.), 537; Mirick *v.* French, 2 Gray (Mass.), 420;

Cottage St. Meth. Episc. Ch. *v.* Kendall, 121 Mass., 528; Caul *v.* Gibson, 3 Pa., 416; Ryerss *v.* Congregation of Blossburg, 32 Pa., 114; Phipps *v.* Jones, 20 Pa., 260; Univ. of Vermont *v.* Buell, 2 Vt., 48; McAuley *v.* Billenger, 20 Johns. (N. Y.), 89; Barnes *v.* Perine, 12 N. Y., 18; Pres. Soc. of Knoxboro *v.* Beach, 74 N. Y., 72; Simpson Centenary Coll. *v.* Bryan, 50 Iowa, 293; Christian *v.* Handley, 49 Cal., 347; Grand Lodge of Templars *v.* Farnham, 70 Cal., 158; S. C., 11 Pac. Rep., 592; McMillan *v.* R. R., 15 B. Mon. (Ky.), 233; Comstock *v.* Hand, 15 Mich., 242; Northwestern Conference *v.* Myers, 36 Ind., 275; Pitt *v.* Gentle, 49 Mo., 74; Swain *v.* Hill, 30 Mo. App., 436; White *v.* Scott, 26 Kan., 476; Sturges *v.* Colby, 2 Flip. C. Ct., 163; Hopkins *v.* Upshur, 20 Tex., 93; Doyle *v.* Glasscock, 24 Tex., 201; Rose *v.* R. R., 31 Tex., 58; Williams *v.* Regan, 59 Tex., 438. Such a subscription may, therefore, well be considered as a conditional contract, conditioned upon the performance of some affirmative act in pursuance of the design that induced the subscription.

There is a considerable degree of variance among the authorities as to what acts will constitute a sufficient consideration for a voluntary subscription; and the lack of harmony is well shown by the successive decisions in the courts of various States—perhaps in none more clearly than in Massachusetts. There, in Trustees of Bridgewater Acad. *v.* Gilbert, 2 Pick. (Mass.), 579, the purchasing of materials for the erection of an academy was held an insufficient consideration to support subscriptions for that purpose. This harsh doctrine was modified in successive cases, until, in Watkins *v.* Evans, 9 Cush. (Mass.), 537, it was suggested that the mutual subscriptions were a good consideration for each other. Then the pendulum swung back once more, and at last, in Cottage St. Ch. *v.* Kendall, 121 Mass., 528, the doctrine of the cases cited above was announced as the true rule.

It is not necessary, however, that the work, or expenditure, or liability, should be extensive in order to support the contract. It is sufficient if any positive action be taken on the faith of it. The implied undertaking of the promisee or corporation to hold and appropriate the funds subscribed in conformity with the terms and objects of the subscription, and the liability consequent upon a misappropriation thereof, has been held a sufficient consideration: North. Eccl. Soc. *v.* Matson, 36 Conn, 26; Parsonage Fund in Fryeburg *v.* Ripley, 6 Greenl. (Me.), 442; Trustees of Maine Central Inst. *v.* Haskell, 73 Me., 140; Ladies' Coll. Inst. *v.* Parker, 16 Gray (Mass.), 196. A subscription made on condition that a college shall remain where it then is, is supported by a sufficient consideration if it does so remain.: Williams Coll. *v.* Danforth, 12 Pick. (Mass.), 541; and so is one made on condition that the additional amount requisite be raised by tax, if the tax is levied and collected: La Fayette Co. Monument Co. *v.* Magoon, 73 Wis., 627; S. C., 42 N. W. Rep., 17. Although it is true that a subscription to pay off a pre-existing debt is without consideration, where no new obligation or liability is incurred on the faith of it: Univ. of Des Moines *v.* Livingston, 57 Iowa, 307; S. C., 42; Pres. Ch. *v.* Cooper, 20 N. E.

Rep., 352; S. C., 112 N. Y., 517; yet if, relying on the subscription, the corporation incurs expense and trouble in raising other funds, or by borrowing money to pay off the indebtedness, the subscription will be binding: Univ. of Des Moines *v.* Livingston, *supra;* United Pres. Ch. *v.* Baird, 60 Iowa, 237; Trustees of Meth. Episc. Ch. *v.* Garvey, 53 Ill., 104.

When a subscription is expressly conditioned on raising a certain fund, the labor and expense spent in raising it will be a valid consideration: Farmers' Coll. *v.* Exrs. of McMicken, 2 Disney (Ohio), 495; Westminster Coll. *v.* Gamble, 42 Mo., 411; Trustees of Ky. Bapt. Ed. Soc. *v.* Carter, 72 Ill., 247. The contrary was held in Trustees of Hamilton Coll. *v.* Stewart, 1 N. Y., 581, a case frequently cited with approval by the courts of that State, though it would seem, on its own grounds, to have been wrongly decided. The decision is expressly put upon the ground that there was no request to the trustees to perform services in raising the fund to be implied from the subscription. But it would be very difficult to find a trustee of a charity who, if a subscription were made to him on condition that he raise a certain sum, would not think it equivalent to a request to him to raise that sum; and would any man that made such an offer deny that he expected him to act on it? If, then, action on such an offer is *expected*, can it be said with any show of reason that there is no request to act implied? The action is not a purely voluntary one, for without the offer it would never be taken. The offer is its sole motive power. It may have been that the Court was impressed with the idea that as the services to be performed were not for the benefit of the subscriber, an action could not lie on a request to perform them, unless express; but this ground is equally untenable. The true rule, therefore, is that any expenditure of time, labor, or money, or any liability incurred by the promisee or beneficiary, on the faith of a voluntary subscription, will raise a sufficient consideration to support the subscription, and render the subscriber liable upon it.

Though the subscription is liable to be revoked by the subscriber at any time before it becomes fixed by the attaching of a consideration, this revocation must be affirmative, and will not be implied simply from the fact that the subscriber failed to take the steps necessary to become a member of the corporation organized in pursuance of the original plan: Osborn *v.* Crosby, 63 N. H., 583.

As the subscription has no validity until a consideration is raised to support it, the death or insanity of the subscriber before the consideration attaches is *ipso facto* a revocation of it, and no action then can be maintained thereon. There is no difference in this regard between an ordinary subscription and a promissory note given in place of one: Foust *v.* Board of Publication, 8 Lea (Tenn.), 552; Baird's Est., 13 Phila., 241; Phipps *v.* Jones, 20 Pa., 260; Helfenstein's Est., 77 Pa., 331; McClure *v.* Wilson, 43 Ill., 356; Pratt *v.* Trustees of Bapt. Soc. of Elgin, 93 Ill., 475; Beach *v.* First Meth. Episc. Ch., 96 Ill., 179; Twenty-third St. Baptist Ch. *v.* Cornwell (N. Y.), 23 N. E. Rep., 177; S. C., 117 N. Y., 601; Cottage St. Meth. Episc., Ch. *v.* Kendall, 121 Mass., 528. And, similarly,

where gifts and conveyances to charitable objects are declared void by statute if made within a certain period of the grantor's death, a subscription to such an object will not take effect if the subscriber die within the statutory period: Reimensnyder *v.* Gans, 110 Pa., 17; S. C., 2 Atl. Rep., 425.

A conditional withdrawal will not be effectual to release the subscriber when the subscription is unconditional. When a subscriber, after the organization of the corporation, notifies the trustees that he will not pay his subscription unless a certain person is excluded from speaking in the church he will still be bound: Snell *v.* Trustees of Meth. Episc. Ch. of Clinton, 58 Ill., 290.

Except when prescribed by statute, no special form of words is necessary to constitute a subscription; it may even be oral: Bullock *v.* Falmouth and Chipman Hall Turnpike Co., 85 Ky., 184; Colfax Hotel Co. *v.* Lyon, 69 Iowa, 683; but when expressly required to be in writing, or to be entered in a certain book, it will not be binding unless this is complied with: McClelland *v.* Whiteley, 15 Fed., 322; Fanning *v.* Ins. Co., 37 Ohio St., 339; S. C., 41 Am. Rep., 517. It may be on a separate sheet, or entered with others on the same paper; but in the latter case will still be generally considered as a several, and not a joint contract, and the subscriber will only be held liable for the amount of his individual subscription: Price *v.* Grand Rapids and Indiana R. R. Co., 18 Ind., 137; Landwerlen *v.* Wheeler, 106 Ind., 523; Darnall *v.* Lyon (Tex.), 19 S. W. Rep., 506. But whenever the clear intention of the contract is that the liability shall be joint, as where, after stating the sum to be raised, the subscription paper contained the following words, "The subscribers hereto agree to pay the above amount," though followed by the names of the subscribers, and the separate sums subscribed, it will be held a joint contract: Davis *v.* Belford, 70 Mich., 120; S. C., 37 N. W. Rep., 919.

As no definite form of words is necessary, any agreement which shows an intention to subscribe will be construed as a subscription: Wemple *v.* St. Louis, Jerseyville & Springfield R. R., 120 Ill., 196; Ross *v.* Bank of Gold Hill, 19 Pac. Rep., 243. A statement to the following effect: "We, the undersigned, having associated ourselves together for the purpose of organizing a banking association, and transacting the business of banking, under chapter 52 of the Revision of 1860, do declare and state as follows. . . . Third. The names and residences of the shareholders of this association, with the number of shares held by each, are as follows," signed by the defendant and others, in pursuance of which the association was incorporated, was held a binding subscription to the capital stock of the corporation: Nulton *v.* Clayton, 54 Iowa, 425; S. C., 37 Am. Rep., 513. A promissory note given to a railroad company, payable on a day certain, with interest, containing a condition that if a certain line of railroad should be so constructed that cars might be run between certain points on or before that date, it should be paid, and five shares of the stock of the company should be issued to the maker, otherwise the note to be void, was held only a contract of subscription: Wemple

v. R. R., *supra*; see R. R. *v.* Black, 79 Ill., 262; Wellensburg *v.* West, N. P. R. R., 12 Md., 476.

The subscription paper does not always represent the whole of the contract. Most subscriptions are made on the inducements of a "prospectus," which will in most cases form a material element of the contract, and if its representations prove to be substantially untrue or misleading, the subscriber will be released from all liability on his subscription: *Re* Metropolitan Coal Consumers' Ass'n, 59 L. J. Ch., 281. But it may also appear that the prospectus is merely tentative in its nature, and liable to change at the will of a majority of the stockholders of the corporation: Compton *v.* The Chelsea, 28 N. E. Rep., 662; S. C., 128 N. Y., 537. And if the subscriber was not aware of the representations of the prospectus, and therefore not induced to subscribe on their credit, he cannot avail himself of a failure to make them good to defeat his liability: Hart *v.* Tichnor (the principal case), 54 N. W. Rep., 369.

If the subscriber was induced to sign the subscription by any material misrepresentation made by a duly authorized agent, he may avoid the contract on the ground of fraud: Wells *v.* Jones, 41 Mo. App., 1; Spellier Electric Time Co. *v.* Leedom (Pa.), 24 Atl. Rep., 197. So, too, a subscriber may bring an action to recover back a subscription obtained by fraud: Grangers Life and Health Ins. Co. *v.* Turner, 61 Ga., 561; or may plead it as a set-off to an action by the corporation: Hamilton *v.* Grangers L. & H. Ins. Co., 67 Ga., 145. Such misrepresentations, however, must be clearly representations, not mere expressions of opinion: Armstrong *v.* Karshner, 47 Ohio St., 276; S. C., 24 N. E. Rep., 897; Montg. So. R. R. *v.* Matthews, 77 Ala., 357. When the subscriber knew, or had it in his power to ascertain, the untruth of the representations, he cannot set them up as a defence: Haskell *v.* Worthington (Mo.), 7 S. W. Rep., 481; Goff *v.* Hawkeye Pump and Windmill Co., 62 Iowa, 691. And when he can properly claim a release from liability on such a ground, he should do so at the earliest possible moment: Fey *v.* Peoria Watch Co., 32 Ill. App., 618; *Re* London and Staffordshire Fire Ins. Co., 24 Ch. Div., 194. Misrepresentations, also, to be effectual, must be made by an agent with authority to make them; and where the misrepresentation is contrary to the interest and duty of the corporation, it will be presumed that the agent was without authority: Custar *v.* Titusville Gas and Water Co., 63 Pa., 381; Perkins *v.* Bakrow, 45 Mo. App., 248.

When there is no law to the contrary, a subscription may be made upon express condition, and before it will become a valid contract that condition, if precedent, must be strictly performed: Santa Cruz R. R. *v.* Schwartz, 53 Cal., 106; McGinnis *v.* Kortkamp, 24 Mo. App., 378; Brown *v.* Dibble, 65 Mich., 520; Pontiac, Oxford and Port Austin R. R. *v.* King, 68 Mich., 111; Moore *v.* Campbell, 111 Ind., 328: Ft. Wayne Electric Light Co. *v.* Miller (Ind.), 30 N. E. Rep., 23; Auburn Bolt and Nut Works *v.* Schuttz, 22 Atl. Rep., 904; S. C., 143 Pa., 256; Bohn Mfg. Co. *v.* Lewis (Minn.), 47 N. W. Rep., 653; S. C., 45 Minn., 154; N. Y. Exch. Co. *v.* De Wolf, 31 N. Y., 273; Lesher *v*, Karshner, 47 Ohio St., 302; S. C., 24 N. E. Rep.,

882; Miller *v.* G. C. & S. F. R. R., 65 Tex., 650. But these conditions may, of course, be waived: Mirick *v.* French, 2 Gray (Mass.), 420; and a failure to perform them should be taken advantage of promptly, or a waiver will be inferred: Lee *v.* Imbrie, 13 Or., 510.

A waiver of conditions will be inferred, also, from the fact that the subscriber, with knowledge of the facts that would release him from his subscription, acknowledges a continuing liability by paying assessments thereon: Great West. Tel. Co. *v.* Bush, 35 Ill. App., 213; Inter Mountain Pub. Co. *v.* Jack, 5 Mont., 568; or by taking part in the corporate meetings: Inter. Fair & Exp. Assn. *v.* Walker (Mich.), 47 N. W. Rep., 338; S. C., 83 Mich., 386. But when a subscription, made on sufficient consideration, has failed by non-performance of conditions, a subsequent oral promise to pay it, notwithstanding that non-performance, is without consideration and cannot be enforced: Schuler *v.* Myton (Kans.), 29 Pac. Rep., 163. It is enough, however, if the conditions relating to the individual subscription be fulfilled: Miller *v.* Preston, 4 N. Mex., 314; Smith *v.* Burton, 59 Vt., 408.

The conditions of a subscription attach to a note given in payment of it: Parker *v.* Thomas, 19 Ind., 213; but if one of those conditions be omitted in the note, while the others are expressed, such omission will be deemed a waiver of that condition: Slipher *v.* Earhart, 83 Ind., 173.

It is frequently a matter of doubt whether a condition is precedent or subsequent; and the solution of the question depends mainly upon the nature of the condition and the manner in which it is expressed. Provisions that a depot should be established at a certain point, Paducah & M. R. R. Co. *v.* Parks (Tenn.), 8 S. W. Rep., 842, and that a side track would be constructed upon the premises of the subscriber, Johnson *v.* Ga., M. & G. R. R. Co., 8 S. E. Rep., 531, have been held conditions subsequent.

When the contract of subscription is absolute on its face, no extrinsic or collateral agreements between the subscriber and the promoters or agents of the corporation, who procure him to subscribe, not amounting to fraud or misrepresentation on their part, can be set up for the purpose of discharging or reducing his liability: Ollesheimer *v.* Thompson Mfg. Co., 44 Mo. App., 172, citing Mangles *v.* Dock Co., 10 Sim., 519; Chouteau *v.* Dean, 7 Mo. App., 210; Haskell *v.* Sells, 14 Mo. App., 91; Pickering *v.* Templeton, 2 Mo. App., 424. Thompson *v.* Bank, 19 Nev., 103; S. C., 3 Am. St. Rep., 797; Cunningham *v.* Edgefield, 2 Head (Tenn.), 23; Conn. Ry. Co. *v.* Bailey, 24 Vt., 465; N. C. Ry. Co. *v.* Leach, 4 Jones (N. C. L.), 340; Miss., etc., Ry. Co. *v.* Cross, 24 Ark., 443; Evansville, etc., Ry. Co. *v.* Posey 12 Ind., 363; Smith *v.* R. R., 3 Ala., 650; Kennebec, etc. Ry. *v* Waters, 34 Me., 369; Minn. Thresh Mach. Co. *v.* Davis, 40 Minn., 110 Baile *v.* Educ. Soc., 47 Md., 117 Robinson *v.* R. R., 32 Pa., 334; R. R. *v.* Coleman, 5 Rich. (S. C. L.), 118; Thigpen *v.* R. R., 32 Miss., 347; Marshall Foundry Co. *v.* Killian, 99 N. C., 501; S. C., 6 Am. St. Rep., 539; Morrow *v.* Iron and Steel Co., 87 Tenn., 262; S. C., 10 Am St. Rep., 658; Scovill *v.* Thayer, 105 U. S., 143; Union Mut. Life Ins. Co *v.* Mfg. Co., 97 Ill., 537; S. C.,

Am. Rep., 129; Jewell *v.* Paper Co., 101 Ill., 57; Wight *v.* Shelby R. R., 16 B. Mon. (Ky.), 4. A subscription contract, plain and complete in itself, cannot be varied, enlarged, or contradicted by a letter which was simply one of the preliminary negotiations to the subscription: Smith *v.* Burton, 59 Vt., 408. *A fortiori* is this true of oral conditions made at the time of the subscribing: Nippenose Mfg. Co. *v.* Stadon, 68 Pa., 256; Minn. Thresh. Mach. Co. *v.* Davis, 40 Minn., 110; Masonic Temple Ass'n *v.* Channell, 43 Minn., 353; S. C., 45 N. W. Rep., 716; Piscataqua Ferry Co. *v.* Jones, 39 N. H., 491; Topeka Mfg. Co. *v.* Hale (Kans.), 17 Pac. Rep., 601; Blair *v.* Buttolph, 72 Iowa, 31; Bell *v.* Americus, Preston & Lumpkin R. R., 76 Ga., 754.

As it is an implied condition of a subscription that its objects will be carried out in accordance with the terms of the subscription paper, any material departure from those terms will avoid the contract. An alteration in the subscription list itself, Texas Print. and Lith. Co. *v.* Smith (Tex.), 14 S. W. Rep., 1074, a material change in the proposed route of a railroad, Moore *v.* Hanover Junction and Susq. R. R., 94 Pa., 324, an abandonment, R. R. *v.* Rowland, 9 Atl. Rep., 929, or a fundamental change in its charter, even by authority of the legislature, First National Bank *v.* Charlotte, 85 N. C., 433; R. R. *v.* Marsh, 17 Wis., 13; Nugent *v.* Supervisors, 19 Wall., 241; R. R. *v.* Leach, 4 Jones (N. C. L.), 340; Chartiers Ry. Co. *v.* Hodgens, 77 Pa., 187; Snork *v.* Ga. Imp. Co. (Ga.), 9 S. E. Rep., 1104, will release a non-assenting subscriber. But it would seem to be the prevailing opinion that when the alteration in the contract tends to benefit the subscriber he is still bound by his subscription: Jacks *v.* Helena, 41 Ark., 213; Cross *v.* Peach Bottom R. R., 90 Pa., 392; Gibbons *v.* Grinsel (Wis.), 48 N. W. Rep., 255. When the legislature reserves the right to amend or repeal the charter all subscriptions are made in view of that provision; and an exercise of that right will not avoid the subscription: Union Hotel Co. *v.* Hersee, 79 N. Y., 454 S. C., 35 Am. Rep., 536. The subscriber will also be bound if he has given a note for his subscription prior to the alteration of the charter: Mitchell *v.* Rome R. R., 17 Ga., 574, or if, knowing that the estimates of the original prospectus have become illusory, he consents to a change of plan: Compton *v.* The Chelsea, 28 N. E. Rep., 662; S. C., 128 N. Y., 537. And it has been held that if alterations are made in a contract of subscription during the progress of the transaction, it is good on the original terms as to the parties who signed it before alteration, and on the altered terms as to those who signed it afterward: Davis *v.* Shafer, 50 Fed. Rep., 764.

It is also an implied condition in a subscription to the stock of a corporation already incorporated, that all the capital stock shall be subscribed before the subscriber is liable. The amount of stock being fixed by the charter, the subscription is in effect a promise to pay on condition the whole fund is raised. Until the stock is all subscribed, therefore, no liability attaches to the subscriber: Mill Dam Co. *v.* Ropes, 6 Pick. (Mass.), 35; Bridge Co. *v.* Chapin, 6 Cush. (Mass.), 53; R. R. *v.* Gould, 2 Gray (Mass.), 278; Masonic Temple Ass'n. *v.* Channell, 43 Minn., 353; S. C., 45

N. W. Rep., 716; Rockland, etc., Steamboat Co. *v.* Sewall, 78 Me., 167; Hotel Co. *v.* Bolton, 46 Tex., 633; Belton Compress Co. *v.* Saunders, 70 Tex., 699; Orynski *v.* Loustavnan (Tex.), 15 S. W. Rep., 674; R. R. Co. *v.* Barker, 32 N. H., 363; Haskell *v.* Worthington (Mo.), S. W. Rep., 481; Exp. Co. *v.* Canal St. Ry. Co., 7 So. Rep., 627. But a subscriber who knowingly participates in the organization and management of the company will be estopped from setting up this or any similar defence: R. R. *v.* Preston, 35 Iowa, 115; Bridge Co. *v.* Cummings, 3 Kans., 55; Hughes *v.* Mfg. Co., 34 Md., 316; Hager *v.* Cleveland, 36 Md., 476; Musgrove *v.* Morrison, 54 Md., 161; R. R. *v.* Abell, 17 Mo. App., 645; Livesey *v.* Hotel Co., 5 Neb., 50; Jewett *v.* R. R., 34 Ohio St., 601; Bell's App., 115 Pa., 88; Weinmann *v.* R. R., 118 Pa., 192. And if the articles of incorporation, or the circumstances which affect the interpretation of the agreement to take stock in the corporation, show an intention that the corporation shall be fully organized and commence business before the full capital stock is subscribed, the former rule does not apply: Arkadelphia Cotton Mills *v.* Trimble, 15 S. W. Rep., 776. This defence may also be waived by an express promise to pay the subscription: Anderson *v.* R. R. (Tenn.), 17 S. W. Rep., 803.

All statutory requisites must be complied with or the subscription will be void: Hibernia Turnpike Road *v.* Henderson, 8. S. & R. (Pa.), 219; Clark *v.* Monongahela Nav. Co., 10 Watts (Pa.), 364; Excelsior Grain Binding Co. *v.* Stayner, 61 How. Pr. (N. Y.), 456; Coppage *v.* Hutton, 124 Ind., 401; S. C. 24 N. E. Rep., 112. If the corporation is organized illegally, a subscriber who does not take part therein is released from his obligation: California Southern Hotel Co. *v.* Russell (Cal.), 26 Pac. Rep., 105; S. C., 88 Cal., 277. A subscriber will not be liable unless the undertaking is bona fide commenced within the period prescribed by the charter, McCully *v.* Pittsburgh & Connellsville R. R., 32 Pa., 25, and if the law requires payment of the first instalment of the subscription in cash, a payment by promissory note will not make the subscriber liable: Leighty *v.* Susq. & Waterford Turnpike Co., 14 S. & R. (Pa.), 434. But a literal compliance with statutory requirements is not necessary; a substantial compliance is sufficient: Woodruff *v.* McDonald, 33 Ark., 97.

It is not necessary that the corporation to which or to whose stock the subscription is made should be in existence. It is enough if it be in prospect, and the subscriptions be made in view of that fact; and when the company is incorporated and accepts the subscription it becomes valid and binding: Glenn *v.* Busey, 5 Mackey (D. C.), 233; Buffalo and Jamestown R. R. Co., *v.* Clark, 22 Hun. (N. Y.), 359; Red Wing Hotel Co. *v.* Friedrich, 26 Minn., 112; Fulton *v.* Sterling Land and Inv. Co., 28 Pac. Rep., 720; S. C., 47 Kans. 621; Marysville Electric Light and Power Co. *v.* Johnson (Cal.), 29 Pac. Rep., 126; S. C. 93 Cal. 538; McCormick *v.* Great Bend Gas & Fuel Co. (Kan.), 29 Pac. Rep., 1147; Ref. Ch. *v.* Brown, 17 How. Pr. (N. Y.), 287; S. C., 24 How. Pr., 76; Willard *v.* Trustees, 66 Ill., 55. No formal acceptance, or notice of such acceptance is necessary; it may be inferred from the action of the

company when incorporated, in making expenditures or incurring obligations in pursuance of the object of the subscriptions, which will, of course, be inferred to have been made on the faith of those subscriptions: Richelieu Hotel Co. *v.* Intern'l Mil. Encamp. Co., 29 N. E. Rep., 1044. But as there must be privity of contract, it is necessary to show that the corporation is the one contemplated by the subscription: Carr *v.* Bartlett, 72 Me., 120; Phillips Limerick Acad. *v.* Davis, 11 Mass., 113; Pres. Soc. of Knoxboro *v.* Beach, 74 N. Y., 72. When a portion of the subscribers held a meeting and elected two persons as a committee who had not signed the subscription list, another subscriber, who had not been notified of the meeting, was not present at it, and had not recognized the committee in any way, was held not liable on his subscription, as there was no privity of contract between him and the committee: Curry *v.* Rogers, 21 N. H., 247.

A contract of subscription that is *ultra vires* on the part of the corporation, as when the subscription is for stock at less than par value, or in excess of the charter limit, is void, and imposes no liability on the subscriber: Zelaya Min. Co. *v.* Meyer, 8 N. Y. Suppl., 487; Clark *v.* Turner, 73 Ga., 1.

Any action by the corporation that is a fraud upon the subscriber will release him from his obligation; but it must be a substantive, not merely an attempted, fraud. A release of a subscriber being void by the weight of authority, will not operate to release the others: Fey *v.* Peoria Watch Co., 32 Ill. App., 618; Melvin *v.* Lamar Ins. Co., 80 Ill., 446; Hayes *v.* Ins. Co., 125 Ill., 639; Whittlesey *v.* Frantz, 74 N. Y., 456; Jewett *v.* R. R., 34 Ohio St., 601.

When the contract of subscription is voidable as between the corporation and the subscriber, it is still binding as between the subscriber and a creditor without notice, and may be sued upon by the latter: Joseph *v.* Davis (Ala.), 10 So. Rep., 830; Elyton Land Co. *v.* Birmingham Co., 92 Ala., 407; S. C., 9 So. Rep., 129; Parsons *v.* Joseph, 92 Ala., 404; S. C., 8 So. Rep., 788; Turner *v.* Grangers' Ins. Co., 65 Ga., 649; S. C., 38 Am. Rep., 801; Hamilton *v.* Grangers' Ins. Co., 67 Ga., 145; Howard *v.* Glenn (Ga.), 11 S. E. Rep., 610; R. R. *v.* Eastman, 34 N. H., 124; McDermott *v.* Harrison, 9 N. Y. Suppl., 184; McDowall *v.* Sheehan, 13 N. Y. Suppl., 386. Nor can the subscriber set up as a defence against a creditor the fact that his subscription was a fictitious one, made only to induce others to subscribe. He cannot avail himself of his own fraud: Blodgett *v.* Merrill, 20 Vt., 509; Jewell *v.* Rock River Paper Co., 101 Ill., 57. When the liability of a subscriber has attached, he cannot free himself by erasing or cutting out his name from the subscription list: Greer *v.* Chartiers Ry. Co., 96 Pa., 391.

A transfer of stock does not relieve the original subscriber from liability for an unpaid subscription: Messersmith *v.* Sharon Sav. Bk., 96 Pa., 440; West Nashville Co. *v.* Nashville Sav. Bk., 6 S. W. Rep., 340, unless accepted by the corporation before assessment is made: Stewart *v.* Walla Walla Print. and Pub. Co., 1 Wash. St., 521.

A subscription to the stock of a corporation does not stand on the