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CONDITIONAL SUBSCRIPTIONS TO THE CAPITAL STOCK OF CORPORATIONS.

In the early days of corporations, before the underlying principles which govern the relations of a corporation with its members on the one hand and its creditors on the other were developed, a usual practice in seeking for subscribers to a new company was for the company's agent, or the commissioners appointed under the statute, to make certain promises whether to one or more of the subscribers, and either in the contract itself or by parol, which promises were with more or less propriety and very naturally regarded by the subscribers as conditions upon the performance of which only they were to be held to their subscriptions. This practice, harmless enough in its inception and purpose, afforded a ready means to speculators with doubtful authority of raising necessary sums, and, therefore, became the means of occasioning not only much confusion in the law, but also considerable diversity of opinion in the minds of various courts, which has resulted at length in the formation of two entirely distinct and conflicting lines of decisions.

It seems advisable, however, before discussing these, to clear

the way by eliminating from the field of discussion one familiar condition (so called) which stands quite on a different footing from the rest, *i. e.*, the condition that all of the capital stock shall be subscribed for before any one subscriber shall become liable to pay for his shares. In the absence of a contrary statute, it seems clear that the promise of a subscriber, whether so expressed in his contract or not, is as a matter of fact intended to be, and therefore should as a matter of law be regarded as, dependent upon a subscription to the full amount named in the charter or constating instrument. One of the most useful features of modern business corporations is the opportunity afforded to accomplish with others what would be impossible for one man unaided; and it is apprehended that few indeed would be the subscriptions of large enterprises, if it were thought or known that each subscriber might by himself or with a few fellows only be required to carry out an enterprise planned for many hands or much capital.

Conformably to this principle of natural justice, the courts have from an early date upheld the requirement of a full *bona fide* subscription by competent persons before holding liable any particular subscriber, and particularly is this the case where the charter contains an express condition to that effect (though on principle such condition ought to be readily implied by law).¹ *Salem Mill Dam Co. v. Roper* (1829), 9 Pick. 187 was a case where a charter authorized no call except for preliminary expenses² of organization until the whole amount had been subscribed; the evidence showed that the number could only be regarded as completed by counting thirty shares subscribed for by one man in another's name, and without authority. As the call was professedly "for materials purchased or contracted for, to be used in carrying forward and completing the general purposes" of the institution, it was held that the actual deficit of thirty shares suspended the

¹The rule is the same where the amount of stock has been fixed by the corporation itself: *Hoagland v. C. & Ft. W. R. R.* (1862), 18 Ind. 45; *Payson v. Withers* (1873), 5 Biss. C. C. 269. But see *Kennebec R. R. v. Jarvis* (1852), 34 Me. 360; *Proprietor's Hotel* (1856), 6 Mass. 586.

²This point about preliminary expenses is amplified in *Central Turnpike Co. v. Valentine* (1830), 10 Pick. 142.

power of levying and collecting assessments, and plaintiff company could not recover. The doctrine is subsequently explained by the same court in the most satisfactory manner, Dewey, J., in *Cabot & West Springfield Bridge Co. v. Chapin* (1850), 6 Cush. 50, saying: "The true construction of the contract of the defendants is that they were to take and pay for three shares in a stock company, the capital stock of which was to consist of 400 shares of \$100 each. Before the making of the subscription by the defendants the capital stock and the number of shares had been fixed by the corporation. The number of shares and the sum to be paid for each being thus fixed and inserted in the articles of subscription, the subscription was to that extent a conditional one, and every subscriber was at liberty to refuse to proceed with the proposed undertaking until the requisite number of shares had been taken. It might materially affect the interests of the subscribers whether the whole number of shares or a less amount was subscribed for. . . . The whole undertaking as a matter of profit and loss to the subscribers might depend upon having the full amount of the capital taken up." *Stoneham B. R. Co. v. Gould* (1854), 2 Gray, 278, declares the rule as follows: "It is a rule of law too well settled to be now questioned, that when the capital stock and number of shares are fixed by the act of incorporation or by any vote or by law passed conformably to the act of incorporation, no assessment can be lawfully made upon the share of any subscriber until the whole number of shares has been taken. This is no arbitrary rule: it is founded on a plain dictate of justice and the strict principles regulating the obligation of contracts. When a man subscribes for a share of stock to consist of 1000 shares, he binds himself to pay 1/1000 part of the cost of the enterprise. If only 500 shares are subscribed, he would be liable to assessments to pay a 1/500 part of the cost, besides running the risk of entire failure and loss of the amount advanced." The authorities are innumerable which support this rule.¹

¹ *Company v. Theobald* (1828), 1 Moo. & M. 151; *Pitchford v. Davis* (1839), 5 M. & W. 2; *Carlisle v. Cahawba R. R.* (1842), 4 Ala. 76;

As already stated, no doubt can exist as to the legality of the condition, when imposed either by the charter itself or by the terms of the subscription paper, that all the capital stock shall be subscribed before any single subscriber can be held

Littleton Co. *v.* Parker (1844), 14 N. H. 543; Atlantic Cotton Mills *v.* Abbott (1852), 9 Cush. 423; Penobscot R. R. *v.* Dunn (1855), 39 Me. 587, holding that the books of the company are competent to prove such full subscription; Galvanized Iron Co. *v.* Westoby (1852), 8 Exch. 17; Penobscot R. R. *v.* Dunn (1855), 40 Me. 172, holding that if the subscription is once completed, it is immaterial that some subscribers prove unable to pay—which is a chance every one takes; N. H. Central R. R. *v.* Johnson (1855), 30 N. H. 390; Controcook Valley R. R. *v.* Baker (1855), 32 N. H. 363; Penobscot R. R. *v.* White (1856), 41 Me. 512, reiterating the doctrine of Penobscot R. R. *v.* Drummer, *supra*, and insisting only on the *bona fides* of the full subscription; People's Ferry Co. *v.* Balch (1857), 8 Gray, 303; Kirksey *v.* Florida R. R. (1857), 7 Fla. 23; Atlantic Co. *v.* Mason (1858), 5 R. I. 463; Penobscot R. R. *v.* Bartlett (1858) 12 Gray, 244, where upon similar facts the Massachusetts court arrived at the same conclusion as had the Maine court in Penobscot R. R. *v.* Dunn, *supra*; Fry *v.* Lexington R. R. (1859), 2 Metc. Ky. 314; Lewis Island R. R. Co. *v.* Bolton (1860), 48 Me. 451; Topeka Bridge Co. *v.* Cummings (1864), 3 Kan. 55, where the same rule was applied, though the contemplated structure had, in fact, been erected; Chase *v.* Sycamore R. R. (1865), 38 Ill. 215, Hughes, *v.* Antietam Mfg. Co. (1870), 34 Md. 317; Childs *v.* Smith (1869), 55 Barb. 45; Read *v.* Memphis Gas Co. (1872), 9 Heisk. 545; Peoria R. R. *v.* Preston (1872), 35 Ia. 118; Somerset R. R. *v.* Clarke (1873), 61 Me. 384; Livesey *v.* Omaha Hotel Co. (1876), 5 Neb. 50; Belfast R. R. Co. *v.* Cottrell (1876), 66 Me. 185; St. Paul R. R. *v.* Robbins (1877), 23 Minn. 439; Allman *v.* Havana R. R. (1878), 88 Ill. 521; Santa Cruz R. R. *v.* Schwartz (1878), 53 Cal. 106; Cheraw R. R. *v.* Garland (1880), 14 S. C. 63; Bray *v.* Farwell (1880), 81 N. Y. 600; Hale *v.* Sanborn (1884), 16 Neb. 1; Rockland Mt. Desert Co. *v.* Sewall (1886), 12 Am. & Eng. Corp. Cas. (Mass.) 85; Exposition Rwy. & Imp. Co. *v.* Canal St. R. Co. (1890), 42 La. Ann. 370; Masonic Temple *v.* Channell (1890), 45 N. W. (Minn.) 716. "No question is made that at common law, where the charter or articles of incorporation or terms of subscription make no different rule, payment of the subscription to the capital stock of a corporation cannot be required until the whole amount of stock has been subscribed. There are solid reasons for the rule—reasons based not only on considerations of public policy but on the presumed understanding and intention of the subscriber. . . . It is, therefore, implied in the contract of subscription as a condition precedent to its being in force, that the entire amount of stock shall be subscribed for. Of course, if the articles of incorporation provide that payment of subscription shall be called for before the whole stock is subscribed, that, as between the parties, is binding." Orynski *v.* Loustaman (1891), 15 S. W. (Tex.) 674; Spellier Time Co. *v.* Leedom (1892), 24 Atl. (Pa.)

to his promise, such condition being so agreeable to public policy as well as to common sense that it is often implied by law. But this legal implication is so far subject to the will of the parties that it can be entirely set aside by mutual consent, which is inferred in those numerous cases where the governing law authorizes business to be begun and the subscriptions to be collected as soon as a certain fraction of the entire capital or a fixed sum of money has been subscribed.¹ The simple principle is thus described in *Penobscot R. R. v. Dunn* (1855), 39 Me. 587: "Such conditions are ordinarily incorporated into subscriptions for the protection of the subscribers, and to insure the completion of the enterprise. When a subscription is made upon condition that the company shall not be organized or shall not enter upon the principal object of its organization until a given amount of its stock shall be subscribed, such condition is a condition precedent, and the company will not be authorized to enforce the collection of such subscription until they have complied with such condition on its part. A person might be willing to become a stockholder in a railroad corporation which should have

197; *Denny Hotel Co. v. Schram* (1893), 32 Pac. (Wash.) 1002; *Lock Co. v. Hockaday* (1893), 16 S. E. (Va.) 677.

That the law of waiver applies to this, as well as to other classes of conditions, see *Ossipee Hosiery Co. v. Canney* (1874), 54 N. H. 295; *Ridgway R. R. v. Boush* (1875), 43 Conn. 86; *St. Charles Co. v. Britton* (1876), 2 Mo. App. 290; *Musgrave v. Morison* (1880), 54 Md. 161; *R. Mt. D. & S. Co. v. Sewall* (1886), 78 Me. 167; *Match Co. v. Senwright* (1889) 16 C. of S. Cases 989; *Exposition Railway Co. v. Canal St. Railway Co.* (1890), 7 So. (La.) 627; *Cotton Mills v. Trimble* (1891), 15 S. W. (Ark.) 776; *Anderson v. Middle Term R. R.* (1892), 17 S. W. (Tenn.) 803; *Auburn Opera Association v. Hill* (1893), 32 Pac. (Cal.) 587; *Portland Co. v. Spillman* (1893), 32 Pac. (Ore.) 688.

For illustrations of conduct not amounting to a waiver in this same class of cases, see *Orynski v. Loustaman* (1891), 15 S. W. 674; *Denny Hotel Co. v. Schram* (1893), 32 Pac. (Wash.) 1002, holding that payment made in ignorance of the facts was no waiver; *Hards v. Plattley Co. Va.* (1893), 35 Neb. 263.

Failure to secure the entire capital after a reasonable time is evidence of abandonment: *Fountain Ferry Co. v. Jewell* (1848), 8 B. Mon. 141.

¹ This is the correct explanation of *Schenectady Co. v. Thatcher* (1854), 11 N. Y. 102, which, however, goes too far in saying that the full subscription is only necessary when required by statute.

\$400,000 of its stock subscribed before its organization and \$700,000 before entering into a contract for building and completing its road who would be unwilling to subscribe to its stock without restriction.”¹

Central Turnpike Co. v. Valentine (1830), 10 Pick. 142, had settled the right of the subscriber to demand that all the required capital should be subscribed before he is called upon. This amount of required capital may be fixed in the charter, or that instrument may simply prescribe the means for fixing it—which means when once adopted will be equally efficacious. So, in *Lexington, Etc., R. R. Co. v. Chandler* (1847), 13 Metc. 311, where the act provided for “not more than two thousand shares, the number of which to be determined from time to time by the directors of the company,” a stockholder was held bound from and after the time at which the directors fixed the number of shares.²

Not only must the required amount of capital be subscribed for, but ordinarily it must be subscribed for in cash on the theory that a subscription is based upon so much money being put into the enterprise; and it is apprehended that the cases establish this rule quite apart from the question, hereafter to be discussed, whether conditional subscriptions are in

¹ *Harlem Canal Co. v. Seixas* (1829), 2 Hall, 504; *City Hotel v. Dickinson* (1856), 6 Gray, 586; *Somerset R. R. v. Cushing* (1858), 45 Me. 524; *P. & K. R. R. v. Bartlett* (1858), 78 Mass. 244; *Boston R. R. v. Wellington* (1873), 113 Mass. 79; *Hanover Junction R. R. v. Haldeman* (1876), 82 Pa. 36, where the statute gave the corporation full powers when ten per cent. of its stock had been subscribed for; *St. Charles Co. v. Button* (1876), 2 Mo. App. 290; *Cherew R. R. v. Garland* (1880), 14 S. C. 63; *Brand v. R. R.* (1886), 77 Ga. 506; *Galena R. R. v. Ennor* (1886), 116 Ill. 55; *Cal. So. Hotel Co. v. Russell* (1891), 88 Cal. 277. See, also, *Hoagland v. Cincinnati R. R.* (1862), 18 Ind. 452; *Hunt v. Kansas Bridge Co.* (1873), 11 Kan. 311; *Livesey v. Omaha Hotel Co.* (1876), 5 Neb. 50; *Emmitt v. Springfield R. R.* (1876), 31 O. 23, where subscriber waived his right to withdraw; *Nangatuck Co. v. Nichols* (1891), 20 Atl. (Conn. 315), where the court refused the subscriber permission to withdraw, construing the charter provision as intended to protect creditor's rights only.

² *Worcester, Etc., R. R. v. Warren Hinds* (1851), 8 Cush. 110; *Rockland Co. v. Sewall* (1888), 14 Atl. (Me.) 939; *Haskell v. Worthington* (1888), 7 S. W. (Mo.) 981. But see *Kennebec R. R. Co. v. Jarvis* (1852), 34 Me. 360.

themselves valid or not. So, in *Troy R. R. v. Newton* (1857), 8 Gray, 596, it was held that a contractor's subscription for stock which he was to receive in payment of his services, and another subscription conditional upon the railroad being located between two points specified, should not be included in determining whether the requisite number had been subscribed.¹

Further, the rule has no application to a going concern increasing its capital stock; the contrary rule there prevailing and the reasons therefor are well illustrated in *Nutter v. Lexington R. R. Co.* (1856), 6 Gray, 85. Nutter's assignor had subscribed to part of an authorized new issue of six hundred shares of stock, and had paid for them; his assignee having discovered that the entire issue had never been taken up, now sues to recover back the money paid, claiming that the same implied condition existed here that was admitted to exist in the case of a newly forming corporation; but the court decided against him, pointing out that in the present case, the corporation being already in active existence, the issue of new stock was not a condition precedent to corporate existence, but was merely an auxiliary project which might either succeed or partially or totally fail without affecting the continuity of the corporate life or the validity of the corporate contracts.² The

¹ *N. Y. Exchange Co. v. DeWolf* (1865), 31 N. Y. 273, condemning fraudulent subscription; *Philips v. Covington Co.* (1859), 2 Metc. 219; *Rutland R. R. v. Thrall* (1863), 35 Vt. 535; *N. Y. R. R. v. Hunt* (1872), 39 Conn. 75; *Holman v. State* (1885), 105 Ind. 569; *Cal. So. Hotel Co. v. Russell* (1891), 88 Cal. 277. Compare *Hahn's App.* (1887), 44 Leg. Int. (Pa.) 38, criticising a married woman's subscription; *Cal. So. Hotel Co. v. Russell* (1891), 88 Cal. 277, holding that directors cannot as against a dissenting stockholder ratify unauthorized subscriptions and thus bind him.

² *White Mts. R. R. v. Eastman* (1856), 34 N. H. 124, where the charter limiting the number of shares between 500 and 10,000, it was held that company might levy an assessment after 500 shares had been subscribed before actually deciding what the ultimate number of shares was to be; *Iowa, Etc., R. R. v. Perkins* (1869), 28 Ia. 281; *Clarke v. Thomas* (1877), 34 O. 46. But a condition may properly be imported into the subscriptions to the increase that they shall be void unless the entire amount is subscribed: *Hahn's App.* (1886), 7 Atl. (Pa.) 482, exonerating the defendant because a part of the subscriptions had been made by two married women who could not be bound by such a contract, even though they may hold and transfer stock.

decision, of course, was not intended to, and does not, apply to the case where such a condition is actually made a condition of the legality of the new issue.

And the rule is thus restated in the recent case of *P. & F. R. Co. v. Spellman* (1893), 32 Pac. (Oregon) 688, where the court disposes of an ingenious argument based upon the Pennsylvania view of conditional subscriptions: "It is argued that the conditional subscription having been made before an organization was effected must be considered absolute and unqualified, and the conditions attached thereto void. In support of this conclusion we are cited to *Putman v. R. R.*, 16 Wall. 396; *Caley v. R. R.*, 80 Pa. 367; *Boyd v. R. R.*, 90 Pa. 172. These decisions were made under the statutes of Pennsylvania and Indiana, which require as a condition precedent to granting a charter for a railroad corporation that a certain amount of capital stock shall be subscribed, and upon the faith of which the charter is issued. . . . Under these statutes any conditions attached to the subscription are held void as a fraud upon the state corporate creditors and other subscribers: *R. R. v. Beggar*, 34 Pa. 455." The learned justice simply adds that this peculiar interpretation does not hold in Oregon.

It should, perhaps, be added that the requirements of the law are satisfied when a *bona fide* subscription of the full (or required) amount of capital has been made; the subscriber cannot then escape liability by showing that some of the subscribers repudiated their obligation. So decided in *West v. Crawford* (1889), 80 Cal. 19.

In *Ridgway R. R. v. Brush* (1875), 43 Conn. 86, a certain M. & Co. had subscribed to a part of the requisite number by an agreement on its face like all the other subscriptions, but under a secret arrangement with the directors by which only one-half was to be paid in cash and the other half in work and materials—for M. & Co. were contractors. The agreement was *bona fide* on the part of the directors to the extent of their honestly believing that M. & Co. were at least competent to fulfil the resulting contract, but the event proved otherwise, for M. & Co. quit work when very little had been accom-

plished. In all of this transaction and especially in the obvious consequence that the company was thus to all intents deficient in just that amount of subscription, Brush saw an opportunity to rest his own unwillingness to pay for his subscription; his case evidently hinged on the legality of M. & Co.'s contract, and the court, taking the bull by the horns and adopting the principle of *White Mts. R. R. v. Eastman* (1856), 34 N. H. 124, decided that the parol agreement was void as to other subscribers, who could have insisted upon it and therefore cannot regard it as a nullity in this action. The question of estoppel thereupon became unimportant,¹ and the exposition of that doctrine may be passed over as dicta.

Before concluding this subject, an exception to the rule as stated should be noted in that while a call for ordinary expenses of operation of a company cannot be sustained until all the capital is subscribed, a special call for purpose of meeting expenses of organization may be made at any time; this is clearly stated in *Salem Mill Dam Co. v. Roper* (1829), 9 Pick. 187, where, however, the call had been levied expressly "for materials purchased or contracted for to be used in carrying forward and completing the general purpose of the institution," and (it appearing that part of the required number of shares had been subscribed for by an agent who had no authority to act for his principal) was evidently illegal.²

Quite a different rule prevails with reference to subscribers to an increase of the capital stock—a subject which is entitled to a passing mention. As contrasted with the position of a subscriber to the stock of a new corporation, the subscriber to

¹ See *Stilman v. Dougherty* (1875), 44 Md. 380, where defendant was held estopped from setting up the incomplete subscription list by reason of his intimate connection with the affairs of the company.

² In addition to cases heretofore cited see *Central Turnpike Co. v. Valentine* (1830), 10 Pick. 142; *Stoneham R. R. v. Gould* (1854), 2 Gray, 277; *Carlisle v. Cahawba R. R.* (1842), 4 Ala. 76. Indeed, the whole principle, as stated in the case last cited, may safely be rested on the general ground that the corporation must comply with all the requirements of its charter before attaining its real corporate existence. Cf. *Price v. Grand Rapids R. R.* (1859), 13 Ind. 58; *Cowley v. Id.*, id. 61; *Hamilton v. Id.*, id. 347; *People's Mutual Ins. Co. v. Westcott* (1860), 14 Gray, 440.

an increase of the capital stock of an existing corporation may claim, perhaps, an advantage, but in respect of the question in discussion, his rights are distinctly inferior. It is probably putting it too strongly to say that the courts are opposed to increasing stock, nor is there any principle of public policy on which such opposition might be grounded; certain it is, however, that they have always been ready to release such subscriber, if in any way the statutes governing the increase have been slighted or disregarded. So, in the case of national banks, whose increase of stock is governed by § 5142 of the Revised Statutes and Act of May 6, 1886, it is held that where it is made without the consent of two-thirds of the stockholders, and without the certificate and approval of the comptroller of the currency, the entire proceeding is invalid, and preliminary subscriptions cannot be enforced.¹ Nor can one who subscribes for part of an increase, which is not actually made, and who without his knowledge receives old shares and receipts for dividends upon them, be estopped from denying his liability for an assessment which valid as to old was of course ineffectual as to any new shares.² *Fitzpatrick v. Publishing Co.* (1887), 83 Ala. 604, seems to indicate that an equally stern rule is applied to corporations incorporated under state laws and governed entirely by them.

The disadvantage of the subscriber to the new stock is that he is bound by his promise whether or not the proposed increase is entirely taken up, and consequently though he may be the only subscriber. This view, which is generally accepted, is based upon the theory that creditors must be taken to have relied upon the least amount of capital upon which the company is authorized to begin business. Obviously, if the creditors are the only interested parties to this contract, the argument is sound; but one may express a doubt whether the objection that a subscriber may have not contemplated such a result of his contract or offer has not been lost sight of.³

¹ *Winters v. Armstrong* (1889), 37 Fed. 508.

² *Stephens v. Foliet* (1890), 43 Pac. 842.

³ *Avengo v. Bank* (1888), 40 La. Ann. 799. No difficulty is experienced

Having thus considered a class of conditions which are always favored by the courts, we pause for a moment, before entering upon the general subject, to note another class of conditions which are in strong contrast with the above, being those which are always frowned upon when they may affect unfavorably innocent corporate creditors. Such are those by which it is agreed between the corporation and its subscriber that the latter shall obtain his shares for something less than their par value.¹

In *Morrow v. Iron & Steel Co.* (1889), 87 Tenn. 262, the particular form the transaction took was a condition in the subscription that the subscriber should receive in addition to his stock an equal amount of the company's bonds secured by a first mortgage on the company's plant; it was held in a suit by the company to recover the amount of the subscription that might recover the full amount, the court thus allowing the company to repudiate the illegal stipulation without subjecting itself to any liability.

To enlarge on this kind of subscriptions, which have been defined as fraudulent in law, would be to trespass too far on the Trust Fund Theory, and we therefore pass on to our main subject, only throwing out the suggestion that possibly the real

in discriminating such cases from those holding that one who subscribes originally after the whole amount has been allotted incurs no liabilities and gains no privileges thereby : *Terwilliger v. G. W. Tel. Co.* (1871), 59 Ill. 249; *G. W. Tel. Co. v. Gray* (1887), 122 Ill. 630; *G. W. Tel. Co. v. Bush* (1889), 35 Ill. App. 213.

¹ *Blodgett v. Morrill* (1848), 20 Vt. 509; *Mann v. Cooke* (1850), 20 Conn. 178; *Robinson v. Pittsburg R. R.* (1858), 32 Pa. 334; *New Albany R. R. v. Fields* (1858), 10 Ind. 187; *Evansville R. R. v. Posey* (1859), 12 Ind. 363; *Cox's Case* (1863), 4 DeG. J. & S. 53; *Bridger's Case* (1870), L. R. 5 Ch. App. 305; *Schaeffer v. Ins. Co.* (1870), 46 Mo. 248; *Peychaud v. Hood* (1871), 23 La. Ann. 732; *Union Fire Ins. Co. v. Mfg. Co.* (1881), 97 Ill. 537; *Wetherbee v. Baker* (1882), 35 N. J. Eq. 501; *Galena R. R. v. Ennor* (1886), 116 Ill. 55; *Cleveland Works v. Ennor* (1886), 12 Am. & Eng. Corp. Cas. 88, are among the cases particularly denouncing this practice. Cf. *Racine Bank v. Ayers* (1860), 12 Wis. 512; *Tel. Co. v. Haight* (1894), 49 Ill. App. 633, condemning a condition that the subscriber might withdraw at any time; *Armstrong v. Dansby* (1894), 75 Hun. 405, deciding that as such a condition is invalid, its presence in A's subscription is no defence to B in a suit on his. But see *Huston v. Coop. Soc.* (1879), 21 Kan. 663.

basis of the much mooted Trust Fund Theory may prove to be nothing more than a condition imported by law on grounds of public policy into contracts of subscription.

As preliminary to a study of our main subject, it is proper to say that, of course, no question can arise as to the legality of or the necessity of complying with any condition imposed by the charter or governing law as a prerequisite to corporate action of any kind; in such case, the company cannot sue the subscriber for precisely the same reason that it can do no other corporate act, viz., because it has as yet no corporate rights. Probably the ground on which such charter provisions and the usual private conditions most nearly meet is where the law requires a subscription of so many thousand dollars per mile to a railroad company's stock. *Swartout v. Mich. Air Line Co.* (1872), 24 Mich. 389, is the leading case to the effect that such a requirement is a condition precedent that must be strictly complied with.¹

The right of a corporation to accept ordinary conditional subscriptions might be opposed on one of two grounds; on the one hand, it may be argued on the doctrine of special capacities that a corporation is not, at least ordinarily, endowed by the legislature with such special power; and on the other, that even assuming it had, in this respect, the same powers as an individual, it is against public policy that public enterprises once begun should have their progress suddenly interrupted by the refusal of various subscribers on various grounds to pay their subscriptions. As to the first point, there seems no question on principle that the power in question is incidental to that which is not only a usual power of a corporation, but, in fact, an indispensable prerequisite to its very existence, *i. e.*, the right to issue stock upon receipt of subscriptions thereto; indeed, on the strictest notions of special capacity, one can hardly imagine a case in which an implied power would more naturally and properly be associated with the express language of a grant, than that of

¹ *Lake Ontario R. R. v. Mason* (1857), 16 N. Y. 451; *People v. Chambers* (1871), 42 Cal. 201 (a proceeding by quo warranto for failure to comply); *Monroe v. R. R.* (1873), 28 Mich. 272.

annexing to the ordinary express power of accepting subscriptions an implied clause, "upon such terms as to it shall seem expedient." But probably the few courts which do object to conditional subscriptions of any kind, place their objections upon the more substantial ground of public policy; the reply to them involves a classification of different kinds of subscriptions, some of which appear to be entitled to very different consideration from others. We have already seen that all the courts agree in condemning subscriptions of a fraudulent character, including those which are characterized by a private arrangement by which one subscriber gains a secret advantage over his fellows, and those which, in fact, constitute a fraud upon the public at large because of their manifest tendency to defeat the just claims of those dealing with the corporation on the faith of an apparent capital. Apart from such peculiar cases, however, it is difficult to see how a simple conditional subscription conditioned, for example, upon the railroad being located through a particular town, infringes upon any principle of public policy; on the contrary such a simple condition may both be a necessary protection to the small subscriber as against a large corporation in whose management his rights are hardly worth considering, and on the other hand may afford a corporation requiring a large and miscellaneous list of subscribers the only available means of obtaining money for a perfect legitimate undertaking. Possibly, under the influence of such considerations as these, the great majority of American courts have upheld the validity of conditional subscriptions.¹ *McMillan v.*

¹ *President v. McKean* (1814), 11 John (N. Y.) 98, a case of a condition imposed by a charter; *Hibernia Turnpike Co. v. Henderson* (1822), 8 S. & R. 219, a similar case, in which the court said: "Words more strong, and an intention more clearly expressed to make the payment of five dollars a share, a condition precedent to the subscription cannot be conceived. . . . If persons are permitted to subscribe without the previous payment, large subscriptions may be made, which otherwise could not have been made, by those who are anxious to give a direction to the road which may benefit themselves at the expense of the public" (it is only fair to the Pennsylvania court to say that such different considerations apply to a condition imposed as this is by the law, that it is quite consistent for the same court to take, as we shall

Maysville R. R. (1854), 15 B. Mon. 218, is an early example:¹ the condition there incorporated into the subscription was that "said road shall be so located and constructed as to make town of C a point in said road." The court readily held the condition to be both sanctioned by the company's charter, and not opposed to public policy. Having disposed of this point, the court proceeded to a determination of the further question raised by defendant, viz., whether he could be held to his subscription when the corporation had only located, not constructed, its road through the aforesaid town; upon this point, also, the court was on the plaintiff's side, saying on grounds of common sense: "Stock was subscribed for the very purpose

find it does take, a different view of ordinary conditions precedent); *Roberts' Case* (1850), 3 DeG. & S. 205; *Macedon R. R. v. Snediker* (1854), 18 Barb. 317; *Henderson R. R. v. Leavvell* (1855), 10 B. Mon. 338; *Roberts v. Mobile R. R.* (1856), 32 Miss. 373; *Clem v. New Castle Co.* (1857), 9 Ind. 488; *E. I. & C. R. R. v. Shearer* (1858), 10 Ind. 244; *Jewitt v. L. I. & U. M.*, id. 539; *New Albany R. R. v. McCormick* (1858), 10 Ind. 499; *Conn. & Pass. R. R. Co. v. Baxter* (1860), 32 Vt. 805; *Racine Bank v. Ayres* (1860), 12 Wis. 512; *Milwaukee R. R. v. Field* (1860), 12 Wis. 341; *Burlington R. R. v. Boestler* (1864), 15 Ia. 555; *Chamberlain v. Painesville R. R.* (1864), 15 Ohio St. 249; *Taggart v. R. R.* (1869), 24 Md. 563; *Mansfield R. R. v. Stout* (1875), 26 Ohio St. 241, applying the same rule after a consolidation of two corporations; *Iowas M. R. Co. v. Perkins* (1869), 28 Ia. 281; *Putnam v. New Albany* (1869), 14 Biss. 365; *B. & M. R. R. v. Cottrell* (1876), 66 Me. 185; *Bucksport & Bangor R. R. v. Buck* (1878), 68 Me. 81; *Red Wing Hotel v. Frederick* (1879), 26 Minn. 112; *Union Hotel v. Hettel* (1880), 79 N. Y. 454; *Wemple v. St. Louis R. R.* (1887), 120 Ill. 196; *Craven v. Cotton Mills* (1889), 21 N. E. (Ind.) 981.

¹ *Morris Canal Co. v. Nathan* (1829), 2 Hall, 239, is a still earlier example of the principle that, at least as against the corporation, the subscriber may incorporate into his contract any condition or warranty, existing or subsequent, that he desires, and will not be held liable upon it unless the condition is fulfilled or the warranty proves to be true. The condition here was that "3000 shares, then held by the corporation, should be *bona fide* subscribed for within ninety days from date; which fact should be certified by at least two directors and the cashier of the company." Such certificate being produced, defendant within three days paid his first call, but successfully defends in a suit on the second on the ground that the statements in the certificate were false, and were known to be so by its authors; had it not been for the first payment, the case could have presented no difficulty, and the upper court had no difficulty in finding that a payment on such false representations could not be construed as a tacit admission that the condition of the offer had been complied with.

of aiding in the construction of the road. To effect this object it must be paid as work progresses. Postponement of payment until work should be finished is inconsistent with the very end to be accomplished by it." The point is somewhat aside from the question as to the validity of conditional subscriptions, yet is so closely connected with it that it frequently is discussed by the courts at the same time.¹

Somewhat analogous are *New Albany R. R. v. McCormick* (1858), 10 Ind. 499, where the subscription being "to be paid out in instalments of twenty-five per cent. every six months after location of said road through said town of Lafayette," it was held that it was completed by an entry on the company's

¹See, also, *Penobscot R. R. v. Dana* (1855), 39 Me. 587; *Penobscot R. R. v. Drummer*, (1855), 40 Me. 172; *Evansville R. R. v. Shearer* (1858), 10 Ind. 244; *New Albany R. R. v. Fields* (1858), 10 Ind. 187 (which, however, restricts the conditions as follows: "Notwithstanding conditional subscriptions may be admitted, yet prior arrangements not expressed in the subscription between the agent of the company and the subscriber, by which he is to have peculiar privileges extended to others or by which his subscription is not to be collected, being made to induce others to subscribe, are regarded as fraudulent on other subscribers and are no defence to suit for amount subscribed"); *Johnson v. Crawfordsville R. R.* (1858), 11 Ind. 280, where a limitation was imposed upon a certain condition which was absolutely within the control of the directors; *Fry v. Lexington R. R.* (1859), 2 Met. (Ky.) 314; *R. R. v. Winkler* (1860), 29 Md. 318; *Racine Bank v. Ayres* (1860), 12 Wis. 512 (which carried its permission of conditional subscriptions to the danger line when it allowed interest on payments); *Ashtabula R. R. v. Smith* (1864), 15 Ohio St. 328; *Chamberlain v. Painesville R. R.* (1864), 15 Ohio, 225 (where an interesting variation, susceptible of much development, was advanced, *i. e.*, that admitting a provision that a road be permanently located on a certain route to be a legal condition precedent to a suit to recover the subscription, the further condition that a freight depot be built was a mere executory stipulation, for breach of which he might only set off any damages resulting to himself,—this construction being strengthened by the fact that defendant had already paid several assessments as the work progressed and had, also, voted for the continuance of the work; *Basey v. Hooper* (1871), 35 Md. 15; *Iowa & M. & R. Co. v. Perkins* (1869), 28 Ia. 281; *Swartout v. Mich. Air Line R. R.* (1872), 24 Mich. 389; *Ottawa R. R. v. Hall* (1878), 1 Ill. App. 612, countenancing what might be described as a condition in escrow; *Freeman v. Matlack* (1879), 67 Ind. 99; *Hotel Co. v. Frederick* (1881), 26 Minn. 112; *Brand v. R. R.* (1886), 77 Ga. 506; *Leshner v. Karshner* (1890), 24 N. E. (Ohio) 882; *Armstrong v. Karshner* (1890), *id.* 897; *Webb v. B. & E. S. R. R.* (1893), 26 Atl. (Md.) 113.

books that "the subscriptions of stock made at Lafayette be and are hereby accepted;" *Meyer v. Blair* (1888), 17 N. E. (N. Y.) 228, where a condition that all the capital should be reliably subscribed was held to have been complied with, in spite of an agreement by some of the principal subscribers with plaintiff, that if dissatisfied with his investment at the end of one year, they would relieve him of it at cost price; *Cravens v. Eagle Cotton Mills Co.* (1889), 21 N. E. (Ind.) 981, where defendant made a subscription conditional upon a contract of sale which was then being negotiated with another company, being approved by a majority of the stockholders, and the court, though apparently conceding the validity of such an arrangement, held that as the terms of the sale were not agreed upon at the time of defendant's subscription, he could not object because the sale, when completed, did not come up to his expectations.

Somewhat similar conditions are those requiring that the road should be put under contract before the subscription became binding, *Conn. & Pass. R. R. v. Baxter* (1860), 32 Vt. 805; and those stipulating that the payments need not be made until completion. In the latter case, the condition must be performed; *Toledo R. R. v. Hinsdale* (1888), 15 N. E. (Ohio) 665, where the court said: "Until the road was completed the subscription could not become absolute. It was only an offer to become a shareholder, and until the condition should be performed, the relation of the subscriber to the company as stockholder would not arise. By the transfer of the subscriptions, road, etc., the original company put it beyond its own power ever to complete the road and render the defendant liable on his subscription." See, however, *Merrill v. Gamble* (1877), 46 Ia. 615, holding that a substantial compliance by the assignee of the company was sufficient.

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(To be continued.)