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THE LEGAL EFFECT OF PRE-INCORPORATION STOCK SUBSCRIPTIONS

CLARENCE MORRIS*

Corporations, unlike Topsy, do not just grow; they must be organized. And organization at its simplest is highly complex human behavior extending over a period of time. A group must be gotten together (ostensibly at least) and certain juridical cabala must be performed before the state sanctions "the ownership of property and the transaction of business by individuals in the corporate mode." Organization behavior is not complex merely because the requirements of the general incorporation laws make it so. The initiation of a new business by an individual is, in itself, sufficiently involved under present complex industrial conditions. But when the corporate project is launched there are added such problems as: "Getting together" the group of prospective business men and property owners; determining the burdens and benefits of group members; securing state sanction, etc. Ordinarily all goes well, negotiations and promises are followed by cooperation; and the desired end of a legally formed corporation is achieved—each member of the pre-incorporation group becomes a stockholder without the aid of courts of law. But sometimes business plans go astray, and some of the prospective stockholders refuse to take part in the corporation after its for-
mation, or the corporation refuses to receive some of them into membership. It is proposed here to discuss the legal effect of signing a subscription paper before incorporation when such pathological cases are presented to the courts.

Space and time will not permit the consideration of any but the simple questions thus presented, and it is the intention of the writer to limit himself to "the American Common Law" of the subject; without consideration of any of the cases except those in which the simple business corporation has been formed under a general incorporation statute.

There is no general duty to pay stock subscriptions, such as the duty not to commit assaults and batteries, the duty not to maintain a nuisance, etc. In other words, a stranger to pre-incorporation proceedings and the subsequently formed corporation has no duty to pay money or property into the corporate fund. The duty, if it exists at all, is in personam (or paucital, if you wish) and is based on associational relations. The duty to pay a stock subscription, when such exists, is a subscriber's duty; the stock subscription transaction consists of that sort of behavior which we usually designate as "consensual." Ordinarily the jural relations arising from consensual behavior are easily dealt with under the law of contracts. But will the present problem fit into the scheme of contract law? The apparent major difficulty is that the corporation is not a juridical person at the time pre-incorporation subscriptions are made. But let us examine the following possibilities:

(1) The corporation is a stranger to pre-incorporation subscriptions, and has no jural relations based on it; and hence, if the subscription list is a contract at all, it is between the subscribers who alone have rights, duties, etc., under it.

(2) The pre-incorporation subscription is a continuing offer which the corporation may, or does, accept at, or after, the time of incorporation, at which time the contract relation between the subscriber and the corporation is complete.

(3) The pre-incorporation subscription list is a contract for the benefit of a third party beneficiary—the corporation. And as a last possibility:

(4) The legal effect of a pre-incorporation subscription
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does not fit the usual scheme of Contract Law, and must be
determined on other, or possibly unique, principles.

(1) The Corporation as an Utter Stranger to Pre-
Incorporation Subscriptions.—Early cases in Ohio,2 Vermont,3
Pennsylvania,4 and a case in New York as late as 19055 all

treat a corporation as though it were an utter stranger to
pre-incorporation subscriptions. In these cases the sub-
scriptions were made in contemplation of the incorpora-
tion which took place afterwards, and the corporations
were attempting to enforce the pre-incorporation subscrip-
tions by suit, but the courts allowed no recovery.

Such treatment would have much to be said for it if the
objects of the law were symmetry, and ease of application
of legal rules—and nothing more. However, if such treat-
ment were generally adoptd it might work many hardships
on business. Its general application would force those who
wished to terminate negotiations leading toward corporate
organization to first incorporate and then deal with the
subscribers. In all probability, it often happens that those
who conceive a corporate scheme are not ready to deter-
mine its details to the extent required by the incorporation
statutes6 before consulting co-ventures. Yet, in our fast
moving business world, where idle funds mean loss, and
speed and sureness of business transaction are constantly
demanded of our legal system, it is highly desirable that
the usual business bargains be quickly made and legally
protected. If a scheme must cool once the bargaining point
is reached, and be re-entered before the arrangement is
binding, the deal is apt to go awry, injuring those who have
relied on its consummation. Further, such treatment would
put the burden of incorporating on the inceptors of the
scheme, while the incorporation would be an advantage to
all stockholders.7

An apparent answer to these objections is that treating a
corporation as a stranger to pre-incorporation subscriptions
does not necessarily have the effect of allowing the sub-

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2 Dayton Co. v. Adam Coy, 18 O. St. 84 (1851).
3 Wallingford Mfg. Co. v. Fox, 12 Vt. 204 (1840).
5 Avon Springs Co. v. Weed, 159 N. Y. 567, 52 N. E. 1123 (1907); reversing 119
6 Such as determining the total capitization, the scope of the corporate enterprise,
etc.
7 All this rationalization is offered with an implied apology for arm chair observa-

scribers to disregard the terms of a bargain that they have entered into—that subscribers can protect themselves by a contract between themselves as is done in the underwriting cases. And to be consistent, if bargaining subscribers had sued defaulting co-subscribers in the cases mentioned above, a recovery in damages should be allowed. But what is the measure of damages? This question, coupled with the often insignificant financial interest of a single subscriber, practically prohibits suits of that kind. The writer has found no case (short of an underwriting agreement) in which individual subscribers were successful in a suit against a defaulting co-subscriber for damages for failure to take and pay for stock. And it is interesting to note that in such a suit in Montana a recovery was denied.

Further, in some states, even though there were no business difficulties which would prevent those who wished to organize a company from incorporating first and seeking subscribers afterwards, that possibility is blotted out by statutes that require subscriptions to capital stock as a condition precedent to incorporation.

Suffice it to say, as will be developed later in this paper, with proper citations, the corporation of today is not considered as an utter stranger to pre-incorporation subscriptions, and while the decisions of the early cases cited may be justifiable in some way, their dicta of lack of privity between corporations and pre-incorporation subscribers have been practically set to naught.

Before proceeding, it might be well to point out that in many cases all the difficulties that confounded the question of pre-incorporation subscriptions are often unnecessarily dragged into the opinions of cases which might be well decided on other grounds;—the class of cases in which the stockholder-corporation relation exists because of the conduct of the subscriber and the corporation after organiza-

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9 In Twin Creek v. Lancaster, 79 Ky. 652 (1881) a corporation was allowed a recovery on a pre-incorporation subscription even though the subscription list was worded: "We promise and agree to subscribe." Cf. Mt. Sterling Co. v. Little, 77 Ky. 429 (1889), in which a corporation was not allowed to recover on a subscription list worded: "The undersigned proposed to subscribe."
10 MACHER, MODERN LAW OF CORPORATION, 148 §153.
11 In Athol Music Hall Co. v. Carey, supra, n. 8, an instruction was asked by a defendant pre-incorporation subscriber to the effect that he could not be held by the corporation without ratifying his subscription after incorporation. The court held that such instruction was rightly refused. And see McClure v. R. R., 90 Pa. 269 (1879).
tion. In these cases the relation would exist even though there had been no pre-incorporation subscription. For example, it was early settled that one who accepts shares issued to him is under a duty to pay for those shares. 12 But the supreme court of Nebraska 13 in an action to recover the unpaid residue on shares of stock has spent much time discussing the effect of the pre-incorporation subscription; even though the organized company had issued a certificate to the subscriber entitling him to his shares, which he accepted and for which he had issued a receipt. The court fails to mention the possibility of a duty to pay for the shares based on the stockholder-corporation relation, though with this rationalization it could have reached the desired result.

The New York court in Avon Springs Company v. Kellogg, 14 was forced into this short cut. In that case a company was seeking to recover on a check issued in payment for shares of a company. There had been a pre-incorporation subscription, but this had been held to be insufficient to ground a recovery of the subscription price in another action against another subscriber. 15 After giving the check in payment for scrip which the company issued to him, and which he accepted, the subscriber stopped payment. The court gave judgment for the company with its eye only on what happened after incorporation.

Similarly, it has been held repeatedly that when an installment on shares has been paid by the subscriber and accepted by the corporation the company may collect the balance by suit. 16

12 In re Empire Co., L. R. 6 Ch. App. 266 (1870).
13 Nebraska Co. v. Ledinsky, 79 Neb. 587, 113 N. W. 245 (1907); see also Inter- mountain Publishing Co. v. Jack, 5 Mont. 668, 6 Pac. 20 (1885); Ferro-Chem. Co. v. Danziger, 23 Cal. App. 584, 138 Pac. 966 (1914).
15 Avon Springs Co. v. Wedd, supra, n. 8.
16 California Hotel Co. v. Callender, 94 Cal. 120, 29 Pac. 550 (1892); Ferro-Chem. Co. v. Danziger, supra, n. 13; Griswold v. Board of Trustees, 26 Ill. 41, 79 Am. Dec. 361 (1861); Stone v. Great Western Oil Co., 41 Ill. 85 (1865); McCormick v. Great Bend Co., 48 Kan. 614, 29 Pac. 1147 (1892); Business Men's Assn. v. Williams, 137 Mo. App. 376, 119 S. W. 439 (1909); McFarland v. West Side Assn., 53 Neb. 417, 73 N. W. 765 (1890); Buffalo Co. v. Gifford, 87 N. Y. 294 (1882); McCord v. Southwestern Co., 165 S. W. 36 (Tex. 1914). See also Horseshoe Co. v. Sibley, 187 Cal. 442, 106 Pac. 308 (1910); Warren Assn. v. Boyd, 171 N. C. 184, 88 S. E. 153 (1916); Cartwright v. Dickson, 88 Tenn. 476, 17 Am. St. Rep. 910 (1890). It is not submitted that in all of these cases the only possible operative fact is the stockholder-corporation relation based on the pre-incorporation subscription. Some there are perhaps other facts which might be sufficient to justify a recovery for the corporation. In other words, some of these situations only stand for the point for which they are cited in the alternative. It is interesting to note that diligent search has failed to disclose one case in which there has been payment of an installment in which the corporation has not been allowed to recover the residue.
Lack of space, and knowledge on the part of the writer, do not permit a thorough summary of the types of evidentiary facts from which the operative fact of the stockholder-corporation relation follows. However, it is unfortunate that the courts have not articulately used this rationalization; the lack of such practice has confused the problem of the legal effect of pre-incorporation subscriptions to a surprising degree. It is hazarded that the explanations for this neglect are: The obvious comparison to the general assumpsit actions presents the bugaboo of finding either the passage of "title" resulting in unjust enrichment, or the conference of a benefit on request. Added to these difficulties are the damage tests in the general assumpsit actions of unjust enrichment or reasonable value, neither of which will fit the case, (the only possible measure of damages being the 'par value of the stock, or that portion of the par value which remains unpaid.) The answer to these objections is that the jural incidents of the stockholder-corporation relation are *sui generis* and not dependent on the usual limitations of the general assumpsit actions, and are so treated when there has been no pre-incorporation subscription.\(^\text{17}\) The practical difficulty presented for judicial determination is what type of behavior on the part of the prospective stockholder and his prospective associates results in his quasi-joint ownership of property and engagement in business with them in the corporate mode so as to found an action to compel payment for his participation.\(^\text{18}\) The question is more hard than unsolvable and has been handled by our courts when other opinion fodder is considered unavailable.\(^\text{19}\)

(2) *Pre-Incorporation Subscriptions as Continuing Offers to Contract.*—Text writers and courts have insistently announced and re-iterated that a pre-incorporation subscription is a continuing offer, made by the subscriber to the afterward organized corporation, which may ripen into a contract on acceptance by the corporation. Since all contracts—other than those implied in law—are either bilateral or unilateral (not by any inherent magic but because jurists have found it convenient to make this inclusive classification) our pur-

\(^{17}\) *In re Empire Co.*, supra, n. 12.

\(^{18}\) See Balfour *v.* Gas Co., 27 Ore. 300, 41 Pac. 164 (1895).

\(^{19}\) This approach was considered as a negative test in Dayton Co. *v.* Coy, 18 O. St. 84 (1861); and see Rensselaer Co. *v.* Barton, 16 N. Y. 457n. (1854).
pose will be better subserved to consider the problem at hand under these separate heads.

I. Bilateral.

(A) Express Acceptance.—In the cases of Shiffer v. Akenbrook\textsuperscript{20} and Redwing Company v. Friedrich,\textsuperscript{21} the respective defendants had subscribed to stock in proposed companies. The companies were thereafter organized, and at meetings of the boards of directors the subscriptions were accepted by resolution. In those two cases it was held that the now-incorporated companies might maintain suits against the pre-incorporation subscribers and recover the amounts of their subscriptions.

However, the writer has been unable to find a case in which it was held that the failure of the board of directors to accept pre-incorporation subscriptions formally or expressly was an operative fact fatal to an action by the corporation to recover the sum subscribed. It will appear later that there are many cases in which there are no formal or express acceptances of pre-incorporation subscriptions, and in which the corporations have been successful in actions to enforce the subscriptions. We may conclude, then, that if the pre-incorporation subscription is an offer, there need be no express promise on the part of the corporation in acceptance. If a promise need be found on the part of the company it may be found in corporate behavior that is not verbalized.

(B) Implied Acceptance.—To modify a homely expression: “Actions may speak as loudly as words.” Hence, by unverbalized conduct one may so act that his behavior is factually equivalent to a verbalized promise.\textsuperscript{22} So the mere fact that corporations are successful in suits to enforce subscriptions made prior to incorporation without making a verbal promise is not sufficient to condemn the bilateral contract theory. Unfortunately the courts have never given us a verbal equivalent of the promise that the corporation must make in order that a contract be formed. But let us attempt to do what the courts have left undone; let us suppose that the pre-incorporation subscription is an offer looking to the formation of a bilateral contract. What, then, is the promise

\textsuperscript{20} 75 Ind. App. 146, 130 N. E. 241 (1921).
\textsuperscript{21} 26 Minn. 112, 1 N. W. 827 (1879).
\textsuperscript{22} Williston, Contracts, §90.
sought from the corporation as the bargain equivalent of the subscriber's promise to become a stockholder? It can be but one thing: "In return for your promise, Mr. Subscriber, to assume the burdens of a stockholder, we, the corporation promise to enter the stockholder-corporation relation with you."

It is conceivable that a mere call on the part of the company may be interpreted as indicating in fact the promise which we have supposed to be the necessary promise of the corporation. And since the layman usually demands what he thinks to be his rights before he goes to courts and lawyers, it is practically impossible to find a case in which a corporation is attempting to hold a pre-incorporation subscriber, who has not repudiated, where there is no evidence from which just such a promise could not be implied.

However, consider the case of Clapp v. Gilt Edge Consolidated Mines Company.23 In that case the plaintiff made a subscription before incorporation. The other subscribers repudiated the plaintiff's subscription before incorporation. The company had no dealing with the plaintiff which was brought out in evidence. There is not even any evidence that the company made a call. Yet the company was held bound by the subscription. From this case, it is at least certain that acts on the part of the corporation which would indicate some sort of a promise are not always necessary to bind the corporation to pre-incorporation subscription arrangements. But merely because there may be special circumstances in which the pre-incorporation subscription is binding without finding a bilateral contract does not completely explain the bilateral contract theory away. The duty in the Clapp Case may arise from the unique circumstances not present in other cases.

But what is to happen to any theory which regards the subscription as an offer for a bilateral contract in view of the many cases in which corporations seek and recover the entire subscription? The measure of damages in actions on bilateral contracts when the plaintiff has not performed is Loss of Bargain. Hence, we should find that if a corporation has not passed title to shares of its stock the measure of

23 33 S. D. 125, 144 N. W. 721 (1913).
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damages should be the difference between the market price of those shares and the contract price.24 But corporations seldom seek loss of bargain, nor is this the test that courts apply.25

Thus in Schrober's Administrators v. Lancaster Association,26 the organized company sought to hold the pre-incorporation subscriber for the entire amount of his subscription. The subscriber did nothing more than sign his name to a subscription list compiled before incorporation. He did not attend any meetings, nor did he have any dealing with the company at all. The company went ahead with its affairs, spent considerable money, and made calls on the subscriber for the full amount which he ignored. A judgment was entered for the company for the full amount of the subscription, and though the judgment was objected to as error, it was affirmed.

In order to fit the Schrober case into the theory of bilateral contracts we must first imply that the pre-incorporation subscription was an offer looking to a promise on the part of the company as acceptance; that making calls on the part of the company is sufficient to justify an implication of this acceptance-promise; that making calls is also an execution of the contract on the corporation's part. The artificiality of the situation is at once apparent. To justify a bilateral contract theory the following distortions must be performed:

(a) An offer must be implied from a pre-incorporation signature to a subscription list. This signature is no offer to anyone, except possibly those negotiating for a division of prospective business and prospective business property which is to be conducted and owned in a novel way—the corporate way.27 This offer must be implied to be to a juridical person, made by a layman who has no conception of juridical persons.

(b) An acceptance must be implied from a demand of the now formed juridical person that the implied promise

24 In Bullock v. Falmouth, 85 Ky. 184, 3 S. W. 129 (1887), the court limited the recovery to loss of bargain. See also Johnson v. Flank Road Co., 15 Ind. 389 (1861).


26 68 Pa. 429 (1871).

27 In Edinboro v. Robinson, 37 Pa. 210, 78 Am. Dec. 491 (1860), the subscription list did not mention that the subscribers intended to incorporate. Yet a corporation was allowed to recover on proof that it was organized to effect the transactions contemplated in the subscription list. Can it possibly be said that this defendant subscriber was offering to the corporation?
of the implied offer be performed.

(c) From demandatory conduct it must be assumed that the contract is performed: \textit{viz.}, that the stockholder-corporation relation is brought into existence.

After making all these beautiful assumptions that have no factual basis we can fit the Schrober Case into the rule of damages which is ordinarily applied to express bilateral contracts when the plaintiff has performed. Such hocus-pocus may result in symmetry that pleases the academic, but what place has it in the moving social science—Law?

It will be noted that application of the theory of bilateral contracts to a case in which the corporation is seeking to recover the entire subscription requires a finding that the contract is executed; and therefore, in order to justify a holding for the plaintiff corporation, it must be found that the stockholder-corporation relation is established. If that fact is found in a particular case, an implication of offer and acceptance is mere surplus baggage, since (as developed in IV) the stockholder-corporation relation is an operative fact in itself justifying a holding that the subscriber is under a duty to pay the par value of his stock.

II. Unilateral Contract.—At first glance the treatment of a pre-incorporation subscription as an offer looking for acts from the corporation as an acceptance seems to do away with much distortion. The shaky ground of having to imply an all-but-verbalized promise on the part of the corporation is dodged. Furthermore, the damage question is somewhat relieved, in as much as a unilateral contract must be fully executed by the acceptor before he may successfully seek the aid of courts of law to secure the bargain equivalent offered; and, when the acceptor has performed, he is entitled to the entire bargain equivalent.

But still such a theory presents a major distortion: the implication that a pre-incorporation subscription is an offer is usually unwarranted in as much as laymen pre-incorporation subscribers are not attempting to bargain with a juridical person, to come into juridical existence at some time in the future, and, if they bargain at all, they usually bargain with each other.

(C) Critique of any continuing offer theory. The main objection that has been submitted to the continuing offer
theory is that it is overburdened with distortion, but criticism does not stop there. The super-defect of such a theory is that it does not fit the decided cases.

For example, *Tonica v. McNeely*,

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*28* holds that a corporation can recover on a pre-incorporation subscription even though the subscriber dies before incorporation. How is it possible to reconcile this decision with the rule of contracts that death revokes an offer?

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In *Steely v. Texas Company* a corporation was allowed to recover the full amount of a pre-incorporation subscription even though there had been no corporate action before repudiation. In order to fit this case into any theory of continuing offer it would be necessary to proceed in the legalistic process of implying promises from acts not promissory; and add that it is further implied that subscribers had promised not to revoke their already implied promises. No court has attempted this distortion.

In *Sanders v. Barnaby*, the action was by the assignee of the corporation who sought to recover on pre-incorporation subscriptions. The complaint contained no allegation that the company had accepted the subscription. Yet the court held that there were sufficient facts stated to constitute a cause of action. And in *Nehama Company v. Settle*, the court refused to enforce a pre-incorporation subscription against a subscriber, even though the subscription remained unrevoked, and the incorporated company had tendered the stock to the subscriber.

So the often announced continuing offer theory is not only a distorted legalism; it also fails to account for the be-

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*31* See also Muncy Co. v. Green, 143 Pa. St. 269, 13 Atl. 747 (1888). Following instruction to the jury was given with the approval of the upper court: "If the defendant withdrew ** * * ** before they (the incorporators) were ready to file their papers in the Secretary of Commonwealth's office, then the plaintiff cannot recover. If afterwards, they can recover." And see Auburn Wks. v. Schultz, 143 Pa. St. 256, 22 Atl. 699 (1881). Also in De Gerville v. Thompson, 150 Mo. App. 692, 176 S. W. 409 (1915); Haskell v. Sell, 14 Mo. App. 81 (1889); Johnson v. Plank Road Co., supra, n. 24, corporations were allowed to recover even though there was evidence tending to prove that there was repudiation before incorporation. In Lake Ontario R. R. v. Mason, 16 N. Y. 451 (1857), the court went so far as to refuse evidence that there had been a revocation before incorporation.


*33* 54 Kan. 380, 88 Pac. 485 (1894).

*34* In Franca Hotel Co. v. Chico, 131 S. C. 344, 127 S. E. 496 (1925); there was no incorporation until two years after the subscription. The corporation was allowed to recover on this subscription. Can this be reconciled with the rule that an offer must be accepted within a reasonable time?
behavior of courts and should be cast off as worthless, even though it cannot be replaced by other sound rationalization. No rationalization is better than misleading theory. The lack of rationalization would be at least stimulus to lawyers and courts presented with the problem and would lead to a more accurate and real solution.

(3) The Pre-Incorporation Subscriptions as Constituting a Contract for the Benefit of a Third Party.—The courts sometimes have vaguely treated pre-incorporation subscriptions as though they were contracts for the benefit of the corporation to be formed, as a third party beneficiary.\(^{85}\) This theory at first sight would seem to do away with many difficulties: no acceptance by the corporation would be necessary; the cases in which there was repudiation before incorporation, which was held to be ineffective, would be accounted for.

But here again, we have a theory that will not fit all the cases. It has been held that, in certain circumstances, a repudiation on the part of the pre-incorporation subscriber will relieve him though neither the corporation nor other subscribers assent.\(^{86}\) Thus a third party beneficiary theory breaks down, for a party to a contract cannot relieve himself by his own repudiation even though it be for the benefit of a third party.

A further difficulty is that, even in jurisdictions where some classes of third party beneficiaries are recognized as having remedial rights, the types of beneficiaries recognized are usually limited to creditor beneficiaries and donee beneficiaries. The corporation will not fit into either of these classifications. It is not a creditor of the subscribers except by virtue of their potential membership in the corporation, and they are not bargaining for payment of debts existing or to come into existence. Nor do the subscribers purport to make the corporation a gift.

Laymen organizing a corporation are seldom dealing for

\(^{85}\) West v. Crawford, 80 Cal. 19, 21 Pac. 1123 (1899), the third party in this case was a "natural person" who was to collect subscriptions as a quasi-trustee for the corporation to be formed. Compare Horseshoe Co. v. Sibley, supra, n. 16. See CLARK, CORPORATIONS (3d ed.) 336.

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the benefit of a third party, a juridical third party of whose imminent existence they are unaware. They are dealing for themselves. They are attempting to get together and divide the burdens and benefits of a prospective business.

Further, it has been held that a corporation itself may be bound by pre-incorporation subscriptions, and may be forced to issue stock or pay its money equivalent. It has never been believed that third party beneficiaries are bound to accept the bounty of a contract made for their benefit.

(4) A Rationale of Pre-Incorporation Subscriptions.—It is not submitted that there could be no cases in which the continuing offer theory, or the contract for the benefit of a third party theory, could be applied. If subscribers clearly indicate that their subscriptions are meant to arouse a reasonable expectation in a corporation to be formed, that their subscriptions are made to induce an acceptance on the part of the corporation, there is no objection to treating the subscriptions as offers; and applying the same rules of contract resorted to when an offer is made to an existing company to take its shares. Or again, if the corporators clearly go through all the necessary conduct to constitute a contract between themselves for the benefit of a third party—the corporation—there is no good reason why the rules governing such contracts should not be applied. But unfortunately for those, who would have the law an artistic system of ideology, laymen are very inconsiderate of legal rules turned academic, and usually fail to designate, either by word or act, which of the two alternative juristic schemes they favor. Inasmuch as law should be made to fit justifiable business conduct rather than business conduct being made to fit the law, it would perhaps be well to speculate on just what these business men are doing.

Suppose this simple case: A, B, and C decide to form a corporation to go into the grocery business. All negotiation between them is complete; they have settled the details of the business to the most minute degree; they have decided how much each shall put into the concern; they have laid complete plans for the organization and conduct of their

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88 See Vermillion Co. v. Vallee, supra, n. 38.
entire business. When they have reached this point each wants some assurance that the scheme is binding, and with that end in view each signs his name to a subscription list. The list sets out all the details in full; but says nothing about continuing offers or third party beneficiaries. Let us suppose further that each of them on signing writes after his name: "I intend this subscription to be binding."

Certainly, when these subscribers sign, all the elements usually found in a business bargain which is enforceable by virtue of the laws of Contracts are present. All the reasons for enforcing the expectations of contracting parties in general, apply to enforcing the expectations of these three that each will do his part in organizing and conducting the business. It would be entirely consistent to allow the other subscribers to maintain individual actions against one who defaults after this bargain is entered into, as is done on breach of a partnership agreement. However, in such actions the courts would be embarrassed in attempting to find a measure of damages. (Courts are willing to face this embarrassment brazenly in actions for breach of partnership agreements, but only because there is no other satisfactory way out.) It is hard for non-defaulting subscribers, if not impossible, to prove that they cannot procure some one else to take the defaulter's place. What their services are worth in seeking such a third party cannot often be evaluated; for usually they are not in the business of finding people to enter schemes. Further, the value of the performance of the defaulter is dependent largely on the success of the venture of the three; and the venture of the three has become only a speculative possibility because of the default itself. No wonder courts have shied when such subscribers have attempted individual actions. Effective justice can be better done another way. By forcing the defaulter to take the interest in the business that he bargained to take and pay for, the bargain is fully protected and he is not imposed on. No supervisory functions need be exercised by the court to see that its decree is performed. The defaulter is not forced to remain in personal contact with the other corporators, in that the corporate mode of

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40 Deschamps v. Loiselle, supra, n. 8.
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doing business can be a vicarious one. Further, if the other corporators are obnoxious to him he may sell his stock and retire from the arrangement entirely. The rules governing the conduct of corporate business are designed to protect adequately even a minority stockholder to whom other stockholders are hostile. In order to accomplish this result it is convenient and perhaps necessary to allow the corporation to sue.\textsuperscript{41} Call it specific performance if you will, call it enforcing a contract made by the acceptance of a continuing offer, call it a contract made for the benefit of a third party; as long as the issue is not confused it makes no difference what legalisms are used to reach this desired result.\textsuperscript{42} But past experience has proved that distorted legal theory leads to distorted results.\textsuperscript{43}

This proposition is not complete without corollaries. In our hypothetical case we assumed that the signers of the subscription list were ready to bargain and in fact did bargain when they signed. But the act of signing a subscription list need not be done in a bargaining situation. Thus in \textit{Tavern Company v. Burkhart}\textsuperscript{44} the defendants signed a pre-incorporation subscription list on the understanding that the paper was not binding, but merely an initial negotiatory proceeding "to see what could be done." The defendants withdrew before the negotiatory stage was terminated in bargain. The afterwards-incorporated company was not allowed to recover on the subscription.\textsuperscript{45} In \textit{Allen v. Hastings Industrial Company}\textsuperscript{46} the subscription list provided that subscriptions

\textsuperscript{41} See \textit{West v. Crawford}, \textit{supra}, n. 35, in which the court says: "The subsequent incorporation of the company named in the contract is of no consequence except that it fixes the time when money should become due and payable."\textsuperscript{42} \textit{Wallace v. Eclipse Coal Co.}, \textit{supra}, n. 37; \textit{Clapp v. Gilt Edge Mines Co.}, \textit{supra}, n. 37; \textit{Chicago Co. v. Peterson}, 133 Ky. 595, 118 S. W. 384 (1909).

\textsuperscript{43} It is not submitted that once bargain between the subscribers is found that the corporation can satisfy any circumstances. In allowing the corporation to sue, rights of bargaining subscribers are settled. Working in an opposite direction from those cases in which the court "goes behind the corporation," the corporation is "put in front of" the non-defaulting subscribers to enforce their rights. Hence, if the subscription list is a conditional bargain, the usual rules of conditions are applicable. Thus, in \textit{Auburn Wks. v. Schultz}, \textit{supra}, n. 31, if there was a bargain between the subscribers at all, it was conditioned on the erection of a factory and the conduct of the corporate business in a specified place. Establishment of the factory in another place relieved the subscriber. Further, in cases in which it is not proved that the corporation is the corporation that was contemplated there can be no such recovery. In other words, the corporation cannot be "put in front of" others than the non-defaulting subscribers and maintain the action. See \textit{California Sugar Co. v. Schafer}, 67 Cal. 395 (1881); \textit{Snook v. Georgia Imp. Assn.}, 83 Ga. 61, 9 S. E. 1104 (1889); \textit{Wheeler v. Floral Mill Co.}, 3 Nev. 254 (1874); \textit{Woods Co. v. Brady}, 181 N. Y. 145, 72 N. E. 674 (1905).

\textsuperscript{44} 87 Mich. 182, 49 N. W. 562 (1891).

\textsuperscript{45} \textit{See also Feltel v. Dryfoos}, 117 La. 766, 42 So. 259 (1906); \textit{Da Ponte v. Breton}, 121 La. 454, 49 So. 571 (1908).

were not binding until $6,900 was subscribed. The defendant pre-incorporation subscriber withdrew before that sum was subscribed. He was held not liable in a suit by the company. Similarly in Nehama Company v. Settle it was held that a pre-incorporation subscriber was not bound, since he was the only subscriber, and hence there was no bargain with anyone. Even Wallace v. Townsend which held that a subscriber who died before incorporation and Tonica Company v. McNeely which reaches the opposite result can probably be reconciled on the basis that death occurred in the former case before bargain, but did not occur in the latter case until after bargain.

If there were an absolute and easily definable distinction between negotiation and bargain in all cases, the foregoing rationale would seem to meet the problems of pre-incorporation subscriptions. Unfortunately, those engaged in organizing a corporate enterprise are not always sure themselves whether they are bargaining or negotiating. Further, what is legally inoperative negotiation at one time may become part of a bargain by subsequent behavior of the parties, or even by the behavior of some of the parties. In the cases just considered in the last two sections of this paper, the problem was easily settled by the facts of the cases themselves. In those cases in which the fact of bargain was clearly established by the evidence, the pre-incorporation subscription was held to be binding, and vice versa. But what to do when this very fact is in dispute? The ordinary solution would be to turn the facts over to a jury or a court and allow the chosen weigher of fact to reach one conclusion or the other, subject to the usual rules of evidence. But another alternative presents itself; viz., the establishment of rules of thumb which will cover most of the cases justly. To a certain extent this later solution seems to have been adopted.

For example, it seems to be a universal rule that a pre-incorporation subscriber cannot be held unless all the stock

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47 64 Kan. 424, 88 Pac. 483 (1894).
48 Supra, n. 28.
49 Supra, n. 28.
50 Other cases standing for the proposition that a pre-incorporation subscriber who did not enter a completed bargain cannot be held are: Campbell v. Raven, 176 Mich. 208, 142 N. W. 366 (1915); Vermillion Co. v. Vallee, supra, n. 86; Collins v. Morgan Grain Co., 15 F. (2d) 253 (1926), and see Woods Co. v. Grady, supra, n. 48.
of the prospective company has been subscribed\textsuperscript{51} with these exceptions: (a) When the subscription list itself, or the subscribers, express a different intention.\textsuperscript{52} (b) When the statute under which incorporation is contemplated expressly permits organization and commencement of business without all the capital stock subscribed for.\textsuperscript{53} Should there be bargain between pre-incorporation subscribers before the entire capital is subscribed (which is unlikely) and should the situation be one in which neither of the exceptions to the rule are operative (which is more unlikely) it is submitted that the bargain, though worthy of legal protection, would not give rise to the usual bargain jural relations. But as rules of thumb go, this one is little likely to work hardship.

How far this rule of thumb method can be extended for dealing with the cases in which the alternative factual conclusion of either bargain or negotiation is difficult, if not impossible, to reach, is a matter for judicial experiment by the trial and error method. Early courts have treated the mere signature of the subscription paper as though it were sufficient evidence of bargain.\textsuperscript{54} But this did not produce the desired results and has fallen by the wayside. There seems to be a tendency to hold a subscriber who does not withdraw before incorporation papers are ready to file with the state officials, and to release him if he does repudiate before that time.\textsuperscript{55}

It is to be noted that the danger of this rule of thumb method is that it will be applied to cases in which bargain, or lack of it, can be established by the evidence. Such an extention of this method would give a legalistic rather than a workable result.

It is not submitted that this rationale will cover all the cases. The dictum of the continuing offer theory has been repeated too often in some jurisdictions, and the courts have taken it to heart. Hence it has sometimes been held

\textsuperscript{51} Branch v. Augusta Glass Wkm., 96 Ga. 573, 23 S. E. 128 (1895); Enterprise Wks. v. Schendel, 56 Mont. 42, 173 Pac. 1059 (1916); Flury v. Irwin Cities Dairy Co., 136 Wash. 462, 249 Pac. 906 (1925); Galveston Hotel Co. v. Bolton, 46 Tex. 638 (1877).

\textsuperscript{52} Auburn Assn. v. Hill, 3 Cal. 839, 32 Pac. 887 (1903); see also Balfour v. Gas Co., supra, n. 18; Business Men's Assn. v. Williams, supra, n. 16; but see Livesay v. Omaha Hotel Co., 5 Neb. 59 (1876).

\textsuperscript{53} Utah Hotel Co. v. Madsen, 43 Utah 285, 134 Pac. 577 (1913); Renascler Co. v. Barton, supra, n. 13.

\textsuperscript{54} Lake Ontario R. R. v. Mason, supra, n. 31.

that a pre-incorporation subscriber may withdraw at any time before incorporation, the court not addressing itself to the question of whether or not the bargaining point has been reached. However, it is submitted that hard cases will eventually alter this situation as they did in Wallace v. Eclipse Coal Company and in Clapp v. Gilt Edge Mining Company, and in Chicago Company v. Peterson.

Conclusions

(1) When pre-incorporation subscribers reach the bargaining point, the pre-incorporation subscription should be legally binding on both the subscriber and the afterward incorporated company.

(2) When the point of bargaining is not reached by pre-incorporation subscribers, the subscription should be of no legal effect.

(3) When it is difficult, or impossible, to reach a conclusion on the question of whether bargain is reached rules of thumb are sometimes applied to determine this fact. No complete system of rules of thumb has yet been devised.

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66 Bryant’s Pond Steam Mill Co. v. Felt, supra, n. 38; Coleman Hotel Co. v. Crawford, supra, n. 86.
67 Supra, n. 42.