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Preliminary Stock Subscription Agreements in Missouri

Manley O. Hudson

PRELIMINARY STOCK SUBSCRIPTION AGREEMENTS IN MISSOURI

I Introduction

A city community is infested with smoke from a railroad switching yard nearby. It is proposed that the people living in the vicinity should organize a corporation to purchase the land used for switching purposes and to convert it into a restricted residence district. All of the residents and property owners in the neighborhood would benefit if such a proposal were consummated and the support of a large number of them would be necessary for its success. To be assured of their co-operation, promoters induce a number of them to sign a preliminary agreement in which it is stated that each signer subscribes for a certain number of shares in the corporation to be formed, and that the signers appoint a committee to purchase the land and convey it to the corporation which they shall cause to be organized. Does the signer of such a paper incur any obligation to take the shares as agreed? If so, what is the nature of the obligation, who is the proper party to enforce it, and from what time is the signer bound thereby?

As simple as these questions seem to be, in Missouri as in many other jurisdictions they cannot be readily answered as a result of the decisions. The case stated is substantially that of *DeGiverville Land Co.* v. *Thompson* [1] in which the recent decision of the St. Louis Court of Appeals marks an advance over previous decisions of the Missouri courts.

Preliminary stock subscription agreements are no longer in general use. In the early part of the last century they were a popular means of organizing corporations, but the more modern general statutes of incorporation which now exist in all of the states have made it less convenient to resort to such methods of organization.[2] In some instances they are still necessary, how-

1. (1915) 190 Mo. App. 682, 176 S. W. 409.
2. Conyngton, Corporate Organization, p. 23.

ever. Whenever the organization of a quasi-public or co-operative undertaking is contemplated they are not only convenient, but almost indispensable. If, for instance, it were proposed to build a railroad from Columbia to Jefferson City for which the capital were not available, it would be necessary to resort to some such method of enlisting co-operation. Milk condensing companies are frequently organized in this way.

A business agreement such as that under consideration should be approached with a desire to find it susceptible of being interpreted in such a way that it can be given legal support.[3] We are not dealing with a voluntary subscription to a charitable enterprise in the success of which the subscribers have no pecuniary interest. It is more than a gratuitous undertaking of each subscriber to take a certain portion of the stock, and if it is clear that the prospective shareholders intended to be bound some basis should be found for holding them. But the agreement must stand analysis according to ordinary principles of the law of contracts—the situation is not unique, except that the questions which usually arise have to do with the rights of the corporation which comes into being after the transaction is completed.

II Corporation Membership in General

Membership in a corporation must be the result either of statute or of contract.[4] A corporation must have some membership at the time of its birth, and therefore some statutory designation is necessary in every case. A person may be made a member of a public corporation with or without his assent, for such corporations are agencies of government; but one can be made a member of a private corporation only with his assent[5] and such

3. "It is the policy of the law to interpret a business agreement in the sense which will give it a legal support." Holmes, J., in *Martin* v. *Meles* (1901) 179 Mass. 114, 60 N. E. 397. *Cf. Twin Creek & Colemansville Turnpike Co.* v. *Lancaster* (1881) 79 Ky. 552; *Bullock* v. *Falmouth & Chipman Hall Turnpike Road Co.* (1887) 85 Ky. 184, 3 S. W. 129.

4. 1 Lindley, Companies (6th ed.) p. 12.

5. *Morrison* v. *Morey* (1898) 146 Mo. 543, 48 S. W. 629; *Ellis* v. *Marshall* (1807) 2 Mass. 269, 3 Am. Dec. 49; *Hampshire* v. *Franklin* (1819) 16 Mass. 76; *Richmond Factory Assn.* v. *Clarke* (1873) 61

assent must continue during the time of the statute's operation unless it has previously been expressed in such a way as to be irrevocable.[6] The statute may designate any assenting person as a member of the corporation which is brought into being under its provisions. The public policy which demands that corporations should have substantial and responsible membership at the time of their birth appeals only to the legislature which enacts the statute. It is competent for a legislature to endow a corporation with any sort of statutory membership and in return to impose on its members any sort of statutory obligations. Such obligations are not consensual in any real sense and no initial contract is necessary for their creation, tho it is common to speak of the obligations *inter se* of shareholders and incorporators as contractual. The statute may confine corporation membership to those who sign articles of association,[7] or it may include signers of preliminary subscriptions not incorporated into the articles of association.[8] In any case the statutory designation by the state becomes the law of association of members of the corporation and common law rules as to contracts do not apply; but unless it is expressly provided that the corporation endowed with statutory membership should have no power to enter into common law contracts of membership it would seem that any corporation may proceed to enter into contracts by which new membership is created.

Prior to its organization, of course, the corporation may not enter into any contract of membership,[9] but if persons see fit to do so they may contract for its benefit and the corporation should stand as any other beneficiary when it comes into existence. This involves an extension of the law as to beneficiary contracts to

Maine 351. In *Kirkwood Gymnasium Assn.* v. *Van Ness* (1895) 61 Mo. App. 361, it is not clear that one of the alleged incorporators assented, but the point was not well considered.

6. *Kidwelly Canal Co.* v. *Raby* (1816) 2 Price 93; 1 Lindley, Partnership (4th ed.) p. 127.

7. *Troy & Boston R. R.* v. *Tibbits* (1854) 18 Barb. 297.

8. A Michigan statute was so interpreted in *Peninsular Ry. Co.* v. *Duncan* (1873) 28 Mich. 130.

9. "A non-existing corporation can no more make a contract for the sale of its stock than an unbegotten child can make a contract for the purchase of it." *Bryant Pond Steam Mill Co.* v. *Felt* (1895) 87 Maine 234, 32 Atl. 888.

cases where the beneficiary is not in existence at the time of contracting, but no reason is perceived why such extension should not be made tho the cases outside the field of corporations may not yet have gone so far.[10] A corporation may by novation become a party to a contract made by its promoters prior to its organization if the other party to the contract has assented to such novation. Strict ratification or adoption of such contracts is impossible because of the non-existence of the corporation at the time of contracting,[11] and the corporation must voluntarily assume any obligation of membership or contract made either before or after its organization.

After its organization, a corporation may contract as any other legal entity may. It may contract for any number of new memberships, except as it may be restricted by a statutory limit on its capital stock.[12] Such contracts are not required to be in any particular form, apart from statutory provisions;[13] any expression of mutual assent is sufficient, if definite enough to be enforceable.[14] The requirements as to contracting parties, offer and acceptance are not peculiar. No certificate is necessary, the certificate being merely a "muniment of title".[15] No particular

10. In *Whitehead* v. *Burgess* (1897) 61 N. J. L. 75, 38 Atl. 802, a contract of the defendant to pay a sum of money to the owner of the first one of the foals of defendant's stallion that should trot a mile in two minutes and thirty seconds or less, was enforced. The court said that "the fact that the person to whose benefit the promise may inure is uncertain at the time it is made, and that it cannot be known until the happening of a contingency, cannot deprive the person who afterwards establishes his claim to be the beneficiary of the promise of the right to recover upon it." The plaintiff was in existence at the time of contracting, and the demurrer admitted a bilateral contract for the benefit of the plaintiff.

11. *Abbott* v. *Hapgood* (1889) 150 Mass. 248, 22 N. E. 907; *Pennell* v. *Lothrop* (1906) 191 Mass. 357, 359, 77 N. E. 842. *Cf. Joy* v. *Mannion* (1887) 28 Mo. App. 55.

12. On the effect of subscriptions in excess of authorized capital, see 1 Machen, Corporations, § 230; *Granger's Life & Health Ins. Co.* v. *Kamper* (1882) 73 Ala. 325; *Clark* v. *Turner* (1884) 73 Ga. 1.

13. *Nulton* v. *Clayton* (1880) 54 Iowa 425, 6 N. W. 685.

14. *Quaere*, whether such mutual assent had not been expressed in *Palais du Costume Co.* v. *Beach* (1910) 144 Mo. App. 456, 129 S. W. 270, (1911) 163 Mo. App. 499, 143 S. W. 852.

15. *Vanstone* v. *Goodwin* (1890) 42 Mo. App. 39. "A certificate is evidence of title to stock; it is not stock itself, nor is it necessary to the existence of stock." *Pacific National Bank* v. *Eaton* (1891) 141 U. S. 227, 11 Sup. Ct. Rep. 984.

shares need be allotted.[16] Unless a writing is specifically required by statute, the contract may be oral.[17] An actual subscription is usually unnecessary,[18] and where it is required a literal "signing underneath" is not to be insisted upon.[19] The name subscription contract is therefore an inapt description of membership contracts made after incorporation.

Several other kinds of agreements are frequently put in the category of subscription contracts, but improperly: contracts to subscribe for stock at a future time where some future act of subscription is contemplated,[20] contracts to see that other persons subscribe for stock,[21] and contracts to purchase treasury or other issued stock.[22] None of these needs to be considered in the present study.

Estoppel is frequently said to be a third road to membership in a corporation. It is, however, no more than a reason for preventing a denial of statutory or contract membership where neither is admitted to exist.[23]

16. Allotment is required by statute in England. *Ward's Case* (1870) L. R. 10 Eq. 659; *Adam's Case* (1872) L. R. 13 Eq. 474. Registration is also necessary in England. 1 Lindley, Companies (6th ed.) p. 125.

17. *Butler University* v. *Scoonover* (1888) 114 Ind. 381, 16 N. E. 342; *Bullock* v. *Falmouth, etc. Co.* (1887) 85 Ky. 184, 3 S. W. 129; *Colfax Hotel Co.* v. *Lyon* (1886) 69 Iowa 683, 29 N. W. 780; *Chaffin* v. *Cummings* (1853) 37 Maine 76; *Wemple* v. *St. Louis, etc. R. R. Co.* (1887) 120 Ill. 196, 11 N. E. 906; *Shellenberger* v. *Patterson* (1895) 168 Pa. St. 30, 31 Atl. 943. *Contra, Fanning* v. *Hibernia Insurance Co.* (1881) 37 Ohio State 339; *Pittsburg, etc. R. R. Co.* v. *Gazzam* (1858) 32 Pa. St. 340; *Freeland* v. *N. J. Stone Co.* (1878) 29 N. J. Eq. 188.

18. See *Pacific National Bank* v. *Eaton* (1891) 141 U. S. 227, 11 Sup. Ct. Rep. 984.

19. *In re Strong* (1891) 16 N. Y. Supp. 104.

20. *Cf.* 6 Michigan Law Review 340.

21. The ordinary underwriting agreement usually provides for the underwriter's subscribing if others do not. *Cf. Colonial Trust Co.* v. *McMillan* (1905) 188 Mo. 547, 87 S. W. 933.

22. A sale of treasury stock involves a renovation of the original contract just as a sale by a shareholder involves a novation. *McDowell* v. *Lindsay* (1906) 213 Pa. 591, 63 Atl. 130. Sales of treasury stock are distinguished from original subscriptions in *Sherman* v. *Shaughnessy* (1910) 148 Mo. App. 679, 129 S. W. 245.

23. "Where the subscription has been acquiesced in, either by becoming a director or by attending meetings of stockholders, or by any other act indicating an acquiescence in the validity of his subscription, [a] defense based on mere technical objections will be disregarded." Napton, J., in *Kansas City Hotel Co.* v. *Hunt* (1874) 57

Membership in a corporation, whether statutory or contractual, usually results in an ownership of shares of stock. But membership does not always involve shareholding and statutory membership is frequently dissociated from owning shares. In some states, signers of articles of incorporation who thereby become incorporators need not become shareholders.[24] Where this is true and unless shareholding is not contemplated at all,[25] the function of the incorporators is really that of promoters[26] and after they have completed the organization and managed the issuance of the shares they disappear altogether[27] unless the statute provides for their continuance.[28] If a statute names the members of a corporation and requires them to be shareholders it would seem that no action is necessary on the part of the corporation to constitute the incorporators shareholders,[29] for it has no option to accept or reject,[30] its obligation to receive as shareholders being the statutory return for the statutory obligations of the shareholders.

Shares of stock have had so many of the qualities of choses in possession ascribed to them that the precise nature of the

Mo. 130. See also *Kirkwood Gymnasium Assn.* v. *Van Ness* (1895) 61 Mo. App. 361; *Business Men's Assn.* v. *Williams* (1909) 137 Mo. App. 575, 119 S. W. 439.

24. *Coyote Gold and Silver Mining Co.* v. *Ruble* (1880) 8 Oregon 284; *Densmore Oil Co.* v. *Densmore* (1870) 64 Pa. St. 43; *Bristol Trust Co.* v. *Jonesboro Trust Co.* (1898) 101 Tenn. 545, 48 S. W. 228; 1 Machen, Corporations, § 164 *et seq.*

25. While a few statutes have the positive requirement of shareholding for membership and some have it by implication, many of the statutes are silent on this point. See 1 Machen, Corporations, § 132.

26. In *San Joaquin Land & Water Co.* v. *Beecher* (1894) 101 Cal. 70, 35 Pac. 349, they are said to be the agents of the intended shareholders. *Sed qu.*

27. "They are *functi oficii* and the corporation is thenceforth composed of the shareholders." *Densmore Oil Co.* v. *Densmore* (1870) 64 Pa. St. 43, 54. Hence the statement that "corporators exist before stockholders and do not exist with them." *Chase* v. *Lord* (1879) 77 N. Y. 1, 11.

28. In *Case of Philadelphia Savings Institution* (1836) 1 Wharton 461, note, some of the members were and some were not shareholders.

29. See *Hawes* v. *Anglo-Saxon Petroleum Co.* (1869) 101 Mass. 385; 1 Machen, Corporations, § 164.

30. In *Windsor Electric Light Co.* v. *Tandy* (1894) 66 Vt. 248, 29 Atl. 248, it was said that the corporation is presumed to accept, which means that no acceptance is necessary. Registration is said to be required in *Dancy* v. *Clark* (1905) 24 D. C. App. 487. See Machen, Corporations, §§ 164, 242.

obligations of the shareholder and corporation *inter se* is often misconceived. A Missouri statute provides that stock is to "be deemed personal estate",[31] and shares have been held to be "goods, wares and merchandise, within the purview of the statute of frauds";[32] but in essence a share of stock is nothing more than a chose in action, the result of a bilateral undertaking. The shareholder's primary obligation is to pay to the corporation the par value of his shares or some other amount agreed upon, as it shall be demanded.[33] The corporation in turn is bound to admit the subscriber to the privileges which its charter and by-laws confer upon shareholders, to a degree of control corresponding to the relative importance of this and other holdings, to a proportionate share of such dividends as may be declared and to a proportionate interest in the property in case of dissolution. These bilateral obligations are the same whether they arise out of statute or contract.[34] It is therefore erroneous to conceive a subscription to stock to be a sale of property by the corporation,[35] for the corporation does not own its unissued stock. A subscription need not therefore comply with the statute of frauds[36] even tho a sale of stock is so restricted. Any later transfer of shares is effective as a novation in the choses in action, to which the corporation has assented in advance. This free assignability makes it unobjectionable to speak of a share of stock "as soon as it is created, as transferable property".[37]

31. Revised Statutes 1909, § 2984.

32. *Fine* v. *Hornsby* (1876) 2 Mo. App. 61; *Tisdale* v. *Harris* (1838) 2 Pickering (Mass.) 9. The better view would seem to be *contra*. See Browne, Statute of Frauds (5th ed.) § 396; 1 Machen, Corporations, § 505.

33. *Hawley* v. *Upton* (1880) 102 U. S. 314.

34. It is for this reason that it is said that "the rights and duties of both parties grow out of contract." *Supply Ditch Co.* v. *Elliott* (1887) 10 Col. 327, 332, 15 Pac. 691; *Haskell* v. *Sells* (1883) 14 Mo. App. 91, 102.

35. As in *Thrasher* v. *Pike County R. R.* (1861) 25 Ill. 393.

36. *York Park Building Assn.* v. *Barnes* (1894) 39 Neb. 834, 58 N. W. 440; *Wemple* v. *St. Louis, etc. R. R. Co.* (1887) 120 Ill. 196, 11 N. E. 906.

37. *Haskell* v. *Worthington* (1887) 94 Mo. 560, 570, 7 S. W. 481; *Vanstone* v. *Goodwin* (1890) 42 Mo. App. 39; *Hamilton* v. *Finnegan* (1902) 117 Iowa 623, 91 N. W. 1039; 1 Machen, Corporations, § 504. In *Newman* v. *Mercantile Trust Co.* (1905) 189 Mo. 423, 88 S. W. 6, it was held that trover may be maintained for shares of stock.

This analysis indicates that shareholding membership involves in no sense a contract between various shareholders. There is no good reason for a disregard of the corporate entity here. Shareholders have some obligations *inter se,* but these are not contractual. The obligations of each shareholder are independent of other shareholders' obligations. Articles of incorporation may contain a contract between the various subscribers, but this is not a necessary part of them.

III Various Types of Preliminary Agreements

Since a corporation has no capacity to contract prior to its birth, no preliminary agreement can have the effect of constituting the parties thereto members or shareholders in the corporation. But the situation presents no inherent difficulty and the confusion in the cases is largely due to a failure to distinguish between the rights *inter se* of the subscribers and the rights of the later-created corporate entity. Numerous forms of preliminary agreements are possible, each of which should be construed with reference to the expressed intention of the parties. But there is an unfortunate tendency to lump all agreements in one class and to determine their validity according to principles not universally applicable. It is important in every case to see just what the parties have agreed to do.

Since preliminary papers are usually circulated by some specially interested promoter,[38] the agreement frequently takes the form of a contract between this promoter and each of the subscribers. If the subscriber is desirous of seeing the project a success, he may give his promise to take a certain number of shares in the corporation to be formed in return for and in consideration of the promoter's promise to put thru the organization, and perhaps to see that the subscriber is accorded the privilege of becoming a shareholder;[39] or the promoter may agree to con-

38. All preliminary subscribers are in a sense promoters. *Peninsular R. R. Co.* v. *Duncan* (1873) 28 Mich. 130.

39. It was held that there was no such promise in *Feitel* v. *Dreyfous* (La., 1906) 117 La. 756, 42 So. 259. In *Dennison* v. *Keasbey* (1906) 200 Mo. 408, 98 S. W. 546, the plaintiff and defendant entered into a contract to form a corporation, the plaintiff agreeing to render

vey to the corporation a tract of land or to transfer a stock of goods. Primarily this is a contract between the subscriber and the promoter, each acting for himself. The corporation when it is born can neither ratify nor adopt it. The subscriber usually contracts to enter into a contract with the corporation, but the corporation will be under no obligation to contract with him and if it refuses the subscriber will be relieved of his obligation to the promoter.

The promoter could of course recover for the breach of the subscriber's contract, tho it may be difficult to determine what damage he has suffered by reason of the subscriber's failure to contract with the corporation. In that the subscriber has bound himself to enter into a contract with the corporation, it is expressly a contract for the benefit of a third person, the corporation. Such contracts are enforced in Missouri both in gift beneficiary and payment beneficiary cases,[40] and no reason is perceived why they should not be enforced where the beneficiary, tho definite and ascertainable, is not in existence at the time the contract is made.[41] Until the birth of a beneficiary, the obligation to benefit it would of course remain contingent upon its coming into being. The benefit to the corporation from the subscriber's promise consists in having an offer open for its consideration. It is a question of some nicety in the law of contracts whether such a "paid-for" offer can be withdrawn so as to preclude the completion of a contract by the corporation's accepting it. It would seem that even tho the "paid-for" offer relates to subject matter of such a nature that equity would refuse specific performance of a contract relating to it, the law may well disregard the attempt to withdraw or revoke the offer, thereby giving specific performance to the

personal services to promote the project, in return for which he was to be given five per cent of the capital stock. The plaintiff was not named a shareholder in the articles and the defendant, who had stock, was ordered to transfer to the plaintiff the amount stipulated for.

40. See 8 Law Series, Missouri Bulletin, p. 38. On the general subject of beneficiary contracts, see Professor Clark's article in 4 Law Series, Missouri Bulletin, p. 30, and Professor Williston's article in 15 Harvard Law Review 767.

41. *Saunders* v. *Saunders* (1891) 154 Mass. 337, 28 N. E. 270, which looks *contra*, was decided where no beneficiary contracts are enforceable.

contract to keep the offer open.[42] No reason is perceived for distinguishing between a contract to keep open an offer made by one of the parties to the other and a contract to keep open an offer made by one of the parties to a third person, in this case the corporation.

It is usually held that prior to assent by the beneficiary, either party to a beneficiary contract may release the other.[43] In Missouri, the beneficiary's assent is presumed,[44] with the result that a release is impossible without the beneficiary's concurrence. The corporation is not in the position of the ordinary gift or payment beneficiary, however, for it is entitled to no benefit from the subscriber's offer, beyond that of considering it, without accepting the offer. In a sense, it assents to the contract made for its benefit when it considers the offer, but such assent might not preclude the promoter from releasing the subscriber. And prior to the incorporation, a release should be effectual for it can hardly be said that the assent of a non-existing beneficiary can be presumed.[45]

42. This view has been expressed by Professor McGovney in a valuable article on "Irrevocable Offers," in 27 Harvard Law Review 644. An offer under seal should be treated as a "paid-for" offer where seals are not abolished. In *Nelson Coke & Gas Co.* v. *Pellatt* (1902) 4 Ontario 481, it was held that an offer under seal to take shares in an existing corporation was therefore irrevocable. But if no offeree is in existence, it is difficult to see how the offer can be irrevocable, even tho under seal or "paid-for." See *Hudson Real Estate Co.* v. *Tower* (1892) 156 Mass. 82, 84, 30 N. E. 465.

A contract for the *sale* of shares of stock will be specifically enforced where the shares are not procurable in the market, *Dennison* v. *Keasby* (1906) 200 Mo. 408, 98 S. W. 546, or where they constitute a controlling interest in the company, *O'Neill* v. *Webb* (1899) 77 Mo. App. 1. Some such special reason for the inadequacy of damages must appear. The contract of subscription for shares of stock is always specifically enforceable if completed, for it gives rise to the status of shareholder and the obligations of the shareholder, such as that of paying calls, may be specifically enforced in actions by the corporation.

43. *Wood* v. *Moriarty* (1885) 16 R. I. 201, 9 Atl. 427; Williston, Cases on Contracts, p. 410 note.

44. *Rogers* v. *Gosnell* (1875) 58 Mo. 589. *Cf. Amonett* v. *Montague* (1881) 75 Mo. 43.

45. A subscriber is released by any material departure from the original purpose or scheme unless he assents to it. *Norwich Lock Mfg. Co.* v. *Hockaday* (1893) 89 Va. 557, 16 S. E. 877. In *Haskell* v. *Worthington* (1887) 94 Mo. 560, 7 S. W. 481, it was said that the organization of a company with powers additional but incidental to

It is possible for a preliminary subscriber to give to a promoter a power of attorney to contract for him with the corporation when it is formed. In England, such a power is irrevocable "where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority", as for instance, where the object of the contract is to enable the promoter to obtain his purchase money for property to be sold to the corporation.[46] It would seem that such a power should be revocable where the promoter has no more at stake than the success of his efforts to put the corporation on its feet. If the authority is given as security for the performance of the contract between the subscriber and the promoter, it should be irrevocable. But this means only that the subscriber owes a specifically enforceable duty to the promoter to permit him to exercise the power, and the subscriber does not come under any obligation to the corporation except in consequence of an exercise of the power.[47]

While analysis thus shows great difficulty in working out an irrevocable obligation of the subscriber on the principles of beneficiary contracts, there is another possibility of finding it, viz., on the principles of novation. The subscriber's contract with the promoter may conceivably admit of the corporation's being substituted for the promoter by a novation assented to in advance. The effect of such a substitution would be to relieve the promoter from further liability.[48] But a pre-incorporation subscription agreement will be so framed as to make these principles of nova-

those originally contemplated does not constitute such a departure, but the case was decided on other grounds. *Cf. Board* v. *Mississippi, etc. R. R. Co.* (1859) 21 Ill. 337; *Dorris* v. *Sweeney* (1875) 60 N. Y. 462; *Woods Motor Vehicle Co.* v. *Brady* (1905) 181 N. Y. 145, 73 N. E. 674. In *Southern Hotel Co.* v. *Newman* (1860) 30 Mo. 118, it was held error to exclude evidence that the venture to which the defendants subscribed was wholly abandoned and that the corporation was the result of a different venture. *Cf. Richmond Factory Assn.* v. *Clarke* (1873) 61 Maine 351.

46. *Carmichael's Case* (1896) 2 Ch. 643. The contract expressly provided that the power should be irrevocable.

47. See Machen, Corporations, § 251; Mechem, Agency (2d ed.) § 570 *et seq. Cf. Staroske* v. *Pulitzer Pub. Co.* (1911) 235 Mo. 67, 138 S. W. 36.

48. See *McArthur* v. *Times Printing Co.* (1892) 48 Minn. 319, 51 N. W. 216.

tion applicable only when there are such responsible promoters willing to bind themselves by contracts with subscribers, and these are frequently lacking. Thirdly, it may be asked whether it is possible for the prospective shareholders to contract among themselves so that each will be bound from the moment of subscribing.

It is competent for each subscriber to contract with each of the others or for each subscriber to contract with all of the others. Charitable subscriptions are sometimes enforced as such contracts.[49] But the subscribers do not in the ordinary case intend to exchange mutual promises, and a clear expression of such intention is necessary. Each case must be examined to determine whether as a matter of fact the subscriber's promise is given for other subscribers' promises. A may agree to take stock in return for B's agreeing to take stock, but this seldom occurs. The promises of the various subscribers may be mutual, but they rarely are so. If mutual, they are sufficient consideration for each other and the numerous bilateral contracts bind the various subscribers to each other. A defaulting subscriber could be sued for the breach by all of the others if the contract is construed to be with all the others,[50] or by each of the others if the contract is by each with each of the others; tho such a liability has seldom if ever been enforced.[51] Such a contract does not have the effect of making the various subscribers partners.[52] The subscriber may obligate himself to assist in the incorporation or to become a shareholder if the corporation will admit him after incorporation is completed.[53] The latter obligation is a beneficiary contract to enter into a contract with the corporation and should be treated as the similar contract with the promoter was treated above.

49. See Professor Williston's note on charitable subscriptions in Parsons, Contracts (9th ed.) p. 490.

50. *Cf. Moore* v. *Chesley* (1845) 17 N. H. 151.

51. It was suggested in *Lake Ontario R. R.* v. *Curtiss* (1880) 80 N. Y. 219; and the petition in *Loewenberg* v. *De Voigne* (1909) 145 Mo. App. 712, 123 S. W. 99, seems to have been framed on this idea.

52. 1 Lindley, Companies (6th ed.) p. 21. But see Taylor, Corporations, § 100.

53. Where the subscriber agrees to pay a certain sum to the treasurer of the corporation to be formed, it is clearly a beneficiary contract. *West* v. *Crawford* (1889) 80 Cal. 19, 21 Pac. 1123; *San Joaquin Land & Water Co.* v. *Beecher* (1894) 101 Cal. 70, 35 Pac. 349.

A subscription does not become a binding contract by reason of the fact that other persons are led to subscribe on the strength of it; and reliance is in no sense a consideration for the subscriber's promise. If A promises to give B ten dollars and C sells a coat to B in reliance on A's promise to B, A's promise does not therefore become binding. Nor should the fact that a corporation is organized in reliance on a subscriber's promise render that promise enforceable. Charitable subscriptions are in this respect treated anomalously by some courts in their anxiety to uphold them.[54] But the agreements in hand are not charitable subscriptions and unless the promise is made in consideration that the action be taken, in which case it is an offer to a unilateral contract, there is no reason why action unstipulated for and merely in reliance on a promise should make it binding. The fact that money is expended in incorporation furnishes no support for a subscriber's promise, for it is in no sense made in return for such expenditure.[55] Estoppel is frequently found in such cases, due to the confusion of promises with representations.

It is submitted that in the ordinary preliminary subscription agreement, the subscriber's promise to take shares is nothing more than a statement of his intention to do so and as such of no binding effect. It is possible to have a preliminary subscription made in such a way as to be binding; but in most of the cases it has not been done. A subscription may, however, constitute an offer to the corporation to be formed, which offer will bind the subscriber if properly accepted by the corporation. Such an offer is of course revocable at any time prior to acceptance.[56]

54. *Pitt* v. *Gentle* (1871) 49 Mo. 74; *James* v. *Clough* (1887) 25 Mo. App. 153.

55. Addressing itself to the incorporation as consideration for the subscriber's promise, the Pennsylvania court said that "procuring legislation of any kind is not a consideration which will support even a direct promise to pay a fair compensation for the labor of the promissee about such a business." *Strasburg R. R. Co.* v. *Echternacht* (1853) 21 Pa. 220. *Cf. Jeanette Bottle Works* v. *Scholl* (1900) 13 Pa. Super. Ct. 96, 100.

56. It was suggested in *Knox* v. *Childersburg Land Co.* (1889) 86 Ala. 180, 184, 550, 578, that "the terms of the offer and the consideration it rests on may render it binding and irrevocable" and that "when it rests on a valuable consideration, it becomes an irrevocable option." One may conceive of an offeree's buying an option on the offer. *Cf. Sooy* v. *Winter* (Mo. 1915) 175 S. W. 132. But the corporation acquires no option in the subscriber's offer in the ordinary case.

The numerous cases which permit subscribers to withdraw before the incorporation is completed proceed on this ground.[57] Until the corporation comes into existence, it is inaccurate to speak of an offer to it for there is no offeree. The birth of the corporation obviates this difficulty but the offer ought still to be subject to withdrawal until actual acceptance by the corporation.[58] Such acceptance ought not to be presumed for it puts an obligation on the corporation.[59] The birth of the corporation in itself is in no sense an acceptance of the offer even tho effected in reliance on it.[60] When the unwithdrawn offer is duly accepted by the corporation, the contract of shareholding becomes complete and the relation of corporation and shareholder is created.[61]

A preliminary subscription may be so informal, however, that it is not even entitled to the dignity of an offer. A mere expression of the signer's intention to take shares in a corporation to be organized is of no more legal significance than an expression of one's intention to buy a horse.[62] An offer must be found

57. *Hudson Real Estate Co.* v. *Tower* (1892) 156 Mass. 82, 30 N. E. 465 (1894) 161 Mass. 10, 36 N. E. 680, is the leading case permitting withdrawal before incorporation. See also *Knox* v. *Childersburg Land Co.* (1888) 86 Ala. 180, 5 So. 578; *Richelieu Hotel Co.* v. *International Military Encampment Co.* (1892) 140 Ill. 248, 29 N. E. 1044; *Vermilion Sugar Co.* v. *Vallee* (La., 1914) 64 So. 670; *Athol Music Hall Co.* v. *Carey* (1875) 116 Mass. 471; *Plank's Tavern Co.* v. *Burkhard* (1891) 87 Mich. 182, 49 N. W. 562; *Wright Bros.* v. *Merchants' & Planters' Packet Co.* (Miss., 1913) 61 So. 550; *Ashuelot Boot & Shoe Co.* v. *Hoit* (1870) 56 N. H. 548; *Muncy Traction Engine Co.* v. *De La Green* (1888) 143 Pa. St. 269, 13 Atl. 747; *Badger Paper Co.* v. *Rose* (1897) 95 Wis. 145, 70 N. W. 302; *Doherty* v. *Arkansas, etc. R. R. Co.* (1905) 142 Fed. 104. See 8 Columbia Law Review 47.

But *contra*, the leading case of *Minneapolis Threshing Co.* v. *Davis* (1889) 40 Minn. 110, 41 N. W. 1026. See also *Nebraska Chicory Co.* v. *Lednicky* (1907) 79 Neb. 587, 113 N. W. 245.

58. *Starrett* v. *Rockland Co.* (1876) 65 Maine 374; *Bryant's Pond Steam Mill Co.* v. *Felt* (1895) 87 Maine 234, 32 Atl. 888.

59. In *Poughkeepsie, etc. Road Co.* v. *Griffin* (1856) 21 Barbour 454, 467, it was suggested that "acceptance may be presumed from the beneficial nature of the offer." *Sed qu.*

60. *Cf. Cleaveland* v. *Mullen* (1903) 96 Md. 598, 607, 54 Atl. 665.

61. So it is said that "the criterion of the liability of a subscriber to stock in a corporation is, whether any act has been done by which the corporation has been forced to receive the subscriber." *Kirkwood Gymnasium Assn.* v. *Van Ness* (1895) 61 Mo. App. 361; *Commerce Trust Co.* v. *Hettinger* (1914) 181 Mo. App. 338, 168 S. W. 911.

62. *Strasburg R. R. Co.* v. *Echternacht* (1853) 21 Pa. St. 220. But *cf. Shober* v. *Lancaster County Park Assn.* (1871) 68 Pa. 429.

to have been intended, and courts have a justifiable inclination to find that subscriptions are not idle expressions of intention.[63]

The foregoing analysis emphasizes the importance of determining which of these situations is present in a particular case. But subscription papers have often been unskillfully drawn and without stopping to analyse them many courts have attempted to lay down general rules which, as this discussion shows, admit only of narrow application. The consequent confusion prevails generally.

IV Missouri Statutes of Incorporation in Relation to Preliminary Agreements

The various statutes of incorporation must now be examined with a view to determining how they affect the position of preliminary agreements as it has been set forth. These statutes may have no effect on such agreements; or they may invalidate them to the extent of excluding preliminary offers and contracts from any consideration by the corporation; or they may expressly impose the obligations of shareholders on preliminary subscribers who have assented. The provisions of the various statutes have probably been framed without much thought of these questions, for there is much diversity among them. But it is none the less important that they should be effectuated.

The first general act of incorporation in Missouri was enacted in 1849[64] providing for the organization of corporations for manufacturing, mining, mechanical or chemical purposes. The incorporators were required to sign and acknowledge and file in the office of the circuit clerk and a duplicate with the Secretary of State, a certificate giving names of directors but not of shareholders, and the persons who signed and acknowledged such certificate "and their successors" were made a corporation. None of the capital stock was required to be paid up and no definite

63. This is not true of charitable subscriptions in which no contract of shareholding is contemplated, and so in England and New York such subscriptions are held to be unenforceable gratuitous promises. *In re Hudson* (1885) 54 L. J. Ch. 811; *Twenty-third St. Baptist Church* v. *Cornell* (1890) 117 N. Y. 601, 23 N. E. 177.

64. Laws of 1849, p. 18.

amount had to be subscribed. In 1851[65] the act authorizing the formation of plank road companies required the articles of association to state the names of "the subscribers" and to be sworn to by at least two of them, and one thousand dollars of stock had to be subscribed. The railroad corporation act of 1855[66] incorporated the persons who subscribed the articles of association and "all persons who shall become stockholders" and required a certain amount of stock to be subscribed, five per cent to be paid in cash thereon. It also authorized the directors of a railroad company to open books of subscription "in case the whole of the capital stock is not before subscribed". The statute of 1865[67] as to telegraph companies required as a condition precedent that a certain amount of stock should be subscribed and that all the subscribers thereto should sign articles of association which should set forth the names of the subscribers, and provided that such signers together with "the persons who from time to time shall become stockholders" should be a corporation. The statute of 1865[68] as to fire and marine insurance companies required the incorporators to sign articles giving the names of the subscribers and stating that one-half of the capital stock should have been in good faith subscribed and five thousand dollars thereof paid up. The statute of 1865[69] as to life, health, stock and accident insurance companies provides for similar articles and incorporates the persons who sign them "their associates and successors". This is the first time that the expression "associates" appears in the Missouri statutes. The statute of 1865[70] as to savings banks and fund companies requires the majority of the shares to be subscribed before business is begun and requires that the president and secretary shall have filed a certificate in which the names of the stockholders are given. In 1865 the statute as to manufacturing and business companies was amended to require the filing of a certificate in the recorder's office in the county in which the company was to transact business.[71] In

65. Laws of 1851, p. 259.
66. Revised Statutes 1855, p. 404.
67. Revised Statutes 1865, p. 348.
68. Revised Statutes 1865, p. 355.
69. Revised Statutes 1865, p. 365.
70. Revised Statutes 1865, p. 365.
71. Revised Statutes 1865, p. 367.

1868, all of the capital stock of savings banks and fund companies was required to be subscribed at the time of incorporation.[72] In 1869 the statute as to manufacturing and business companies was amended and the articles were required to be signed and acknowledged by the incorporators and filed in the office of the recorder, and it was provided that "all persons so acknowledging and giving said certificate and their associates and successors" should be a body corporate.[73]

In 1879 the section authorizing directors to open books of subscription after the organization of the corporation "in case the whole of the capital stock is not before subscribed" was transferred from the chapter on railroad corporations to the general chapter concerning private corporations, so that it thereafter applies to all corporations.[74] This section had required five per cent to be paid to the directors at the time of the subscription, and this requirement was continued until the whole section was repealed in 1909.[75]

In 1879, the statute as to savings bank and fund companies[76] was amended to require the articles to state that all the stock had been subscribed and one-half paid up, and to give the names of all shareholders and the number of shares subscribed by each; such articles to be signed and acknowledged "by the parties thereto". The privilege of incorporating was given to any five or more persons associated by such articles and it would seem that only incorporators were "parties thereto" so as to be required to sign. The statute of 1879 as to manufacturing and business companies[77] gave the privilege of incorporating to any three or more persons who should have associated themselves by articles which were required to state that all the stock had been subscribed, one-half paid up, and to give the names of the several shareholders and the number of shares subscribed by each; such

72. Laws of 1868, p. 30.
73. Laws of 1869, p. 10.
74. Revised Statutes 1879, § 711.
75. Laws of 1909, p. 347. It is difficult to believe that the continuance of at least that portion of the section which required five per cent to be paid at the time of subscription was anything more than an oversight of the revisioners.
76. Revised Statutes 1879, § 902.
77. Revised Statutes 1879, § 926.

articles to be signed and acknowledged "by the parties thereto" and after proper filing the persons so acknowledging and "their associates and successors" were to be a corporation.[78]

The statute of 1885 as to trust companies [79] authorized incorporation by three or more persons associated by articles stating the amount of the stock actually subscribed which had to be at least one-fourth of the authorized capital stock, and one half of the subscribed stock was required to be paid up and the names of the shareholders given; the articles to be signed and acknowledged "by the parties thereto" and the corporation to be composed of such persons "their associates and successors".

In 1899, a new statute [80] authorized the formation of world's fair and centennial expositions by any twenty-five or more persons associated by articles which were required to state that one-half the stock had been subscribed and ten per cent thereof paid up, and to give the names of the first fifty of the subscribing shareholders; such articles to be signed and acknowledged by the parties thereto and the persons so signing and acknowledging and their successors to be a corporation. It is very plain that the statute requires the naming only of the first fifty of the shareholders; that there may be other shareholders not named; and that all of the named shareholders need not sign the articles of agreement as "parties thereto". It is possible that under this statute incorporators would not be required to be shareholders.

No substantial changes were made in the statutes of incorporation in 1909, but in 1911 a wholly new statute [81] concerning the organizing of manufacturing and business companies was enacted, by which incorporation is permitted to any three or more persons associated in articles of agreement which state the amount of the capital stock, that fifty per cent thereof has been subscribed and actually paid up, and which give the names of the several shareholders and the number of shares subscribed by each. The statute also provides for a later sale by the corpora-

78. The new statute of 1879, § 958 *et seq.* as to mutual saving fund, loan and building associations has no peculiar interest in this connection.
79. Laws of 1885, p. 123.
80. Revised Statutes 1899, § 1523.
81. Laws of 1911, p. 148.

tion of all of its stock "not subscribed and paid for at the time of its organization". The articles are required to be "signed and acknowledged and sworn to by all parties thereto, including the parties selected as directors or managers for the first year".[82] Since a director must be a stockholder [83] it is impossible to see any reason for the specific requirement of directors' signing if they were included in the expression "parties thereto"; which seems to indicate that the expression "parties thereto" does not include all persons named as shareholders.

It is clear from the foregoing exposition that these statutes do not admit of general application. Each case must be decided with close reference to the actual terms of the statute under which incorporation is attempted. Where a statute does not require shareholders to be named it would seem that preliminary subscribers should not be required to sign articles of association; where the shareholders are required to be named, it would seem that all need not be incorporators, tho all named would of course be legal shareholders from the instant of the corporation's birth. The "parties" to the articles who are required to sign and acknowledge are the incorporators, not the shareholders,[84] as is clearly indicated by the statute of 1911 which expressly requires directors to be among such "parties", tho directors are of necessity shareholders; if all shareholders had to be "parties" to the articles, this express naming of directors would be superfluous.[85] If the statute does require shareholders to be named and requires all the stock to be subscribed, it would seem that the omission of the name of a preliminary subscriber from the complete list of

82. The acknowledgment since 1911 must be before some Missouri officer having a seal. This requirement works considerable hardship on non-residents who are named as original shareholders in the articles if they must sign and acknowledge as incorporators.

83. *Loomis* v. *Missouri Pacific Ry. Co.* (1904) 165 Mo. 469, 65 S. W. 962.

84. In *First National Bank* v. *Rockefeller* (1905) 195 Mo. 15, 93 S. W. 761, an attempt was made to hold the incorporators as partners and it was contended that the incorporation was ineffectual because some of the persons who signed the articles failed to acknowledge them; but the court refused to go behind the certificate of the Secretary of State. *Cf. Ryland* v. *Hollinger* (1902) 117 Fed. 216.

85. But the Secretary of State interprets the statute to require that all named shareholders sign. See his instructions issued in "Form for Incorporating Manufacturing and Business Companies."

shareholders would discharge him altogether; but this would not be true where all the stock is not required to be subscribed.

All of the statutes purport to incorporate the "parties" who execute the articles.[86] Since 1869, the statutes as to manufacturing and business companies have purported to incorporate the parties, "their associates and successors". The meaning of the word *associates* should be determined to some extent at least with reference to its meaning in the statute of 1865 as to life, health, stock and accident insurance companies, in which it made its first appearance in Missouri statutes. That statute required the incorporators to sign the articles of association stating the names of all the subscribers to the stock, tho there was no requirement that any particular amount of stock should be subscribed and it is fairly clear that all the subscribers were not required to act as incorporators. The *associates* at that time must have been subscribers to the stock who intended to be incorporators but who failed to act as "parties" to the articles which were filed. In the statute of 1869 as to manufacturing and business companies, in which the word *associates* was first used as to such companies there was no requirement that the subscribers or shareholders be named in the articles. At that time it must have meant subscribers who were not active as incorporators. No reason is perceived for the continued use of the word in the statute of 1879, in which all the stock was required to be subscribed and all the shareholders were required to be named, unless all of the named shareholders were not required to be incorporators; in which case *associates* must have been a designation for named shareholders who were not incorporators. To have pre-

86. *Quaere*, can one who signs and acknowledges the articles which name him as one of the shareholders, withdraw before the Secretary of State has issued the certificate? If corporate existence really does date from the time of filing a copy of the articles with the Secretary of State, Revised Statutes 1909, § 2975, it would seem that such withdrawal should be permitted. *Cf.* Revised Statutes 1909, § 3341. Where both signing and acknowledging of the articles are required, it would seem that one who signs but fails to acknowledge should not be bound as an incorporator. *Coppage* v. *Hutton* (1890) 124 Ind. 401, 24 N. E. 112; *Greenbrier Industrial Exposition* v. *Rodes* (1893) 37 W. Va. 738, 17 S. E. 305. In *Metropolitan Lead & Zinc Mining Co.* v. *Webster* (1906) 193 Mo. 351, 92 S. W. 79, an incorporator, who had been induced to become such by fraud, was held not liable on his subscription.

liminary subscribers not named in the articles included among "associates" under this statute, would be to abrogate the effect of the provision that all shareholders should be named. Conceivably, preliminary subscribers might become incorporators by force of the word *associates* without becoming shareholders, but such a result would be absurd under the Missouri statutes. Unless all the named shareholders were not required to be incorporators and as such to sign and acknowledge the articles between 1879 and 1911, it is difficult to find any meaning whatever for the word *associates* during that period. Since 1911, tho it is unnecessary that all of the stock should be stated to be subscribed, the names of the "shareholders" must be given in the articles. This provision will be abrogated if *associates* is made to include preliminary subscribers not so named, for by such inclusion they would become shareholding incorporators immediately upon the birth of the corporation. This, too, without any reference to the intent of the preliminary subscribers at the time of their signing. It is submitted that the proper interpretation of the word *associates* in the present statute as in the statute of 1879 which prevailed until 1909, will make it refer only to subscribers for stock who are named in the articles but who fail to execute them. And with the general practise compelled by the Secretary of State of having all named shareholders to execute the articles as parties thereto, the word *associates* becomes insignificant. But this does not mean that preliminary subscriptions are forbidden by the statute. It means that preliminary subscribers are not made incorporators by the statute and their relation to the corporation is therefore to be fixed without reference to the statute.

It is interesting to note that the new statute concerning the incorporation of building and loan associations enacted in 1915 [87] provides for the incorporation of twenty-five or more persons associated by an agreement in writing, and all who may thereafter become associated with them, which articles are required to state the names of the *incorporators* and the number of shares subscribed and to be signed and acknowledged by any ten of the parties thereto.

87. Laws of 1915, p. 231.

V Review of Missouri Decisions

The Missouri courts have followed a tortuous course in dealing with preliminary subscription agreements. The first litigation to reach an appellate court was in *Southern Hotel Co.* v. *Newman*,[88] in which the Supreme Court held that it was error to exclude evidence that the original subscription paper which had been signed by the defendant had been abandoned and that the corporation was formed in reliance on a wholly new subscription list. The court said that "corporators would have no right to set aside or annul subscriptions at their pleasure, without the assent or acquiescence of the subscribers; but why may not the subscribers, before the rights of third persons have intervened, agree to abandon their subscription, and to regard it as no longer of any force or effect?" There was no other indication of the court's view of the nature of the preliminary agreement.

Keane v. *Beard*[89] and *Ghio* v. *Beard*,[90] in the St. Louis Court of Appeals, arose out of a preliminary agreement under which numerous persons agreed to take stock and to employ the defendant Beard as an agent of the corporation to be formed. The subscriptions were paid in advance to Beard in cash and notes, and he proceeded to purchase the property which the corporation was to be formed to handle, but the corporation was never formed. In both cases the plaintiffs recovered from Beard the amounts advanced, in actions which resembled actions for money had and received. It was held that other subscribers were not necessary parties and the court said "that so far as questions of procedure are concerned, the contract of subscription to the capital stock of a corporation has always been regarded as a several contract between each subscriber and the corporation or other contracting party". It is clear that the agreement was not considered the mutual contract of all the subscribers.

88. (1860) 30 Mo. 118. It is not clear in *LaGrange & Monticello Plank Road Co.* v. *Mayo* (1859) 29 Mo. 64, whether the defendant had signed the articles or a preliminary paper.
89. (1881) 11 Mo. App. 10.
90. (1881) 11 Mo. App. 21.

New Lindell Hotel Co. v. *Smith*,[91] in the St. Louis Court of Appeals, involved an agreement by numerous persons with a Mrs. Ames to contribute certain sums of money to a corporation which she agreed to procure to be organized and to which she agreed to convey a site in St. Louis to be used for a hotel. It was in reality a series of bilateral contracts to which the various subscribers and Mrs. Ames were parties, tho each of the subscribers purported to contract with the others and the unborn corporation. The court held that the subscriptions enured to the benefit of the corporation so as to be enforceable by it and found the mutual promises of the several subscribers to be consideration for each other, wholly neglecting the consideration in Mrs. Ames' undertaking. The subscription seems to have been regarded as a subscription to stock, but it was only a donation of a bonus in which no contract with the corporation was contemplated. Even if there had been no bilateral contracts with Mrs. Ames, the subscriptions would have been enforceable after Mrs. Ames had performed the acts called for from her as the consideration.[92]

In *Haskell* v. *Sells*,[93] the defendant had signed a preliminary subscription agreement in which each subscriber "agreed to take a certain number of shares of stock in the corporation to be formed and to pay the par value thereof to the corporation". The corporation was duly organized under the statute of 1870[94] and became insolvent. The defendant knew nothing of what had happened after his subscription until he was sued by the assignee to enforce a stockholder's liability. The lower court had held that the beginning of the contemplated business constituted an acceptance of the subscription; without any analysis, the St. Louis Court of Appeals treated the subscription as a contract enuring to the benefit of the corporation and the plaintiff recovered. It was intimated that a different result might have been reached under a statute requiring the articles to name all share-

91. (1882) 13 Mo. App. 7.
92. *Workman* v. *Campbell* (1870) 46 Mo. 309; *James* v. *Clough* (1887) 25 Mo. App. 153.
93. (1883) 14 Mo. App. 91.
94. Wagner's Missouri Statutes 1870, Art. VII.

holders. In pursuance of an option allowed him by the promoter, the subscriber in this case had notified the promoter who had solicited him that he would not take the stock and the promoter seems to have agreed to release him. This was before the incorporation, but the court thought it unavailing, tho little attention was given to the point.[95] If it had been inclined to find that the subscriber could withdraw, it is submitted that notice to the leading promoter who had induced the subscription was a sufficient notice of withdrawal.[96]

The leading case in Missouri is *Sedalia, Warsaw & Southern Railway Co.* v. *Wilkerson*,[97] in which a railway company sought to enforce a preliminary agreement to take a certain number of shares of its stock against the estate of a subscriber who had died before the incorporation was completed. The statute then in force purported to incorporate the persons who had subscribed the articles of association and "all persons who shall become stockholders" and provided that the directors "may, in case the whole of the capital stock is not before subscribed, open books of subscription to fill up the capital stock of the company";[98] and it did not require shareholders to be named in the articles. The court held that the statute excluded any other method of becoming a subscriber to the capital stock of a corporation, except by signing the articles of association or by subscribing the book opened after the creation of the corporation. This interpretation was probably due to the influence of two New York cases cited by the court, *Troy & Boston R. R.* v. *Tibbits*[99] and *Poughkeepsie & Salt Point Plank Road Co.* v. *Griffin*,[100] both of which were decided under the New York statute which in terms provided that preliminary subscribers should also subscribe the articles of

95. The court cited *Hughes* v. *Antietam* (1870) 34 Md. 316, in which the subscriber signed the certificate of association.

96. *Hudson Real Estate Co.* v. *Tower* (1894) 161 Mass. 10, 36 N. E. 680; *Planters' & Merchants' Independent Packet Co.* v. *Webb* (Ala., 1908) 46 So. 977.

97. (1884) 83 Mo. 235.

98. Wagner's Missouri Statutes 1870, p. 299, and Laws of 1877, p. 371. The sections are the same as Revised Statutes 1879, §§ 711, 764.

99. (1854) 18 Barb. 297.

100. (1861) 24 N. Y. 150, overruling *Poughkeepsie & Salt Point Plank Road Co.* v. *Griffin* (1856) 21 Barb. 454.

association.[101] The Missouri statute was copied from a later New York statute [102] which in *Buffalo & Jamestown R. R.* v. *Gifford,*[103] decided two years before *Sedalia, Warsaw & Southern Ry. Co.* v. *Wilkerson,* was held "not to prescribe a fixed statutory mode of making a subscription".[104] Perhaps owing to its recentness, this later New York decision was overlooked by the Missouri court. A board of directors has power to open books of subscription independently of statute and the view of the Missouri court that the statute enumerating such a power excludes common law subscriptions perfected by the corporation's acceptance of preliminary offers or by its taking advantage of contracts made for its benefit, is wholly untenable and unsustained by authority.

But the judgment that the deceased subscriber's estate in *Sedalia, Warsaw & Southern Ry. Co.* v. *Wilkerson* was not liable on the subscription may be justified on other grounds. *Haskell* v. *Sells,* which had been decided a year previously, was not cited by the court and it was authority for holding that the corporation could recover on the contract made for its benefit before its organization in spite of the subscriber's death. But the subscription in *Sedalia, Warsaw & Southern Ry. Co.* v. *Wilkerson* was clearly not a mutual contract and *Haskell* v. *Sells* might have been repudiated; unfortunately the court gave no attention to this phase of the case. The subscription was only an offer to the corporation which it was impossible for the corporation to accept after its organization because of the previous death of the of-

101. N. Y. Laws of 1847, c. 210, and N. Y. Laws of 1848, ch. 140 are in this respect identical.

102. N. Y. Laws of 1850, c. 140, art. 4.

103. (1882) 87 N. Y. 294. See also *Peninsular Ry. Co.* v. *Duncan* (1873) 28 Mich. 130.

104. The court said of the New York statute, in all respects identical with the Missouri statute: "It does not prohibit or forbid any other mode of subscription and it is not perceived that any public policy would be subserved by holding that any subscription valid at common law is invalid by this section of the statute, and we are inclined to the opinion that it was not intended by this section to prescribe a fixed statutory mode of making a subscription and that any contract of subscription good and valid at common law is still valid, notwithstanding this section."

feror.[105] It is for this reason that the right result was reached in *Sedalia, Warsaw & Southern Ry. Co.* v. *Wilkerson.*

Haskell v. *Worthington*,[106] in the Supreme Court, involved the same agreement passed on by the St. Louis Court of Appeals in *Haskell* v. *Sells.* The defendant Worthington was the last of the subscribers to sign, but he was held not liable on the ground that all of the capital stock as stated in the recorded certificate had not been subscribed.[107] *Haskell* v. *Sells* was not cited and the court did not address itself to the possibility of recovery where all the capital stock is subscribed [108] tho it seems to have been taken for granted. It was said *obiter* that the defendant was not released because the corporation as organized had additional powers to those contemplated at the time of the defendant's subscription, such additional powers being incidental to those contemplated.

In *Ollesheimer* v. *Thompson Mfg. Co.*,[109] the defending stockholders had signed the articles of association and it was entirely *obiter* that the court spoke of the contract of subscription, which was said to "inure to the benefit of the corporation as soon as it is formed", and to be a *polypartite* contract between each subscriber and each of the others "in a sense which creates an estoppel against the subscriber", which "estoppel enures to the benefit of subscribers subsequently signing".

Davis v. *Johnson* [110] shows the possibilities of the preliminary situation in that the various subscribers who proposed to form a corporation, contracted with the plaintiffs to accept and pay for a building which the plaintiffs agreed to erect. The subscribers became liable to the plaintiffs when the latter erected the building as agreed and turned it over to the corporation,

105. *Wallace* v. *Townsend* (1885) 43 Ohio St. 537, 3 N. E. 601. *Cf. Beach* v. *Methodist Church* (1880) 96 Ill. 177.

106. (1887) 94 Mo. 560, 7 S. W. 481.

107. In *Sedalia, Warsaw & Southern Ry. Co.* v. *Abell* (1885) 17 Mo. App. 645, the statute expressly authorized the corporation to begin business before all of its capital stock had been subscribed, so the defendant who signed the articles of association was held liable tho all the stock had not been subscribed.

108. *Haskell* v. *Worthington* was approved in a dictum in *Hequembourg* v. *Edwards* (1899) 155 Mo. 514, 521, 56 S. W. 490.

109. (1890) 44 Mo. App. 172.

110. (1892) 49 Mo. App. 240.

irrespective of rights which each subscriber might have had against the corporation. Such a subscription constituted a bilateral contract with the builders, tho a further contract with the corporation was contemplated. Similarly, subscribers might become liable to promoters and the case is not unlike *New Lindell Hotel Co.* v. *Smith.*

In *Newland Hotel Co.* v. *Lowe Furniture Co.,*[111] the preliminary subscription was *ultra vires* to the corporation which made it and the subscriber was not bound. But the Kansas City Court of Appeals said that "the subscription if valid of course enured to the benefit of the plaintiff [the corporation]. This assertion is too well settled to require the citation of the authorities to support it". And the same court said of the same preliminary agreement in *Newland Hotel Co.* v. *Wright,*[112] "the subscription paper became as between the parties thereto a binding contract, the obligation of each and all being a consideration for the undertaking of every other subscriber. And said contract, good between the parties at the time, inured to the benefit of the corporation when subsequently formed." But the preliminary subscription paper in these cases was of the most informal sort and could not have been more than an offer which ripened into a contract when accepted by the corporation. In the latter case, after all the stock had been subscribed the defendant subscriber met with the other subscribers and participated in the meeting which appointed a committee to formally incorporate the company and "to sign as the holders of all the stock". This was held to estop him to deny his liability. But the stock was not all subscribed since the subscription of the Lowe Furniture Co. was void because it was *ultra vires;* this point was not noticed, but on the authority of *Haskell* v. *Worthington* it should have been held a sufficient defense.[113] The incorporation was under the statute as to manufacturing and business companies [114]

111. (1897) 73 Mo. App. 135.
112. (1897) 73 Mo. App. 240.
113. *Cf. McCoy* v. *World's Columbian Exposition* (1900) 186 Ill. 356, 57 N. E. 1043. But see *United States Vinegar Co.* v. *Foehrenbach* (1895) 148 N. Y. 58, 42 N. E. 403.
114. Revised Statutes 1889, §§ 2768, 2769, as amended in Laws of 1891, pp. 77, 79.

as enacted in 1879, but the court found it unnecessary to interpret its provisions.

A preliminary subscription was enforced in *Louisiana Purchase Exposition Co.* v. *Kunzell*,[115] the corporation having been organized under the world's fair corporation statute of 1899.[116] The only contention was that the condition that a certain amount of stock should be subscribed had not been complied with. The preliminary subscription constituted an offer to the corporation which had been accepted subsequently to its organization and no question was raised as to the validity of this contract.

Shelby County Railway Co. v. *Crow*[117] is a companion case to *Sedalia, Warsaw & Southern Ry. Co.* v. *Wilkerson* and was decided by the St. Louis Court of Appeals under the same statute. The preliminary subscription was informal, each signer subscribing the amount set opposite his name as the amount of stock to be taken in a corporation to be formed. Tho it was bound to follow the decision of the Supreme Court in *Sedalia, Warsaw & Southern Ry. Co.* v. *Wilkerson,* the St. Louis Court of Appeals protested very vigorously against that decision, stating its view to be that a subscription to the stock of a corporation is a "trilateral contract, that is, an undertaking not only between the corporation and the individual stockholder, but it is an undertaking between the corporation, the individual subscriber and all other subscribers to the stock as well". One is surprised to read, however that this "doctrine obtains generally". Indeed, it cannot to be said to prevail except in Pennsylvania, where recent decisions have been to this effect.[118] Tho contracts are now generally classified as unilateral and bilateral, the term trilateral has rarely been used. The common law does not seem to admit of the conception of a trilateral contract. It is possible for A to promise B in

115. (1904) 108 Mo. App. 105, 82 S. W. 1099.
116. Revised Statutes 1899, § 1523 et seq.
117. (1909) 137 Mo. App. 461, 119 S. W. 435.
118. *Graff* v. *Pittsburgh & Steubensville R. R. Co.* (1858) 31 Pa. St. 489; *Philadelphia, etc. R. R. Co.* v. *Conway* (1896) 177 Pa. 364; 35 Atl. 716; *Acetylene Light Co.* v. *Beck* (1898) 6 Pa. Super Ct. 584; *Braddock Ry.* v. *Bily* (1899) 11 Pa. Super. Ct. 144; *Altoona Milk Co.* v. *Armstrong* (1909) 38 Pa. Super. Ct. 350; *Garrett* v. *Philadelphia Lawn Mower Co.* (1909) 39 Pa. Super. Ct. 78.

consideration of B's promise to C, B's promise in turn being in consideration of C's promise to A; or for A to be obligated to B and C severally, B to A and C severally and C to A and B severally by one agreement, the obligations being respectively in consideration of each other; but these are nothing more than series of bilateral contracts. The term *trilateral* indicates simply a number of separate obligations as the term *tripartite* indicates a number of parties. Contractual obligations at common law must be the result of either unilateral or bilateral contracts and even a unilateral contract must be at least bipartite. It would seem to serve no useful purpose to employ the ambiguous term *trilateral* in connection with subscription contracts. But for the decision in *Sedalia, Warsaw & Southern Ry. Co.* v. *Wilkerson,* the subscriber might have been held in *Shelby County Ry. Co.* v. *Crow* on the ground that the demurrer admitted that after the corporation was organized it had accepted the offer contained in the subscription and had tendered a certificate of stock to the subscriber. Such facts would seem to have entitled the corporation to treat the subscriber as a stockholder.

In *Business Men's Association* v. *Williams,*[119] the defendant had subscribed an informal agreement to take stock in a corporation to be organized and after the incorporation had been completed had actually paid a part of his subscription. The corporation was organized under the statute concerning manufacturing and business companies [120] so that the St. Louis Court of Appeals was not bound to follow *Sedalia, Warsaw & Southern Ry. Co.* v. *Wilkerson* as it had been in *Shelby County Ry. Co.* v. *Crow.* The court expressed the view that the preliminary subscription constituted a valid contract between the subscribers for the benefit of the corporation to be formed, tho it did not clearly distinguish between such a contract and a mere offer to the corporation. It seems to have been thought that the mere organization of the company would in itself constitute an acceptance of an offer made to the corporation. The decision was put on the ground that the defendant was estopped to deny his lia-

119. (1909) 137 Mo. App. 575.
120. Revised Statutes 1899, § 1312.

bility after having paid a part of his subscription.[121] The directors had been authorized to proceed with the organization of the company and to vote the stock of the subscribers as they might see fit. All of the stock had been issued to the persons who acted as incorporators and it was therefore impossible for the corporation to issue to the defendant any stock which had not previously been issued.

The attempt to form a corporation in *Loewenberg* v. *DeVoigne*[122] was abortive. It had been preceded by an agreement among various persons that a majority in interest of the subscribers should organize a corporation for certain purposes and the defendant refused to participate in such organization. The petition was held bad on demurrer. It is not clear that the defendant had agreed to join in the incorporation or to take shares in the corporation when formed, but even if such were the case the agreement was too indefinite to be enforced.[123]

In *Palais du Costume Co.* v. *Beach*,[124] the defendant was not one of the original subscribers. But the Springfield Court of Appeals seems to have thought an original subscription might be withdrawn before acceptance by the corporation.

Louisiana Purchase Exposition Co. v. *Schnurmacher*, first decided by the Springfield Court of Appeals[125] and later by the St. Louis Court of Appeals,[126] arose under the statute as to world's fair corporations[127] which does not substantially differ from the railroad corporation statute under which *Sedalia, Warsaw & Southern Ry. Co.* v. *Wilkerson* was decided, except that the articles of agreement, tho they must be signed by only twenty-five incorporators, must state the names of the first fifty subscribing shareholders and the corporation is to be composed of

121. *Kirkwood Gymnasium Assn.* v. *Van Ness* (1895) 61 Mo. App. 361, is in accord, but the defendant there was one of the incorporators. *Cf. Nebraska Chicory Co.* v. *Lednicky* (1907) 79 Neb. 587, 113 N. W. 245. *Quaere*, whether the giving of a note for a part of the subscription would have the same effect.

122. (1909) 145 Mo. 712.

123. *Watson* v. *Bayliss* (Wash., 1913) 128 Pac. 1061.

124. (1910) 144 Mo. App. 456, 129 S. W. 270 (1911) 163 Mo. App. 499, 143 S. W. 852.

125. (1910) 151 Mo. App. 601, 132 S. W. 326.

126. (1911) 160 Mo. App. 611, 140 S. W. 1198.

127. Revised Statutes 1899, § 1523 *et seq.*

those who acknowledge the articles of agreement and their successors. The preliminary agreement is not set out in terms and neither court gave attention to the nature of the contract, but assuming it to exist distinguished the statute so that the subscriber might be held.

The question as to the effect of a preliminary subscription is squarely presented in the recent case of *DeGiverville Land Co.* v. *Thompson* [128] in the St. Louis Court of Appeals, which arose under the statute as to manufacturing and business companies in force until 1911. Numerous persons subscribed for certain numbers of shares of stock in a corporation to be formed for the purchase and sale of certain land, and appointed a committee to effect the purchase and to borrow money and give a deed of trust for this purpose if necessary and to cause to be formed a corporation to which such land should be conveyed. The committee prepared articles of agreement which named an attorney, not a member of the committee, as the holder of a large number of shares which had been subscribed for by numerous persons of whom the defendant was one. The committee then borrowed a sum of money equal to what defendant agreed to pay for shares and consummated the purchase, taking title in the name of the corporation. The corporation sued for the amount of defendant's subscription and recovered. It was held that the statute [129] does not require the subscribers to sign the articles of association, and that they are included in the word "associates", and on this ground the court distinguished *Sedalia, Warsaw & Southern Ry. Co.* v. *Wilkerson* and *Shelby County Ry. Co.* v. *Crow*. It was admitted by the court that the statute of 1909 requires all named shareholders to sign the articles [130] but stated that there could be incorporators who did not sign; [131] the effect of this would be that there were incorporators who were not shareholders. Surely this is not a proper interpretation of

128. (1915) 190 Mo. App. 682, 176 S. W. 409.
129. Revised Statutes 1909, § 3339 *et seq.*
130. This as a result of the requirement that the articles state "the names and places of residence of the several shareholders" and be signed "by the parties thereto".
131. This as a result of the incorporation of the persons who acknowledge the articles, and their "associates" and successors.

the statute. The court said that the preliminary agreement constituted a trilateral contract and spoke of the mutual promises of other subscribers as consideration for the defendant's promise which inured to the benefit of the corporation. But on this theory there was a breach of the contract of the other subscribers for defendant was not named as a shareholder and another person was named in his stead. When it came into being the corporation had all of its capital stock held by the shareholders named in the articles who were entitled to certificates therefor. The corporation was bound to treat the attorney as the holder of the number of shares which had been set opposite his name in the articles, for it was in no way affected by the attorney's obligations to the defendant.[132] It could not have treated defendant as a shareholder without going beyond its authorized capital stock and such conduct would have been *ultra vires*.[133] Defendant was therefore left to his recourse against the committee and it is a question of interpretation of its authority whether it could have compelled him to receive from the attorney some of the shares which he held. The lender of the money may have had an action against the defendant for money lent if it could be shown that the defendant authorized money to be borrowed when he was not entitled to any shares as against the corporation but not otherwise. If the defendant was included among the "associates" as an original incorporator, then we should have an anomalous situation in which both the attorney and the defendant would be entitled under the statute to the same shares of stock. It is difficult on any theory to work out liability to the corporation. The court attempts this by saying that the defendant contracted with the corporation "for the benefit of all the subscribers on the theory of a trilateral contract", having previously treated it as a contract between the subscribers for the benefit of the corporation. This confusion is due to a failure to keep in mind the distinction between a contract between various persons for the benefit of the corporation, in no sense a trilateral but simply

132. *Boatmen's Bank* v. *Gillespie* (1908) 209 Mo. 217, 108 S. W. 74, quoting with approval from 1 Morawetz, Corporations (2d ed.) § 304.

133. See note 11, *infra*.

an ordinary contract for the benefit of a third person, and an offer to a corporation which ripens into a contract when accepted by the corporation, which contract is for the benefit of the corporation alone. If such an offer be found in this case, it could not be accepted by a corporation whose capital stock was already fully subscribed. The court really disregarded the corporate fiction in this case to justify a recovery by the corporation. It may well be doubted whether in making the attorney a shareholder instead of the defendant, the committee did not violate its instructions so as to release the defendant altogether.[134] But if the defendant was liable at all, it would seem that the suit ought to be in the name of the attorney or the committee or the lender.

It is also sought to justify the result of the decision in *De Giverville Land Co.* v. *Thompson* by saying that the defendant was estopped to deny his liability for what the committee as his agents had done. In this respect the case is unlike *Newland Hotel Co.* v. *Wright* where the defendant met with the other subscribers and authorized the committee "*to sign as the holders of all the stock*", with the understanding that the stock should subsequently be issued, really transferred, to the subscribers. Here the defendant had given the committee no such authority and the committee organized a corporation which was not in any way bound to treat the defendant as a stockholder, tho it is possible that the attorney could have been treated as a constructive trustee of the stock for the defendant. The committee owed no contractual duty to the defendant except that which every agent owes to his principal, and it's members did not purport to contract with the corporation as agents of the defendant, tho they may have borrowed the money as his agents. It is difficult to see, therefore, how the unauthorized act of his agents constituted any representation to the corporation which would estop the defendant.[135]

134. *Cf. Birmingham National Bank* v. *Roden* (Ala., 1892) 11 So. 883, where one who was named in the articles as a shareholder recovered from the corporation which issued the shares, to which the plaintiff was entitled, to a promoter.

135. *Cf. Ottawa Dairy Co.* v. *Sorley* (1904) 34 Canada Sup. Ct. 508. Nor can the decision in *De Giverville Land Co.* v. *Thompson* be justified on the authority of *Carmichael's Case* (1896) 2 Ch. 643, cited in note 46, *supra.*

VI Summary

These decisions leave preliminary stock subscription agreements in a precarious and unsatisfactory position in Missouri law. It can be much improved by a careful revision of the statutes of incorporation so as to make it clear who are incorporators and who are initial shareholders so constituted by the statute. Meanwhile there must be some interpretation of past and present statutes with reference to corporations organized under them.

As to the railroad statute in which no change material in this respect has been made since it was first enacted in 1855, it is submitted that the decision in *Sedalia, Warsaw & Southern Ry. Co.* v. *Wilkerson* ought to be overruled. As to railroad corporations organized since 1909, that decision is not binding in view of the fact that it rests so largely on an interpretation of the statute authorizing directors to open books of subscription, which section was repealed in 1909.

As to manufacturing and business corporations, it is improbable that any cases will arise under the old statutes which prevailed prior to 1879. Under the statute as it existed from 1879 to 1911, it is difficult to find any room for preliminary subscribers since all the stock had to be subscribed and all the shareholders had to be named in the articles, tho the statute purports to incorporate "associates". *Newland Hotel Co.* v. *Wright* and *Business Men's Association* v. *Williams* do not determine the construction to be placed on this statute for both cases can be rested on estoppel. It is submitted that this statute was misapplied in *De Giverville Land Co.* v. *Thompson.* No case has arisen under the statute of 1911—it is submitted that since all of the stock is not required to be subscribed, preliminary subscribers who do not become incorporators and who are not named as shareholders in the articles, may nevertheless become shareholders after incorporation. This is clearly permitted by the statute as to world's fair companies.

The statute as to telegraph and telephone companies has since it was first enacted in 1865 required all preliminary subscribers to sign the articles. The new statute of 1915 as to building and loan associations does not in any way restrict preliminary subscriptions.

Apart from statute, it is difficult to state the result of the Missouri decisions as to the legal effect of the preliminary subscriptions. The courts show a disposition to find a mutual contract between the subscribers in every case, but all of the decisions except *Haskell* v. *Sells* can be explained by saying that the subscribers had made an offer which the corporation accepted after its organization. *Haskell* v. *Sells* is authority for the proposition that the subscription constituted a contract from which the subscriber cannot withdraw even before the organization is completed. The opinion is poorly considered and the holding is opposed to the great weight of authority in other states.

It is suggested that preliminary subscribers should always be made to sign the articles of association, and that to avoid the consequences of their refusal do so, the preliminary subscription should always be made to take the form of an agreement between the promoter and each subscriber, by which both will become obligated from the moment of the latter's signing.

MANLEY O. HUDSON.[136]

136. The writer has been ably assisted in the preparation of this article by S. P. Wilkes, Esq., of the class of 1916.