

NOTICE AND GROUNDS OF APPEAL.

COURT OF ERRORS AND APPEALS OF
NEW JERSEY.

ROBERT Z. COLLINGS, Trustee,
Plaintiff-Appellant,
vs.

WALTER ALLEN,
Defendant-Respondent.

ROBERT Z. COLLINGS, Trustee,
Plaintiff-Appellant,
vs.

ABRAHAM SALTZMAN,
Defendant-Respondent.

APPEAL FROM SUPREME COURT.

NOTICE AND GROUNDS
OF APPEAL.

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*To V. Claude Palmer, Martin V. Bergen, and
Morris Wolf, Esquires, Attorneys for Respondents:*

Dear Sirs:

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Take notice that the plaintiff appeals the above-stated causes to the Court of Errors and Appeals from the judgment entered in the above causes on the day of March, nineteen hundred and seventeen upon the following grounds:

1. Because the determination of said Court that the subscribers to the stock of plaintiff's company were not liable for the amount of their unpaid subscriptions is erroneous and contrary to law.

2. Because the stock subscription of the defendants and each of them on which these suits were brought is a valid contract and the amount thereof with interest is due to plaintiff.

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3. Because the defendants and each of them either waived or are estopped from setting up informality of organization of the said automobile company, after insolvency proceedings were instituted.

4. Because the determination of said Court is erroneous in point of law.

Your obedient servant,

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JOSEPH BECK TYLER,
Attorney for Appellant.

Proper and sufficient service is hereby acknowledged this fourteenth day of April, A. D. 1917.

V. CLAUDE PALMER,
MARTIN V. BERGEN,
Attys. for Defendants-Respondents.

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OPINION.

NEW JERSEY SUPREME COURT.

Nov. TERM, 1916.

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ROBERT Z. COLLINGS, Trustee,
vs.
WALTER ALLEN.

Appeal from Burlington Circuit Court.
Argued before Gummere, Chief Justice, and Jus-
tices Trenchard and Black. 20
For the appellant, Martin V. Bergen.
For the respondent, Joseph Beck Tyler.
The opinion of the Court was delivered by

GUMMERE, C. J.:

This action was brought by Collings, the trustee of "The Ottomobile Company," a corporation of New Jersey, adjudicated a bankrupt by the United States District Court, upon a stock subscription 30 signed by the defendant, of which the following is a copy: "Subscription to preferred stock of the Ottomobile Company, par value \$100 per share. September 25, 1911. I hereby subscribe to four shares of the par value of \$100 per share of the six per cent. preferred stock of the Ottomobile Company,

a corporation to be organized under the laws of the State of New Jersey with an authorized capital of \$250,000, six per cent. preferred, and \$250,000 common stock, one share of common stock to be given as a bonus with each two shares of preferred. The purpose of the organization is to acquire the automobile interests of the Otto Gas Engine Works of Philadelphia, and the entire assets and good will of the Otto Motor Car Sales Company of Philadelphia. I agree to pay for such stock as follows," and then follows the dates and amounts of the payments.

The case was tried before the Court without a jury, and resulted in a finding in favor of the plaintiff for the par value of four shares of the preferred stock, and two shares of the common stock of the bankrupt corporation, with interest upon the same from the date when, according to the finding of the Court, the defendant was obligated to take the stock. From the judgment entered on this finding the defendant appeals.

The company of which the plaintiff is the representative was organized under the corporation laws of this state in January, 1912. The principal purposes of its incorporation, as set forth in the certificate filed by it, were to manufacture automobiles, automobile and motor car accessories and supplies of every class and description, including any and all parts of vehicles of all kinds, or any other goods pertaining to the automobile business, or otherwise, which the corporation may determine to manufacture. To buy, sell and deal in automobiles, automobile and motor car accessories and supplies of every class and description as manufacturers, agents, jobbers, wholesale or retail, on commission or consignment or otherwise, including any and all

parts of vehicles of all kinds, or any other goods pertaining to the automobile business, or otherwise, in which the corporation may determine to deal. To carry on the business of mechanical engineers, and dealers in and manufacturers of plants, motors, engines and other machinery. To buy, sell, manufacture and deal in machinery, implements, rolling stock and hardware of all kinds. To build, construct and repair railroads, water, gas and electric works, tunnels, bridges, viaducts, canals, hotels, wharves, piers, 10 or any like work of internal improvement, public use or utility. To manufacture, purchase, or otherwise acquire goods, merchandise and personal property of every class, and to hold, own, mortgage, sell or otherwise dispose of, trade, deal in and deal with the same. To borrow or raise money without limit as to amount by the issue of, or upon, warrants, bonds, debentures and other negotiable or transferrable instruments, or otherwise.

Other purposes are also specified in the certificate of incorporation; we do not find it necessary, 20 however, to recite them. It is enough to say that the purposes for which the bankrupt corporation was organized are not only far different from, and far more comprehensive than those for which the proposed company referred to in the defendant's subscription contract was to be organized, but that they do not any of them necessarily embrace either of the two purposes expressed in that contract, namely, 30 the acquisition of the automobile interests of the Otto Gas Engine Works of Philadelphia, and the entire assets and good will of the Otto Motor Car Sales Company of Philadelphia.

The case was decided below, and is argued here on behalf of the respondent, upon the theory that the appellant by signing the subscription contract

became a quasi stockholder in the proposed company, and that having stood by without protest and permitted the organizers of the now bankrupt corporation to incorporate it for purposes entirely different from those which were originally proposed, he is deemed to have acquiesced in the change, and to be bound by their acts. But, clearly, the position of the appellant was not that of a quasi stockholder acquiescing in the proposal of his fellow stockholders to divert his and their moneys to purposes other than those to which they were agreed to be appropriated at the time he signed the subscription. His contract, and that of his fellow subscribers, was to take specified shares in a New Jersey corporation to be thereafter organized, having a specified name, a specified amount of capital stock, and to be created for the purpose of carrying into effect certain specified objects. The name of the intended corporation was, of course, of secondary importance. That it should be organized under the laws of the state of New Jersey, and also be clothed with all the powers, and receive all the protection, afforded by those laws, was of primary importance. So, too, was the amount of the capital stock. But even more important was the purpose to which the moneys of the gentlemen who signed these subscription certificates was to be devoted. They became subscribers upon the express condition that their money should be used for the specific purposes set out in the contract signed by them, and for such ancilliary purposes as were necessary or reasonable. They never agreed to embark their money in any such schemes as are exhibited by the certificate of incorporation of the company of which the plaintiff is the trustee, and, subsequently, had no interest in the formation of a company to exploit those

schemes. Their acquiescence or non-acquiescence in the organization of such a corporation was entirely immaterial, so far as the power of the promoters to create it for the purposes specified in its certificate of incorporation was concerned; and their protest against such action would have been entirely unavailing; for the intended promoters were at perfect liberty to embark their own capital, and the capital of any one else who desired to join them in floating any scheme which they saw fit to inaugurate, without the let or hindrance of persons who had no interest therein. So, too, they had a right to adopt the name which was proposed for the corporation intended to be organized for the purposes expressed in the subscription contract which the appellant signed; for no right to that name had vested in him and his fellow subscribers, and could not do so until the corporation in which they had expected to invest their money had actually been formed. 10 20

The obligation of the defendant and his fellow subscribers is expressed within the four corners of the instrument which is the foundation of the present suit. The fact that the promoters of the intended corporation saw fit to abandon the original purposes thereof, and organize a company the purposes of which were radically different in every respect, could not alter the fundamental contract of Mr. Allen and his associates, and impose upon them an obligation to invest their moneys in the new scheme. We conclude, therefore, that the judgment under review must be reversed. 30

JUDGMENT AND REMITTUR.

NEW JERSEY SUPREME COURT.

ROBERT Z. COLLINGS, Trustee,

Plaintiff-Respondent,

VS.

WALTER ALLEN,

Defendant-Appellant.

APPEAL FROM' BURLINGTON COUNTY
CIRCUIT COURT.

JUDGMENT AND REMITTUR.

The above-stated cause having been duly argued at the present term of this court by V. Claude Palmer and Martin V. Bergen, attorneys for appellant, and Joseph Beck Tyler, attorney for respondent, and the Court having inspected the record and judgment below, and considered the causes assigned for error:

It is thereupon ordered that the judgment of the Burlington County Circuit Court be in all things reversed, set aside and for nothing holden; and that the record and proceedings be remitted to the said Burlington County Circuit Court to be proceeded with in accordance with this judgment and the practice of said court.

On motion of

V. CLAUDE PALMER,
MARTIN V. BERGEN,
Attorneys for Appellant.

Consent is hereby given that this judgment be entered as of February term.

V. CLAUDE PALMER,
MARTIN V. BERGEN,
Attorneys for Appellant.

JUDGMENT AND REMITTUR.

NEW JERSEY SUPREME COURT.

ROBERT Z. COLLINGS, Trustee,

Plaintiff-Respondent,

vs.

ABRAHAM SALTZMAN,

Defendant-

Appellant.

APPEAL FROM BURLINGTON COUNTY
CIRCUIT COURT.

JUDGMENT AND REMITTUR.

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On motion of

V. CLAUDE PALMER,
MARTIN V. BERGEN,
Attorneys for Appellant.

Consent is hereby given that this judgment be entered as of February term.

V. CLAUDE PALMER,
MARTIN V. BERGEN,
Attorneys for Appellant.

INSTITUTION AND EXHIBITION

THE GREAT BRITISH MUSEUM

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BURLINGTON COUNTY CIRCUIT COURT

ROBERT Z. COLLINGS, TRUSTEE,	}	ACTION AT LAW NOTICE OF APPEAL	10
Plaintiff			
<i>VS.</i>			
WALTER ALLEN,			
Defendant.			

ROBERT Z. COLLINGS, TRUSTEE,	}	ACTION AT LAW NOTICE OF APPEAL	
Plaintiff.			
<i>VS.</i>			
ABRAHAM SALTZMAN,			
Defendant.			

To Joseph Beck Tyler, Esq., Attorney for Plaintiff. 20

Take notice that the defendants in the above entitled causes appeal to the New Jersey Supreme Court the whole of the judgment entered in this case on the following grounds:

1. Because the Court refused to permit the defendants to show that the promoters of the Ottomobile Company came to Mount Holly with a certain proposition for a plant to manufacture automobiles, which was to be located at Mount Holly; that as in the original plans as presented to the citizens of Mount Holly there were changes made, which were agreed to by the promoters, and which subsequently became the circumstances and conditions and agreements upon which the subscriptions were obtained, 30

2. Because the Court refused to permit the witness, William D. Marren, to answer the following questions:

"Q. Now, Mr. Marren, did you ever hear any statements made by Messrs. Jones and Irvin with reference to where the plant for the manufacture of these automobiles was to be erected?"

"Q. What were those statements?"

10 "Q. Mr. Marren, did you ever hear any statements made by Messrs. Jones and Irvin with reference to whether or not a plot of ground had been purchased for the erection of a factory for the manufacture of automobiles at Mount Holly?"

"Q. What was that statement?"

"Q. Mr. Marren, did you ever hear Messrs. Jones and Irvin make any statements with reference to the amount of stock they had secured in Philadelphia?"

"Q. What was that statement?"

20 "Q. Mr. Marren did you ever hear Messrs. Jones or Irvin make any statement with reference to having obtained a subscription for stock from one Edward F. Burns?"

"Q. Did you ever see, Mr. Marren, a blue print of the proposed factory to be built at Mount Holly?"

"Q. Mr. Marren, did you ever hear Messrs. Jones or Irvin make a statement as to the kind of motor that was to be put in the care to be manufactured by the Otto-mobile Company?"

"Q. What was that?"

30 "Q. I will ask you the same question and make the time subsequent to the 28th of September, 1911?"

"Q. What motors?"

"Q. Mr. Marren, has the Otto Gas Engine, as manufactured by the Otto Gas Engine Works, of Philadelphia, a distinctive reputation of its own."

"Q. Mr. Marren, were you present at any meeting of the citizens of Mount Holly at which Messrs. Jones and Irvin were present prior to the 25th day of September, 1911, at which meeting there was any statement made by Messrs. Jones or Irvin as to the location of the plant which was to be erected by the Ottomobile Company?"

"Q. What were those statements?"

3. Because the Court refused to permit the defendants to prove by the witness, Marren, and other witnesses, 10 that Messrs. Jones and Irvin, at meetings held during August and September, 1911, at the America Hose House, in Mount Holly, also in the Court House, and at the Kelsey & Killie Building, at which meetings were present a large number of citizens of Mount Holly, some of whom subsequently became subscribers for stock, included in which are the two defendants in the cases now before the Court, at which time Messrs. Jones and Irvin stated that the plant to be erected by the Ottomobile Company was to be erected at Mount Holly for the man- 20 ufacture of automobiles, which automobiles were to be those then manufactured by the Otto Gas Engine Works of Philadelphia, with which concern the Otto Motorcar Sales Company, represented by these gentlemen, Messrs. Jones and Irvin, had a contract to take over and manufacture the cars of the Otto Gas Engine Company; that a plot of land had been purchased or contracted for at Mount Holly, known as the Bidwell Tract, situate on West Washington Street, at the edge of Mount Holly; that these two gentlemen, Messrs. Jones and Irvin, had, 30 at the time of these statements, secured from subscribers in Philadelphia and elsewhere subscriptions to capital stock to the amount of one hundred thousand dollars of the preferred stock of the proposed corporation; that

among these subscribers, Messrs. Jones and Irvin had secured a subscription of Mr. Edward F. Burns to preferred stock to the amount of ten thousand dollars; that the engine to be placed in the cars to be manufactured by the Ottomobile Company was the engine as manufactured by the Otto Gas Engine Works of Philadelphia; that these statements were made by these two gentlemen in the hearing of the two defendants here before the Court, and that these statements induced these defendants to subscribe for this stock; that these men also stated that the corporation to be organized was to be organized for the purposes as indicated in these statements I have made.

4. Because the Court refused to non-suit the plaintiff at the conclusion of the plaintiff's case.

5. Because the Court refused to direct a verdict for the defendants at the conclusion of the whole case.

6. Because the Court refused to find as facts the requests of the defendants for finding of facts numbers 20 four to twenty-six, inclusive.

7. Because the Court refused to make the conclusions of law as requested by the defendants, numbers one to twenty-seven, inclusive.

V. CLAUDE PALMER

Attorney For Defendant.

30 Service of copy of within notice of appeal is hereby acknowledged this sixteenth day of September, 1916.

JOSEPH BECK TYLER,

Attorney for Plaintiff.

BURLINGTON COUNTY CIRCUIT COURT

ROBERT Z. COLLINGS, Trustee of	}	ACTION AT LAW 10 COMPLAINT.
THE OTTOMOBILE COMPANY, a		
Corporation of New Jersey,		
Bankrupt,		
	Plaintiff.	
VS.	}	
WALTER ALLEN,		
	Defendant.	

Plaintiff, ROBERT Z. COLLINGS, Trustee of THE OTTOMOBILE COMPANY, a Corporation of New Jersey, Bankrupt, of the City and County of Camden and State 20 of New Jersey, says:

1. The Ottomobile Company is a corporation of the State of New Jersey and was adjudicated a bankrupt on the fifth day of October, nineteen hundred and twelve and on the twenty-sixth day of November nineteen hundred and twelve plaintiff was appointed trustee of the estate of said bankrupt and has duly qualified as such trustee.

2. That on the twenty-second day of May nineteen hundred and fourteen, the United States District 30 Court for the District of New Jersey made an order assessing unpaid subscriptions to the preferred and common capital stock of the said The Ottomobile Company, a copy of which order is hereto annexed and made a part hereof.

3. That on September twenty-fifth, nineteen hundred and eleven the defendant subscribed to four shares, of the par value of One Hundred Dollars per share, of the preferred stock of the said The Ottomobile Company and, also, to two shares, of the par value of One Hundred Dollars per share, of the common stock of the said The Ottomobile Company and signed a subscription in writing, a copy of which subscription is hereto annexed and made a part hereof.

10 4. That the defendant has paid nothing on account of the four shares of preferred stock or the two shares of common stock, which makes a total amount of Six Hundred Dollars remaining unpaid on both the preferred and common stock together.

5. On the sixteenth day of December, nineteen hundred and fourteen, the plaintiff served upon the defendant a notice or call for payment of the unpaid subscription to both the preferred and common stock, a copy of which notice is hereto annexed and made a part hereof.

20 Plaintiff demands \$600.00 damages.

JOSEPH BECK TYLER,
Attorney for Plaintiff.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

IN THE MATTER OF THE OTTO-MOBILE COMPANY, BANKRUPT.	}	ON PETITION TO ASSESS STOCK ORDER
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The Trustee, Robert Z. Collings, in the above matter, having filed his duly verified petition praying that an assessment be made against the capital stock of said Otto-mobile Company for the full amount remaining unpaid on the subscriptions thereto and an order to show cause, dated the twenty-seventh day of March, nineteen hundred and fourteen, having been made thereon and duly served upon each and all of the stockholders herein-after set forth and coming on for hearing on Monday, 20 the twentieth day of April, nineteen hundred and fourteen at one o'clock in the afternoon and petitioner having taken testimony to prove the allegations set forth and the said matter having been duly adjourned to the first day of May, nineteen hundred and fourteen and further testimony having been taken and no one appearing in opposition thereto and the Court being satisfied of the sufficiency of the application therefor and that the full amount of the unpaid stock subscriptions of the said Otto-mobile Company is necessary to pay the debts of 30 said company and that the capital stock of said company should be assessed for the amount remaining thereon to satisfy the debts of said company, on motion of Joseph Beck Tyler of counsel for the trustee herein:

It is, on this twenty-second day of May, nineteen

hundred and fourteen, ordered, adjudged and decreed that an assessment is necessary for the full amount of all unpaid stock subscriptions, both for the preferred and common stock of said Otto-mobile Company, including the common stock subscribed for as a bonus to be given with the preferred stock and further that the said Robert Z. Collings, Trustee herein, do assess all of the subscribers to the said preferred and common stock of the Otto-mobile Company for the full amount subscribed for and
 10 remaining unpaid and for the full amount of the common stock subscribed for as bonus to be received with the preferred stock and further that the said trustee is further directed to institute and prosecute the necessary proceedings at law for the collection of said assessments.

It is further adjudged and decreed that the following are subscribers to the capital stock of the said Otto-mobile Company and that they be assessed for unpaid stock subscriptions in the amount set opposite their respective names, which is the amount remaining unpaid

20 thereon:

T. Lacey Akins,	\$300.
Walter Allen	600.
Artillias A. Anderson,	900.
Andrew R. Bedwell	150.
S. H. Bodine	150
T. Walter Borton	250.
Dr. Raymond S. Clark	300.
Ezekias W. Esham	300.
Dr. John J. Flynn	75.
30 George L. Garwood	375.
J. Harry Halt	600.
Clayton Hancock	150.
Miles W. Hargroves	300.
Charles Horner	150.
John R. Howell	150.

Edward B. Hulse	150.
B. Henry Jones	250.
Jonathan Kelsey & Herbert S. Killie, partners, trading as Kelsey & Killie	350.
Mary Krupnick	300.
William Kumpf & Rudolph Kumpf, partners trad- ing as Kumpf Bros.	200.
Richard Lamb	300.
Dr. Clifton E. Lord	150.
Richard H. Parsons	150. 10
Dr. Elmer D. Prickett	300.
Alexander Dubell	450.
Henry Rosenfeld	300.
Abraham Saltzman	600.
South Jersey Tobacco Company	400.
Cynthia S. Sutter	600.
William C. Wetherill	450.
Henry B. Wright	150.

S. CONRAD OTT,

Referee. 20

SUBSCRIPTION TO PREFERRED STOCK

— of —

THE OTTOMOBILE COMPANY

Par Value \$100 Per Share

10

Sept. 25th, 1911.

I hereby subscribe to four shares, of the par value of \$100 per share of the

SIX PER CENT. PREFERRED STOCK OF THE OTTOMOBILE COMPANY a corporation to be organized under the laws of the State of New Jersey with an authorized capital of \$250,000 Six per cent. Preferred and \$250,000 Common Stock, ONE SHARE OF COMMON STOCK TO BE GIVEN AS A BONUS WITH EACH TWO SHARES OF PREFERRED.

20 The purpose of the organization is to acquire the automobile interests of the Otto Gas Engine Works, of Philadelphia, and the entire assets and good will of the Otto Motor Car Sales Co., of Philadelphia.

I agree to pay for said stock as follows: Twenty-five per cent. upon notice to me of the completion of the organization of the corporation, and the balance upon call of the Treasurer of said corporation, in allotments of not to exceed twenty-five per cent. of my total subscriptions, at intervals of not less than thirty days for
30 each succeeding call, stock certificates to be delivered to me upon completion of payments.

Name
Address

Walter Allen
Mt. Holly

Dec. 15, 1914.

To Walter Allen

TAKE NOTICE that on the twenty-second day of May, nineteen hundred and fourteen an order was entered in the United States District Court for the District of New Jersey in the matter of the OTTO-MOBILE COMPANY, Bankrupt, wherein it was ordered, adjudged and decreed that an assessment is necessary for the full amount of all unpaid stock subscriptions, both 10
for the preferred and common stock of the said Otto-Mobile Company, including the common stock subscribed for as a bonus to be given with the preferred stock, and further, the trustee in bankruptcy is directed to take the necessary proceedings to make collection of such assessment.

IT WAS FURTHER ORDERED AND DECREED in the said order that the amount due from you upon your stock subscriptions for preferred and common stock, as aforesaid, is six hundred dollars. 20

YOU ARE, THEREFORE, requested to make payment of such assessment to the undersigned trustee within ten days from the date of the service of this Notice upon you, whereupon receipt will be forwarded and stock certificate issued.

Very truly yours,
ROBERT Z. COLLINGS, Trustee.
By JOSEPH BECK TYLER,
Attorney

BURLINGTON COUNTY CIRCUIT COURT

ROBERT Z. COLLINGS, TRUSTEE,
Plaintiff

VS.

WALTER ALLEN,

Defendant.

ACTION AT LAW.

ANSWER.

10

Defendant, who resides at Mount Holly, Burlington County, New Jersey, says:

1. He admits the allegations in paragraph one of said complaint.
2. He admits the allegations in paragraph two of said complaint.
3. He admits the allegations in paragraph three of said complaint, except that he denies that he signed any subscription for any shares of the common stock of said Company.
- 20 4. He admits the allegations in paragraph four of said complaint.
5. He admits the allegations in paragraph five of said complaint.

DEFENCES.

1. Defendant denies any liability to pay anything on account of said alleged subscription because of the false and fraudulent representations made to him by the said
30 Ottomobile Company and its agents; that the factory for the manufacture of automobiles by said Company was to be erected at Mount Holly and that the tract of ground upon which said factory was to be erected at Mount Holly had been purchased by said Company; which representations were known to be false by the said

Ottomobile Company and its agents, which false and fraudulent representations, knowingly made as aforesaid, induced this defendant to sign said subscription.

2. Defendant denies any liability to pay anything on account of said alleged subscription because of the false and fraudulent representations made to him by said Ottomobile Company and its agents that the parties in the City of Philadelphia interested in the formation of said Company had subscribed for stock to the amount of \$100,000.00, which false and fraudulent representations, 10 knowingly made as aforesaid, induced this defendant to sign said subscription.

3. Defendant denies any liability to pay anything on account of said alleged subscription because of the false and fraudulent representations made to him by the said Ottomobile Company and its agents that one Edward F. Burns had subscribed for stock in said Company to the amount of \$10,000.00, which false and fraudulent representations, knowingly made as aforesaid, induced this defendant to sign said subscription. 20

4. Defendant denies any liability to pay anything on account of said alleged subscription because of the false and fraudulent representations made to him by the said Ottomobile Company and its agents that the engine to be used in said car was an engine manufactured by the Otto Gas Engine Company of Philadelphia, which false and fraudulent representations, knowingly made as aforesaid, induced this defendant to sign said subscription.

5. Defendant denies any liability to pay any- 30 thing on account of said alleged subscription because the gift of common stock provided for in said subscription was in violation of section forty-eight of "An Act concerning corporations," (Revision of 1896) Comp. Stat. p. 1630.

6. Defendant will object, that this paper is not a subscription to preferred stock.

7. Defendant will object, that this paper is not a subscription to common stock.

8. Defendant denies any liability to pay anything on account of said alleged subscription to common stock because the Company had already issued all its common stock, and if this was a subscription it was an over subscription and there is no liability on same.

10 9. Defendant denies any liability to pay anything on account of said alleged subscription to preferred stock, because the Company was unable to carry out its part of same because it had already issued all of its common stock, issuance of which to the subscriber was a term of the agreement.

10. Defendant will object that the alleged subscription is not binding on defendant because it is illegal in that by it the Company purports to agree to sell this preferred and common stock for cash below its par value
20 contrary to the statutes of New Jersey. That therefore it will not be enforced against defendant.

11. Defendant denies any liability to pay anything on account of the said alleged subscription to preferred stock because the entire issue of preferred stock was not subscribed for and no liability rests on a subscribed until the entire issue had been subscribed for.

12. Defendant denies any liability to pay anything on account of the said alleged subscription to common stock because the entire issue of common stock was not
30 subscribed for and no liability rests on a subscriber until the entire issue had been subscribed for.

V. CLAUDE PALMER,
MARTIN V. BERGEN,
MORRIS WOLF,

Attorneys for Defendant.

NEW JERSEY SUPREME COURT
BURLINGTON CIRCUIT

ROBERT Z. COLLINGS, TRUSTEE, Plaintiff	}	ACTION AT LAW.	10
VS.			
ABRAHAM SALTZMAN, Defendant.	}	ACTION AT LAW.	
and			
ROBERT Z. COLLINGS, TRUSTEE, Plaintiff	}	ACTION AT LAW.	
VS.			
WALTER ALLEN, Defendant.	}		

Mt. Holly, N. J., April 5, 1916.

20

ROBERT Z. COLLINGS, Sworn for plaintiff.

Direct examination by Mr. Tyler—

Q. You are the plaintiff in this matter, are you not? 30

A. Yes, sir.

Q. You are the Trustee in Bankruptcy of the Otto-mobile Company?

A. Yes, sir.

Q. Appointed by the United States District Court?

A. Yes.

Q. You were also the receiver, were you not, appointed by the Court of Chancery before bankruptcy proceedings took place?

A. Yes.

Q. What is your connection with the Collings Carriage Company?

A. President and treasurer.

Q. Is the Collings Carriage Company a creditor of
10 this corporation?

A. It is.

Q. To what extent?

A. About \$5,200.

Q. And has their claim been filed and allowed?

A. Yes.

Q. What is the amount of claims which have been filed and allowed in this matter?

A. About \$60,000.

Q. They were claims which existed prior to the in-
20 solvency proceedings?

A. Yes.

Q. All of them?

A. Yes, sir.

Q. I show you what purports to the minute book of the Ottomobile Company and ask you whether or not that is the minute book that came to you as trustee.

A. Yes, sir.

Mr. Tyler— The minute book is offered in evi-
30 dence with the understanding that we shall read such parts in evidence as we deem pertinent.

(Book marked Exhibit P 1.)

No Cross Examination.

Mr. Tyler. The part of the minute book I want to read in the record is as follows: first is Article 2, giving the objects for which the corporation is established.

Mr. Bergen. I think we ought to have the charter.

Mr. Tyler. Then I will offer the whole charter as contained in the minute book. Then I will omit entirely the bylaws, which are unimportant and very lengthy.

I offer in evidence the minutes of the first meeting 10 of the incorporators, showing that the company was organized on January 4, 1912, and elected directors, and immediately following that the minutes of the directors showing that they organized and elected officers of the company; also in the same minutes, setting forth the fact that they had acquired all rights acquired by the Otto Motor Car Sales Company, under agreement dated September 20, 1911, between said Sales Company and the Otto Gas Engine Works. That is paragraph No. 1. Then paragraph No. 2, "The good-will of said Sales Com- 20 pany and such of its agency and contracts as the Ottomobile Company may in writing designate. Then paragraph 3, "all rights acquired by W. S. Jones and E. H. Irvin under agreement dated December 20, 1911, all their interest in said work."

Mr. Bergen. Would you mind spreading on the record what they paid for their rights?

Mr. Tyler. When this transfer was made in consideration of the issue of stock to this company to the 30 amount of \$50,000 preferred and \$250,000 common.

Mr. Palmer. Issued to whom?

Mr. Tyler. Well, it doesn't say in that paragraph,

but I understand that this offer was made by William S. Jones and E. H. Irvin, and that the issue would be made to them

The Court. Who were Jones and Irvin?

Mr. Tyler. They were two of the organizers.

Mr. Palmer. They were the promoters.

10

The Court. Promoters?

Mr. Tyler. Yes.

The Court. And do I understand that the minutes show that this company which Mr. Collings is trustee of took over the business and assets of another concern?

Mr. Tyler. Whatever it provided in there. I do
20 think they took over the assets of any concern in toto: that is, the Otto Sales Company still continued to exist and the Ottomobile Company was a distinct organization, and they simply took over the same rights which this company had under contract with these two concerns, but not taking over the entire concern.

Mr. Bergen. And they issued for that \$50,000 preferred and \$250,000 common to these two persons?

30

Mr. Tyler. Yes, I believe so.

Mr. Bergen. And they issued it to them?

Mr. Tyler. No, I believe not. The stockbook

shows that they issued 2,490 shares to Jones and Irwin of common only.

Mr. Bergen. What does this mean?

Mr. Tyler. That means \$249,000 instead of \$250,000.

Mr. Bergen. And how much preferred did they issue to those?

10

Mr. Tyler. I don't think they ever issued it. I have the stock books here and I am going to offer those in evidence. I have both the preferred and common stock books here, which I will ask counsel to admit as being the stock books of the company, and I will offer those in evidence.

(Books marked Exhibits P 2 and P 3.)

Mr. Tyler. Exhibits P 2, which is the common stock book, shows that a certificate of stock for 2,490, 20 issued to William S. Jones and Edwin H. Irwin, was turned back to the company, endorsed by them and cancelled of record, so that that stock—

The Court. When did that occur?

Mr. Tyler. That occurred a long time ago, before these suits were brought.

Mr. Bergen. It occurred after bankruptcy; it 30 occurred very recently.

Mr. Tyler. After bankruptcy the trustee required all stock to be handed back and cancelled for the reason that it was not issued for a bonafide consideration, and it

was handed back and the certificates are now in the possession of the trustee and attached to the book and cancelled. That, of course, is a statement of counsel, but I presume the attorneys for the defendant will admit that is a true statement.

Mr. Bergen. We will admit it as a fact. You make it as a fact?

10 Mr. Tyler. Yes, it is true.

The Court. When the order of bankruptcy was made what stock was then outstanding?

Mr. Tyler. The stock outstanding was certificate No. 14, 2,490 shares of common, to William S. Jones and Edwin H. Irvin. They were officers of the company.

The Court. How much was still retained in the
20 treasury?

Mr. Tyler. All the other certificates are here showing that there were then at that time ten shares in the treasury. There does appear, however, certificate No. 15, for 25 shares, which is alleged to have been issued in exchange for that many shares of certificate No. 14, so that it does not increase the total amount of outstanding stock. The \$1,000 has never been issued.

30 The Court. Does the minute book show that those 2,490 shares of stock were issued to Mr. Jones and Mr. Irvin?

Mr. Tyler. Yes.

The Court. What?

Mr. Tyler. The minute book shows that was issued as a consideration for the turning over to them of those rights that the Otto Motor Car Sales Company had in the Otto Gas Engine Company.

Mr. Bergen. Can we ask to have that spread on the minutes, just what that minute states? I would like to have the minute itself spread on the record. 10

Mr. Tyler. That is a lengthy offer which was accepted by the stockholders and directors and it can be spread on the minutes. But let me finish this matter for the present. So that at that time there had been issued 2,490 shares of common stock only. That is all that there is outstanding.

The Court. What is common stock?

Mr. Tyler. Common stock only. No preferred 20 stock had been issued at all.

The Court. When the decree of bankruptcy was made?

Mr. Tyler. Yes, and as I stated before, since this the 2,490 shares have been surrendered and cancelled at the request of the trustee, because it was an unconscionable over-valuation. 30

The Court. All the court wants to know is what was still left in the treasury when the 2,490 shares were turned over to the subscribers.

Mr. Tyler. 10 shares of common and all the preferred, 2,500 shares.

The Court. Now when did the transactions occur as shown by the minutes under which these promoters got this stock?

Mr. Tyler. The first minutes, that is, the organization minutes, include the offer to sell and the agreement
10 to buy the corporation. That is the one that I read on January 4, 1912, and then I want to read from the adjourned first meeting of directors minutes called on January 5, 1912, as follows: "Upon motion duly made the treasurer was authorized to demand from the subscribers to the capital stock of the company the full amount of their subscriptions, to-wit, one hundred per cent."

The Court. Now, do the minutes show who the subscribers were?

20

Mr. Tyler. No.

The Court. Have you any books, any stock books or anything showing it?

Mr. Tyler. Yes we have. Then I want to read from the minutes of a special meeting of the directors held on March 16, 1912, as follows:

"The first call on the subscription contracts was
30 issued January 18, 1912, said call covering subscriptions in the amount of \$40,000. The return from the first call was small."

Then I have here—

Mr. Bergen. May I ask counsel to show me what

subscription No. 1, 10 shares, to William S. Rendell is?

Mr. Tyler. This referred to the common stock of the company, certificate No. 1. The certificate has been made out but never executed or sealed, still remained in the stock book. The same applies to all certificates in the book. They have never been sealed or signed, with the exception of the two certificates which I have mentioned, Nos. 14 and 15.

10

Mr. Bergen. When were those written on the stub of the book? Can you tell me that?

Mr. Tyler. I don't know, but I will say that is prior to the insolvency proceedings. Anything written in there is prior to the insolvency proceedings, with the exception of the cancellation of certificate 14.

Mr. Bergen. Can you explain to me what certificate 15 is for, 25 shares issued to Jones and Irwin? 20

Mr. Tyler. I have no knowledge of it whatever.

The Court. Haven't you the secretary of the corporation here?

Mr. Tyler. No, I have not.

The Court. They evidently are the 2,490 shares of common issued to Jones and Irvin, which are signed 30 received by Jones and are returned with the date being blank, the assignment book, but which counsel admits was done after bankruptcy, because the receiver admitted that they had been illegally issued; but also there is a certificate for 25 more shares, dated April 8, 1912, receipted by

William S. Jones, which is not returned.

Mr. Tyler. But it states on the stub that it is issued as part of certificate No. 14, so that the written certificate —

The Court. Who was secretary of the company, Mr. Tyler?

10 Mr. Tyler. Mr. Irwin, I believe.

The Court. Where does he live?

Mr. Tyler. Oh, he is not available at all. I think he is out in Buffalo.

Mr. Bergen. I think you will find they have skipped the jurisdiction.

Mr. Tyler. I object to the statement that they have
20 skipped the jurisdiction. Their business simply took them elsewhere. They had no further business here. I think it is an improper statement to make.

The Court. I do not suppose Mr. Collings has any independent knowledge of the transactions shown by the books. The books came into his hands as trustee and they speak for themselves, I suppose, in these transactions. It would be useful if we had the secretary here to explain any items that require explanation. How-
30 ever, it may not be of any importance.

Mr. Bergen. I call the court's attention and make that as a statement on the record, that there appear here certificate No. 1, 10 shares, to William S. Rendell, the certificate not having been signed by the president but

having been torn out of the book, dated March 9, 1912, and not sealed, and it is pasted in again; certificate No. 2, 10 shares, to William S. Rendell, dated March 9—that is, the stub book shows this—March 9, 1912, certificate also to William S. Rendell, 10 shares, not sealed or signed; certificate No. 3, torn out and pasted in again; certificate No. 3, for 50 shares—this is common stock we are talking about—issued to William S. Rendell, dated March 9, 1912, the certificate being drawn to him, not signed by the president, although by the treasurer, 10 and not sealed, torn out and pasted in again; certificate No. 4, 10 shares, to William S. Rendell, dated March 9, 1912, exactly in the same shape; certificate No. 5, 20 shares, to William S. Rendell, the same thing; the same statement as being true; certificate No. 6, 50 shares, to William S. Rendell, dated March 9, 1912—counsel informs me that there was an insolvency proceeding the 1st of July, 1912, by which the corporation went into insolvency by decree of the Court of Chancery of New Jersey and subsequently the bankruptcy proceedings 20 came up.

Mr. Tyler. The bankruptcy proceedings were instituted in the fall and the trustee appointed in October of the same year.

Mr. Bergen. Certificate No. 6, for 50 shares, to William S. Rendell, dated March 9, 1912, the same thing is true; certificate No. 7, 12 shares, the stub showing issued to William S. Rendell, dated March 9, 1912, the same thing is true; certificate No. 8, for 5 shares, issued to W. D. Marren, the same thing, dated March 9, 1912, the certificate being not signed or sealed, being drawn up in his name and for that amount of shares, and torn out and pasted in again; certificate No. 9, for 75 shares 30

to Mr. Marren, dated the same day, and exactly the same thing is true; certificate No. 10, 75 shares to Mr. Marren, the same thing is true. This is R. B. Marren this time. Certificate No. 11, 8 shares to W. D. Marren, this being marked "Of the original issue," in the stub, "from original issue."

Mr. Tyler. But the certificate not signed or sealed
the same as the others.
10

The Court. Then does the court understand the 2,490 shares of the common stock were made up by these small allotments?

Mr. Bergen. That is just what is not made out. The corporation issued a certificate to these two promoters for 2,490 shares, leaving 10 shares remaining. Now they show that they have appropriated those 10 shares from these gentlemen by their statements on the
20 book.

The Court. You mean to say then that all the common shares were issued?

Mr. Bergen. Yes, more than issued.

Mr. Tyler. And this is not according to the facts set forth in the book.

Mr. Bergen. But there is the original book of your
30 corporation showing certainly a portion of it.

Mr. Tyler. The only stock that has ever been issued is 2,490 shares, which certificate, as I stated, has been cancelled. The rest of the stock is in the possession of the company and always has been .

ROBERT Z. COLLINGS, recalled.

Cross examination by Mr. Bergen.

Q. How many subscribers for preferred stock are there?

A. I will have to take reference to the book there.

Q. Will you be kind enough to tell us?

By the Court.

10

Q. Do you know?

A. Not off-hand; no, sir; without I make reference.

IT IS STIPULATED BY COUNSEL that over \$8,000 preferred stock was subscribed for by these alleged subscription agreements.

Q. And are in your possession?

A. Yes.

Q. And that is 80 shares?

20

A. Well, they show on their face, you know. They vary, the amounts of those.

Q. But the total is \$8,000?

Mr. Tyler. About that.

The Court. About that.

Q. And it is \$100 par?

A. Yes.

30

Q. So at least 80 shares of preferred stock were subscribed for in this agreement?

Mr. Tyler. I say about that, but there is no way to

tell exactly, unless I produce this preferred stock subscription list, and I haven't any here.

Mr. Bergen. I think the receiver in a bankruptcy proceeding is supposed to know something on cross-examination, and I am trying to get this out of him and I think it is a very important thing.

10 Mr. Tyler. Attached to the proceedings in this case is an order made by the United States District Court assessing this stock and every bit of stock that is assessed is shown in that statement, which is part of the pleadings in this case. Now there is, I should say, about fifty per cent of the stock assessed is preferred stock and the rest is common stock. The rule is that there are two shares of preferred to one share of common, but a great deal of the preferred had been paid, so that leaves the amount that is remaining due on the preferred and makes them about equal, as near as I can tell.

20

The Court. Let me ask you this question, Mr. Tyler. Mr. Saltzman and Mr. Allen, according to your contention, each subscribed for a certain amount of preferred stock. Did they subscribe also for common stock or were they to get the common stock thrown in?

Mr. Tyler. That is set out as part of their subscription agreement. The agreement provides that they take four shares each of preferred and as a part of the consideration for that subscription they are to get two shares
30 of common each.

Mr. Bergen. To be given to them?

Mr. Tyler. Yes, to be given as a bonus, and so states, I think, in the subscription agreement.

The Court. That is set out in the subscription agreement?

Mr. Palmer. Not as a part of the subscription, but as a bonus, distinctly stated.

Mr. Tyler. I submit that the bonus is a part of the 10 consideration in the original subscription, no doubt about that.

By Mr. Bergen.

Q. Were more than 20 shares of preferred stock subscribed for under those agreements?

A. Yes.

Q. And therefore the corporation agreed to give more than 10 shares of common stock? 20

A. There was considerable more than 20 shares.

Q. Considerable more?

A. Yes, sir.

Q. How much can you in your mind give as a minimum?

A. I have a book there that sets forth a good many of them. They are not fully complete right through.

Q. Which book do you refer to?

A. Right there, the stock record book.

Q. This one? (Book shown witness.) 30

A. Yes, it shows a record of the stock as I got it, and they are not complete, all of them.

Mr. Tyler. Let me suggest that I use the order of

the United States District Court, that sets out the number in each case accurately.

The Court. I don't suppose that that will change the facts that you are after, Mr. Bergen?

Mr. Bergen. That order does not show preferred and common.

- 10 Mr. Palmer. It does not distinguish at all; and further than that, if your Honor, please, it includes a number of gentlemen who never signed any of those stock subscriptions on this order in the United States Court.

Mr. Tyler. I think my statement covered that, that about fifty per cent. of that amount was preferred and the other was common. If that does not cover the facts they are after I do not see possibly how it can be covered.

- 20 The Court. Are you satisfied to take Mr. Tyler's statement of the facts in lieu of proof?

Mr. Bergen. Oh, yes, I think so; so far we are, yes.

Q. There was more than ten shares of common stock agreed to be given out under these papers as a bonus, was there not?

A. Whatever these subscription blanks call for; yes, sir.

- 30 Q. More than ten? Now it was more than thirty, wasn't it?

A. Well, I would have to refer to the books to get the correct amount.

Q. Well, it was considerably more than ten?

A. But as I said before, it was more than ten.

Mr. Bergen. If your Honor please, the certificate of incorporation contains the statement that William D. Marren takes 8 shares of common, that W. S. Rendell takes 1 share of common; "Subscriber, Number of Shares Taken by Each Subscriber, Common," in the certificates, and William S. Jones takes the other share of common. That takes the 10 shares.

Mr. Tyler That stock has never been issued, and further than that, the consideration set forth in this 10 transaction say that it shall include the stock originally subscribed for. That is mentioned in the offer made by Jones to Rendell.

The Court. You mean when they took over the 2,490 shares?

Mr. Tyler. Yes. It says, "Shall include the stock originally subscribed for in the charter."

The Court. What the court would like to know is 20 how much common stock there was in the treasury of the company when the decree of insolvency was made.

Mr. Tyler. 10 shares; with the right existing in the trustee, of course, to have this other stock cancelled, which he subsequently did at the time of the insolvency.

The Court. Were the two promoters officers of the 30 company?

Mr. Tyler. Yes, they were; one was secretary and the other vice-president. They are the persons who held this 2,490 shares of stock.

The Court. Were they both directors?

Mr. Tyler. Both directors.

The Court. Of the corporation?

Mr. Tyler. Yes.

By Mr. Bergen.

10

Q. What did you pay for the return of that certificate of 2,490 shares of stock?

A. What did we pay?

Q. Yes, those men.

A. Didn't pay anything.

Q. How did you get it from them?

A. Just demanded them to return it.

Q. Didn't you release a claim to them for it?

A. No, not to my knowledge.

20

Q. You didn't?

A. Not to my knowledge, no, sir.

Q. Didn't you release a claim against them for it?

A. No, as I remember it was done, it was considered that it was illegally issued and they should return it.

Q. Didn't you give them a release for any claim against them if they returned it?

A. Not to my knowledge.

30

Mr. Tyler. That matter was handled through me entirely, Mr. Bergen. I do not think Mr. Collings has any knowledge of it. We compromised the matter and released any claim against them in this matter and demanded that the stock be returned. That was involved in a negotiation in which we had threatened to take pro-

ceedings to have it cancelled and we compromised the matter and released the claim against them and they surrendered the stock to us.

Mr. Bergen. In other words, you released, Mr. Tyler, the right to collect whatever was due on that stock certificate which you say was illegally issued, you released the right to collect on behalf of the receiver against those men?

10

Mr. Tyler. I think that would be the effect of the release, yes.

The Court. Did the court also assess that stock?

Mr. Tyler. No.

The Court. No assessment was made?

Mr. Tyler. No.

Q. Now, Mr. Collings, is it not a fact that those men refused to assign any of that stock to these preferred stock subscribers? 20

A. No, not to my knowledge.

Q. Not to your knowledge?

A. No.

Mr. Bergen. Mr. Tyler, can you tell me anything about that?

30

Mr. Tyler. I have no knowledge whatever in that respect. I never heard of their refusing it at all.

Mr. Bergen. Is it not a fact that Mr. Bleakley represented them, John S. Bleakley, a member of the bar of

Philadelphia, and that he advised them not to issue it because they would be perpetrating a fraud on the preferred stock holders and they refused to do it and so notified you?

Mr. Tyler. On the contrary, Mr. Bleakley recognized the fact that this stock was unlawfully issued and advised them to cancel the stock and return it to us.

10 Mr. Bergen. And advised them to refuse—

Mr. Tyler. To the best of my knowledge.

Mr. Bergen. And advised them to refuse, which they do here, to issue it, carrying out the agreement of that proposition.

Mr. Tyler. No, he never made any such statement as I know of, and as a matter of fact no demand was ever
20 made for him to do that. The stock would not be due to any of the subscribers until it had been fully paid according to the terms of the subscription, so that the tender of service has never been questioned, never been due.

That is the plaintiff's case.

Mr. Palmer. Mr. Tyler will you read into the record from the minutes that you offered?

Mr. Tyler. Suppose, Mr. Palmer, you read any of
30 them you want. I have read in whatever I considered pertinent to my case, and if you want to read in any way, they are in evidence with the understanding that you can read whatever you want.

Mr. Palmer. But you offered yourself the resolution

of the Board of Directors at its first meeting whereby certain things were transferred to the company from Jones and Irvin in consideration of the issuance to them of this stock. You made an offer of that resolution and Mr. Bergen asked you to read it and you asked that it be postponed for a few minutes. I ask that that go in evidence.

Mr. Tyler. The minutes are in evidence, with the privilege of reading any part that you want. 10

Mr. Palmer. It is not a question of what is in evidence, it is your offer.

Mr. Tyler. Well, that is my determination of it.

MOTION FOR NON-SUIT

Mr. Bergen. If the court please, we move for a nonsuit in this case and we base it on a number of grounds which I would like to argue to your Honor right now. 20

The first in that there is an implied contract in this thing by these men that they would secure subscriptions to all of the preferred stock, and until that is done they have not performed their part of the contract and cannot call on us to pay. Now the subscription itself, the paper called the subscription paper, says that the corporation to be organized—"I hereby subscribe to four shares of the par value of \$100 per share of the six per cent preferred stock of the Ottomobile Company, a corporation to be organized under the laws of the State of New Jersey, with an authorized capital of \$250,000, six per 30

cent, preferred, and \$250,000, common stock."

Now there is no liability on the subscribers to that implied by law until they have secured subscriptions for the \$250,000 preferred and \$250,000 common, or at any rate, preferred. I have many authorities on that, but I will call your Honor's attention to but a few of them.

(Cites authorities.)

10 The Court. State the facts again in the subscription agreement.

Mr. Palmer. The facts are that the subscription agreement says, "I hereby subscribe to four shares of the par value of \$100 of the six per cent preferred stock," a corporation to be formed with this capitalization.

The Court. Now the proposition, Mr. Tyler, is that this was not binding, that this subscription contract was
20 not binding until the whole stock was taken?

(Mr. Tyler replies.)

Mr. Bergen. The next ground is the modification of plans and alteration of this thing. As the case now is before your Honor these gentlemen signed these papers, this great mass of Mount Holly men, on an agreement stated in the subscription agreement to be as follows:
30 "The purpose of the organization is to acquire the automobile interest of the Otto Gas Engine Works of Philadelphia, and the entire assets and good-will of the Otto Motor Car Sales Company of Philadelphia." Now that is what these people agreed to, that they would take stock, because this is nothing but an offer, like any other offer, it is an offer to come into being in the future. We offer

to a corporation which is organized for that specific purpose, we offer to take stock in it. Now what do they do? We are sued now on a company which bears the name of the Ottomobile Company, but which is not the company at all which we agreed to subscribe for. We do not know these people. All of a sudden somebody bobs up in this court and says, "This is a subscription to us." We want to find out whether it is. We say, "We will take stock in that company which is organized for that purpose." Now let us see what it is organized for. 10

"The objects for which the corporation is established are:

To manufacture automobiles, automobile and motor car assessories and supplies of every class and description, including any and all parts of vehicles of all kinds or any other goods pertaining to the automobile business or otherwise, which the corporation may determine to manufacture."

(Continues reading from certificate of incorporation.) 20

Now that is the corporation that says we subscribed to them. There is not a mention of the Ottomobile Sales Company. It simply chances that this receiver comes in and gets hold of this paper and says, "This is my company, because it bears the same name." That is all it is. This is not the company we subscribed for

(Cites authorities.)

The Court. I will hear Mr. Tyler in reply on this point. 30

(Mr. Tyler replies, followed by Mr. Bergen.)

The Court. Did this company which you say organized in 1912, did it next call for all that subscription?

Mr. Tyler. They did, and their organization minutes show it. That was my second point.

Mr. Bergen. This is a suit against these men, both of these suits are suits not only in reference to the subscription to preferred stock but also in reference to the subscription to common stock. Now on that point I think your Honor should undoubtedly grant a nonsuit. This is not a subscription for common stock. The corporation
10 had no common stock. It was an over-subscription. There is no subscription to common stock here at all. We subscribed for preferred. They are going to give us as a bonus common. We did not agree to pay for the common. This is a suit on an agreement; it is not a suit on having received the common. It is purely and simply a suit on them.

The next point I call your Honor's attention to is this: That is, I consider undoubtedly we should get a nonsuit as to the common stock.

20

The Court. Because you have not had the common stock?

Mr. Bergen. Because we have not had the common stock.

The Court. How much is that?

Mr. Palmer. \$200 in each case.

30

The Court. You hadn't any right as a matter of law to the common stock, but you say you never got the common stock.

Mr. Bergen. Never got the common stock.

The Court. And they are trying to enforce the agreement—

Mr. Bergen. Which they could not have carried out. They did not have common stock. It was an over-subscription and it was not a subscription.

Mr. Palmer. And it was an illegal proposition, because the company had no authority to give its stock away, prohibited under the corporation act. 10

(Mr. Tyler replies.)

Mr. Bergen. Now the next point is that how in the world can we be held on a subscription for stock when they did not have the stock to give us?

The Court. Well, their answer to that would be that if that was a binding contract on the concern the concern could be made to get after these officers of the company who had gotten away with 2,490 shares of stock. 20

Mr. Bergen. If the court please, that was done by the Board of Directors of the corporation, but you cannot issue stock twice. That stock was issued at a valuation. Remember, he is not suing us on anything but a subscription on unissued stock, and the contemplation of this proposition and what they did was that they issued all of the common stock to these people except ten shares. We are arguing now, if the court please, that they cannot 30 hold us on that common stock, They concede it was a subscription, because they did not have the stock. It is an over-subscription to stock, but you cannot hold a man to over-subscription on stock, and they did not have the stock.

The Court. Now move along to the next proposition. Assuming that they did not have this common stock to give out to the preferred stockholders, that would not in any wise vitiate the contract to take four shares of preferred stock, would it?

Mr. Bergen. Why not? If A sues B for something which B has not got and can't get how can he sue me for it? It A agrees with me to buy something I have not got
10 and B turns around and says, "I admit I have not got it"—

The Court. Was that the illegal contract?

Mr. Bergen. Well, does the fact that this is an illegal contract work against us?

The Court. No, we haven't got that far yet. I am asking you a fundamental question, was this an illegal
20 contract on its face?

Mr. Bergen. Yes, just as illegal as the Equatorial case. They can't sue on any of it.

The Court. Is it void then if it is illegal?

Mr. Bergen. No, it is not void if it is illegal, but no court would take jurisdiction of it to enforce it: and these people have the audacity to come into the court of New
30 Jersey and ask the court to enforce it.

The Court. No, but I want to know now whether a contract which is illegal upon its face is not void as a matter of law.

Mr. Bergen. It is void and it is unenforceable; and these cases—

The Court. I will hear you now, Mr. Tyler, as to whether or not that contract is void upon its face. It calls for the doing of what the law says shall not be done.

(Mr. Tyler replies.)

10

Recess Till 1.20 P. M.

(Trial of the cause resumed at 1.20 P. M.)

Mr. Bergen. If the court please, there is just one 20
other thought I want to give to your Honor's mind on
this point. We have argued that there is no liability on
this averred subscription to common stock, because it is
not a subscription. We have completed our argument
on the question of illegality, which is patent here. I
want to submit the subject of illegality with just this
point: Suppose this was a valid contract, by which this
corporation validly sold its assets to the subscriber. His
agreement was to give to the subscriber two things: One 30
was preferred stock and the other was a bonus of com-
mon. Just consider it legal for this argument. The
corporation did not have the common stock to give.
Therefore how can this corporation hold us liable? It
did not have it. Our contract is to take the preferred
stock, plus a gift, a bonus, of common. He did not have

the common. Therefore how could he do it? That is what this New York case says. But this corporation under this agreement says that it will give a bonus of common stock. It did not have the common stock to give. It probably meant that it would have these promoters give it but it could not enforce it. Therefore how can it hold this subscriber liable on its stock?

(Mr. Tyler replies.)

10

The Court. My inclination is to hold this motion and hear the proof out and to allow the motion to be renewed, or a motion to direct a verdict, as the case may be, at the conclusion of the whole case.

Mr. Bergen. Your Honor, we would like an exception to the refusal, but your Honor, as I understand it, has not refused it yet, but will hold it over, our motion for a non-suit.

20

The Court. Yes, I will deal with the motion before the case is concluded; merely to accommodate the witnesses and get through with the taking of testimony, considering the legal phases of the case afterwards.

DEFENDANT'S TESTIMONY

WILLIAM D. MARREN, sworn for defendant.

Direct Examination by Mr. Palmer.

Q. Mr. Marren, you live in Mount Holly?

A. I do.

10

Q. And you know Messrs. Jones and Irvin, who came to Mount Holly in the summer of 1911, with reference to this Ottomobile proposition?

A. I do.

Q. When did you first become acquainted with them, approximately?

A. Oh, sometime in August or September of that year.

Q. Were you present at any meetings that were held for the consideration of a proposition of this company coming to Mount Holly?

A. I was.

Q. Were you present at a meeting held at the Market Fire Company house on August 11, 1911?

A. I couldn't verify the date, but I was present at a meeting held there.

Q. And was there a discussion of this proposition between Messrs. Jones and Irvin and the citizens there assembled?

A. There was.

30

Q. As a result of that discussion was there a committee appointed to investigate the proposition?

A. Yes.

Q. You were a member of that committee?

A. I was.

Q. What did you do in pursuance of that appointment?

A. We went down to the Otto Gas Engine Works to look over the plant and see what they had to offer, looked at the automobiles then in construction, the ones that were finished, and some of the machinery and things of that kind that were supposed to have gone with the agreement that they were trying to make with the citizens of Mount Holly.

10 Q. As a result of those investigations did your committee make a report to another meeting of citizens held in the latter part of August or forepart of September?

A. I believe they did, but I was not present.

Q. Was there in your negotiations any modification of the original plans worked out by this committee?

A. Yes.

Q. With reference to what points particularly?

A. With reference to the bonus of the common
20 stock.

Mr. Tyler. I object. I think that the question should be confined to the matters set out in these stock subscriptions, and any modifications of plans made by the committee has nothing at all to do with it. I don't know what plans they had and I don't think it is material what plans this committee may have had or whether the company followed the plans of the committee or not. We are dealing with a stock subscription, a stock sub-
30 scriber, and are only dealing with the matters concerned therein.

The Court. Are you trying to change the character of the contract by—

Mr. Tyler. By showing what some committee appointed by a citizens' league or something of that kind may have had, some arrangement or some plans or modification of those plans. We had nothing to do with those plans.

Mr. Palmer. The question was prior to the plan as originally presented by these promoters and in the course of the negotiations there were changes made in those plans as originally presented, with changes were ultimately culminated in the proposition as it went through. I merely wanted to show as between the thing as originally presented and what went through there were some changes suggested by the committee to the promoters, that is all; not the changes made by the committee in any of its plans, but the changes suggested by the committee which the promoters agreed to. 10

The Court. I do not understand they are attempting to change the contract. 20

Mr. Tyler. Any change they may have made could not have had any effect after that time. What took place before that time we have nothing to do with. He is referring to what took place away back in 1911, before anything was done.

The Court. I do not think anything is relevant with regard to what these people did or said prior to the signing of the subscriptions. 30

Mr. Palmer. How do we know what the proposition was then? The subscription does not tell anything.

The Court. That is supposed to embody the contract, isn't it?

Mr. Palmer. No, sir; not at all. It is entirely a unilateral contract, signed by one party. The other party has no signature to it, nothing at all. And what a conversation was prior to that possibly, while not a part of that contract, shows what inducements were held out to these gentlemen to get them to sign this subscription.

Mr. Bergen. The New York case we were citing here came right on the point where it says, "The prospectus showed a certain thing. That was what they were contracting for." (Reads authority.)

The Court. This is an offer to show—

Mr. Bergen. What the corporation was to do that we subscribed to.

The Court. An offer to show fraud which was an inducement of the contract?

20

Mr. Bergen. No, this is an offer to show a subsequent alteration of the plans of the corporation.

The Court. You mean to say after the subscription was signed?

Mr. Bergen. Yes.

Mr. Tyler. No.

30

Mr. Bergen. It is an offer to show what the plans were when we subscribed and then show what they actually did afterwards. These subscriptions were obtained in connection with a prospectus, which stated that the purpose to be performed was this—

Mr. Tyler. They are trying to vary, if anything, a written contract, which is in writing, and sets forth the purpose of the company. They are trying to show that it was something else. You can't do that. All the cases hold that you cannot vary a contract by collateral evidence.

The Court. The writing is presumed to embody the agreement of the parties and all that the parties agreed to. 10

Mr. Palmer. This is not a contract under seal where any such rule as that applies at all. It is not a mutual contract under seal.

Mr. Tyler. Not under seal doesn't make a particle of difference. That applies to any and all contracts in writing, that they cannot be varied by collateral agreements or anything of the kind, especially by anything that took place prior; and if they desire to show it afterwards then it must assume a novation, a new contract, between the parties. 20

The Court. Now, Mr. Palmer, please state over again what your offer is.

Mr. Palmer. I propose to show that these promoters came to Mount Holly with a certain proposition of a plant to manufacture automobiles, which was to be located at Mount Holly; that in the original plans as presented to the citizens of Mount Holly there were changes made which were agreed to by the promoters, and which subsequently became the circumstances and conditions and agreements upon which the subscriptions were obtained. 30

Mr. Tyler. I object, that that is trying to inject into this case as to what the company would do or what they said, either through their duly authorized agents or promoters and could not be a part of this case. I consider it absolutely incompetent and irrelevant, under the Oradell case, what was said before at any time, to vary this contract.

The Court. You will have the benefit of your offer,
10 Mr. Palmer. If you want to make it any fuller you may do so now and the court will pass upon the legality of it.

Mr. Palmer. That is my offer at the present time.

Mr. Bergen. Can I argue that to your Honor?

The Court. Do you desire to argue the question?
In effect, Mr. Palmer, your proposition is to show false
and fraudulent misrepresentations which induced the
20 making of this subscription; is that it?

Mr. Palmer. Yes, sir.

The Court. I understand the objection to this offer is that that is not a matter which will avail a subscriber for stock after the concern has been decreed to be insolvent?

Mr. Tyler. That is correct, after rights of credit-
30 ors have intervened.

The Court. Do you want to argue it?

Mr. Bergen. Well, if your Honor please, I hardly see anything to argue. We rely on that case in 70 New

York, in which they permitted it. They permitted the prospectus to come in.

(Continues argument.)

The Court. I have not examined your New York case, but that suit was between whom?

(Mr. Bergen cites authority.)

10

The Court. The objection will prevail.

(Objection noted for defendants as ground of appeal.)

By Mr. Palmer.

Q. Now, Mr. Marren, did you ever hear any statements made by Messrs. Jones or Irvin with reference to where the plant for the manufacture of these automobiles was to be located? 20

A. In Mount Holly.

Mr. Tyler. I object and move that it be stricken out as not responsive. It should be yes or no.

The Witness. Yes. I beg your pardon.

Q. What were those statements?

30

Mr. Tyler. That is objected to as irrelevant, immaterial and incompetent, for the same reasons stated on the previous question.

The Court. Does the subscription say anything about it?

Mr. Tyler. No, says nothing about it.

The Court. The objection is sustained.

(Objection noted for defendants as ground of appeal.)
10

Q. Mr. Marren, did you ever hear any statements made by Messrs. Jones and Irvin with reference to whether or not a plot of ground had been purchased for the erection of a factory for the manufacture of automobiles at Mount Holly?

A. Yes, sir.

Q. What was that statement?

(Objected to. Objection sustained for the same reason.)
20

(Objection noted for defendants as ground of appeal.)

Q. Mr. Marren, did you ever hear Messrs. Jones or Irvin make any statements with reference to the amount of stock that they had secured to be subscribed in Philadelphia?

A. Yes.

30 Q. What was that statement?

Mr. Tyler. That is objected to for the same reasons stated before.

(Objection sustained.)

(Objection noted for defendants as ground of appeal.)

Q. Mr. Marren, did you ever hear Messrs. Jones or Irvin make any statement with reference to having obtained a subscription for stock from one Edward F. Burns?

A. Yes.

Q. What was that statement?

10

(Objected to for the same grounds stated before.)

(Objection sustained.)

(Objection noted for defendants as ground of appeal.)

Q. Mr. Marren, did you ever receive a telegram from Mr. Jones with reference to a subscription for 20 stock in the Ottomobile Company by Edward F. Burns?

A. Yes, sir.

Q. Have you that telegram?

A. If I have not you have.

Q. Well, it is among your papers?

A. Yes, sir.

Q. Will you produce it?

(Witness produces papers.)

Mr. Palmer. I offer this telegram.

30

Mr. Tyler. I object, if it is for the purpose—what is the purpose of the offer, to show representations made by Mr. Jones or Irvin?

Mr. Palmer. Yes, which they telegraphed to Mr. Marren.

The Court. When was it?

Mr. Palmer. It was dated 10-21-1911.

(Objected to for the same reasons stated before.)

10 The Court. Was that after this subscription?

The Witness. Before, long before.

The Court. Long before that?

The Witness. Long before there was a subscription made.

20 Mr. Palmer. The telegram is dated subsequent to the subscriptions. The telegram is dated in October and the subscriptions were in September.

Mr. Tyler. It is objected to on the further ground that whatever contract there was was made prior to the telegram being sent and the telegram being sent subsequent could have no bearing on this subscription. Anything that took place afterwards cannot be offered as an inducement for something that happened before.

30 The Court. The objection will prevail.

(Objection noted for defendant as ground of appeal.)

Mr. Palmer. May I have the telegram marked for identification?

The Court. Yes.

(Telegram marked Exhibit A for Identification.)

Q. Did you ever see, Mr. Marren, a blueprint of the proposed factory to be built at Mount Holly?

A. Yes.

10

Q. Have you such a blueprint?

A. Yes.

Q. Will you produce it, please?

(Witness produces blueprint.)

Q. From whom did you obtain this plan?

A. Either Mr. Irvin or Mr. Jones.

Q. And were you told by either of them what it was?

20

A. It was a plan of the proposed factory to be erected in Mount Holly.

Q. By whom?

A. By the Ottomobile Company.

Mr. Palmer. I offer this plan.

Mr. Tyler. I object to it being offered in evidence at this time. It is not in any way shown how it is relevant or competent testimony. I think the most that can be done is to mark it for identification until it is shown in some way that it is competent evidence. It has not appeared yet in what way it is competent evidence.

30

The Court. Please state upon what ground you offer it in evidence.

Mr. Palmer. The offer is made upon the ground that it is part of the false and fraudulent representations that induced these subscribers to subscribed for stock.

10 The Court. If that is the ground for the offer the objection is sustained.

Mr. Bergen. Also on the further ground that it is part of the prospectuses and the statement made as to the purpose of the corporation to be incorporated.

The Court. The same ruling.

(Objection noted for defendants as ground of appeal.)

20 (Plans marked Exhibit B for Identification.)

Mr. Palmer. The specifications are offered.

The Court. The same ruling.

(Objection noted for defendants as ground of appeal.)

30 (Specifications marked Exhibit C for Identification.)

By Mr. Palmer.

Q. Mr. Marren, did you ever hear Messrs. Jones or Irvin make a statement as to the kind of motor that

was to be put in the cars to be manufactured by the Otto-mobile Company?

A. Yes, sir.

Q. What was that?

(Objected to for the same reasons stated before.)

The Court. When? What period of time, before the defendant subscribed for the stock?

10

Mr. Palmer. Yes.

The Court. The objection will prevail.

(Objection noted for defendants as ground of appeal.)

Q. I will ask you the same question and make the time subsequent to the 28th of September, 1911.

20

Mr. Tyler. I request that it be answered yes or no.

A. The 28th of September?

The Court. That is, after the stock was subscribed for?

Mr. Palmer. Yes.

The Court. Upon what theory do you think that testimony should be received, Mr. Palmer?

30

Mr. Palmer. On the general fraudulent representations. Your Honor rules against it as before the time of the subscription. I simply want to place upon the record

the same question dealing with a subsequent time.

Mr. Tyler. I object on the ground already stated, and on the further ground that anything said after the subscription was made could not possibly be an inducement for the subscription.

10 Mr. Bergen. I have suggested to Mr. Palmer that he should call the attention of the court in his questions and his objections to the fact that not only are these things admissible upon the ground of fraud and fraudulent representation, but eliminating fraud and fraudulent representation, they show a change of plan.

The Court. Well, now, that is a different question. That is the reason I asked you. Testimony tending to show a departure by these promoters of the scheme, a business proposition made afterwards, would be, it seems to me, relevant evidence.

20

Mr. Tyler. I would like to be heard on that question then, may it please your Honor.

The Court. Certainly. Now let me give you a concrete example. Suppose Mr. Jones and the other gentleman, these two promoters who got up this corporation, came around and told the defendant, after the defendant had signed the agreement to buy some stock in the company, that they were going to turn the automobile concern
30 into a concern for the manufacture of wheel-barrows; wouldn't that be proper?

Mr. Tyler. No, not in insolvency, because if they have an outstanding subscription agreement and fail to take any action whatever to repudiate it and allow cred-

itors to become interested and the company goes into insolvency, nothing that can be said afterwards can avail; because when insolvency intervenes it eliminates everything except the contract itself.

The Court. I am inclined to receive that proof. I will consider what you say.

(Mr. Tyler cites authorities.)

10

The Court. The question now is whether it would be evidence to show that the promoters of this Ottomobile concern, which was going to take over the business of some other concern and manufacture automobiles, whether if these promoters concluded not to engage in the business of manufacturing automobiles at all but were going to manufacture hoes or wheelbarrows, whether or not then the subscriber would be obliged under those circumstances to perform his contract.

20

Mr. Tyler. Well, I don't think I make my point clear. You cannot determine what the purpose was by statements or representations made by the promoters, because then you are injection a purpose into the contract which is contrary to the contract itself. You must go by this contract, because it states that the purpose of this corporation is: (read.) If they will confine it to that then I won't have any objection, as far as I can see now; but when they come and try to create a purpose or representations or statements made by promoters or agents soliciting stock, then I say they are going away beyond the scope of the contract at all. 30

(Question repeated.)

The Court. I am inclined to receive that evidence.

(Objection noted for plaintiff as ground of appeal.)

Mr. Palmer. Now your Honor has presistently refused to permit me to show what the original statements were. I do not see how it is going to be possible for me to show any changes in the situation without testimony as to what the original proposition was.

10

Mr. Bergen. You see, if the court please, we are not trying to vary the contract, we are trying to show what the status of the offer was, not to vary it. That is the first thing.

The Court. Well, I think it is the law that statements made by promoters, even though they be fraudulent and actually induce persons to subscribe for stock in a corporation, that when the corporation afterwards is
20 decreed to be insolvent and a trustee or receiver, as the case may be, brings action in behalf of the creditors and stockholders on the subscription contract, the court will not inquire into what was said or done which induced the making of that subscription.

Mr. Bergen. Now, if the court please, let us take this view of it, entirely different from your Honor's view of fraud. We are after —

30 The Court. Pardon me. What the court had in mind when it suggested that you might show anything that occurred after the making of this subscription by the defendants was that which goes to the question of whether or not there was such a material departure from the corporated enterprise which the defendants subscribed

stock for and that which the promoters were acutally going to carry out.

Mr. Bergen. Now we want to show what the purpose of the corporation to which we subscribed stock was to be, and then show that they change it by their charter and stated the changes they were making after subscription.

Mr. Tyler. But I submit that that must be determined by the writing, inasmuch as it is full and complete on the subject. The authorities all say you cannot add any purposes to or vary whatsoever. 10

The Court. The court has decided that the contract speaks for itself. When a contract is reduced to writing it is presumed to embody all that the parties intended and you cannot add to or take from by something else. That is true enough.

20

(Question repeated.)

A. I did.

Q. What was that statement?

(Objected to on the grounds already stated.)

The Court. The court has ruled it is admissible.

Mr. Tyler. It seems to me we are opening up a subject here, if the rulings are to be considered, which will introduce a great lot of testimony which under the cases here are irrelevant. Now any statements made in regard to the motor has nothing to do with this subscription agreement, has nothing to do with it whatever. 30

The Court. Probably that is so, but I am inclined to hear the proof and see whether it has any bearing upon the case or not. I am not inclined to shut out any evidence at this stage of the case which will throw any light upon the question of whether or not there was such a departure from the scheme as originally gotten up for which the defendants agreed to take stock.

10 Mr. Tyler. I object on the further ground that there is nothing set forth in the subscription blank that has anything to do with the motor for this engine and is no part of this subscription as designating the scheme.

The Court. I see your point. It is a very close and doubtful question but I am inclined to hear the testimony.

(Objection noted for plaintiff as ground of appeal.)

(Question repeated.)

20

A. That they was to put in a motor made by the Otto Gas Engine Company under patents that they had.

Q. Do you know what motor was placed in such cars as were made by the Ottomobile Company ?

A. Yes.

Q. What motors?

Mr. Tyler. That is objected to as immaterial, and irrelevant and incompetent, nothing to do with the suit
30 on stock subscriptions.

The Court. Unless there was a very radical departure from the scheme, as I said a moment ago, which brought this enterprise into existence, evidence tending to show mismanagement on the part of the officers or

tending to show that they in the exercise of their discretion made some changes from one thing to another, that would be of no consequence. You might say that they made an engine fifty pounds lighter or fifty pounds heavier than the other, or that they finished it up in a different way from the other, that they used somebody else's paint and all that. There is a certain amount of discretion which is lodged with directors and managers of corporations. They are presumed in law to be the trustees for the stockholders and creditors and they must exercise their judgment. They have a certain leeway. That is a matter of no consequence, it seems to me, and the objection will therefore prevail. 10

(Objection noted for defendants as ground of appeal.)

By Mr. Palmer.

Q. Mr. Marren, has the Otto gas engine as manufactured by the Otto Gas Engine Works of Philadelphia a distinctive reputation of its own? 20

Mr. Tyler. I object to that as immaterial, irrelevant and incompetent, for the reasons already stated. We have nothing to do with the Otto Gas Engine Company or any particular engine that they may have made or any reputation which they have. I think, may it please the court, the line of examination must be confined not to what anybody said, but to whether the corporation was organized substantially for the purpose set forth in the stock subscriptions, not what kind of engine it had. It says the purpose of the organization was "to acquire and undertake the good-will, and property rights and assets, and the liabilities of any person, firm, association 30

or corporation, and to pay for the same in cash, stock or bonds of the corporation or otherwise."

The Court. The objection is sustained.

(Objection noted for defendants as ground of appeal.)

Q. Mr. Marren, were you present at any meeting
10 of the citizens of Mount Holly at which Messrs. Jones and Irvin were present prior to the 25th day of September, 1911, at which meeting there was any statement made by Messrs. Jones or Irvin as to the location of the plant which was to be erected by the Ottomobile Company?

A. I was.

Q. What were those statements?

(Objected to as immaterial and irrelevant. Objection sustained.)

20

Mr. Palmer. May I have my reasons for the question on record? I offer this testimony upon the ground that this, together with succeeding questions, would show false and fraudulent representations made by these promoters to induce these stock subscriptions, as to what their plans were in the organization of the company, which plans were materially changed and altered after the organization of the company, or were not carried out at all.

30

Mr. Bergen. And for the further reason that these statements, furthermore, made by these promoters at these general meetings of people who subsequently became subscribers or signed these papers, show what was the purpose and intention of those promoters in reference to

this corporation and show the plans and ideas of the corporation for which these people signed these subscriptions, the two defendants included. We want to follow this proof by proof that they modified and altered those plans as then enumerated and stated.

Mr. Tyler. Inasmuch as the offer has been supplemented by a statement of reasons for making the offer, I wish to state my reasons for making the objection. The agreement signed by defendants is in writing and sets forth the purposes for which the organization of the company was to be made; and I object because the question does not go to anything which would tend to deny or alter the purpose set forth in this subscription agreement. The subscription agreement is in writing, cannot be varied or altered, and inasmuch as it is complete on its face it is the only matter which is material, that which is therein set forth, and only testimony tending to deny the purposes set forth in that agreement could possibly be material.

20

(Objection sustained.)

(Objection noted for defendants as ground of appeal.)

Mr. Palmer. Now, if your Honor please, I can possibly save time if I make an offer as to what I propose to show by this witness and have a ruling upon it, rather than go through each of these matters separately. If the court will prefer I will make that formal offer of proof, and then your Honor can rule upon it, and save any further trouble and discussion as to each question. Does your Honor prefer having it in that form?

The Court. Yes.

Mr. Palmer. I desire to prove by this witness and other witnesses that Messrs. Jones and Irvin at meetings held during August and September, 1911, at the Market House, a house in Mount Holly, and also here in this court house, and at the Kelsey & Killie Building, at which meetings were present a large number of citizens of Mount Holly, some of whom subsequently became sub-
10 scribers for stock, included in which are the two defendants in cases now before the court, at which time Messrs. Jones and Irvin stated that the plant to be erected by the Ottomobile Company—

Mr. Tyler. I object to the statement of facts. I think you should state the purpose of the offer and not the facts.

The Court. No, he must state the facts. He is en-
20 titled to state his facts fully.

Mr. Palmer. That they proposed to erect at Mount Holly a plant for the manufacture of automobiles, which automobiles were to be those then manufactured by the Otto Gas Engine Works of Philadelphia, with which concern the Otto Motor Car Sales Company, represented by these gentlemen, Messrs. Jones and Irvin, had a contract to take over and manufacture the cars of the Otto Gas Engine Company; that a plot of land had been purchased
30 or contracted for at Mount Holly, known as the Bidwell Tract, situate on West Washington Street, on the edge of Mount Holly, that these two gentlemen, Messrs. Jones and Irvin, had at the time of those statements secured from subscribers in Philadelphia and elsewhere subscriptions to capital stock to the amount of \$100,000 of

the preferred stock of the proposed corporation; that among those subscribers Messrs. Jones & Irvin had secured a subscription of Mr. Edward S. Burns to preferred stock to the amount of \$100,000; that the engine to be placed in the cars to be manufactured by the Otto-mobile Company was the engine as manufactured by the Otto Gas Engine Works of Philadelphia; that these statements were made by these gentlemen in the hearing of the two defendants here before the court and that those statements induced these defendants to subscribe for this 10 stock; that these men also stated that the corporation to be organized was to be organized for the purposes as indicated in these statements I have made.

The Court. Objection is made to that, I understand?

Mr. Tyler. I object to that for the reasons already stated.

The Court. And the court sustains the objection.

20

Mr. Bergen. If the court please, we have an exception to your Honor's ruling. We also offer to prove at these meetings as stated in the previous offer these two promoters, Messrs. Jones and Irvin, stated that the corporation was to be formed for the purpose of erecting a factory in Mount Holly; that that factory—we want to eliminate the fraud from it.

30

Mr. Palmer. Which tract was to be located upon the Bidwell Tract in Mount Holly, situate on West Washington Street, which company was to manufacture automobiles known as the Ottocar, then being manufactured by the Otto Gas Engine Works of Philadelphia, which car

was then a known product and upon the market under the name of the Ottocar.

Mr. Tyler. I would like to inquire whether that last offer refers to statements made prior to these contracts for subscriptions or afterwards.

Mr. Palmer. Make it both.

10 Mr. Bergen. Made prior to this time.

Mr. Tyler. I object to any offer that may tend to show representations of the corporation made prior to this subscription, because the subscription itself was subsequently reduced to writing and set forth in writing clearly, definitely and without ambiguity what the purpose of the corporation was, and it cannot be varied by any parole, collateral or antecedent conversations or statements made by promoters as to what it was for. The case
20 is fully covered by 45 New Jersey Law (cites authority) and many cases along that same line. It is nothing more than a statement of fraudulent inducement in a different way. The purpose is to show that there was an inducement.

The Court. The court has already ruled that anything that operated on the mind of a subscriber in the way of representations by these promoters, in the present
30 status of the corporation, will not be relevant evidence.

Mr. Bergen. Now, if the court please, we have an exception to this last ruling of your Honor? .

The Court. Yes.

Mr. Bergen. Now in reference to the first offer of proof which was made by Mr. Palmer, we want to offer that same evidence—we forgot to do it then—the same offer to be followed by proof that they did not have the Burns subscription, they did not have the subscription of the Philadelphia people, they did not have the purchase of the Bidwell Tract.

Mr. Tyler. Well you simply want to show that these things are false. I say it is likewise covered by the 10 Oradell case.

The Court. I understood you to say in the presence of the court this morning that you would concede that the defendants were fraudulently induced to make these subscriptions.

Mr. Tyler. But that I would object that such testimony and evidence was irrelevant, incompetent, etc., which I am doing.

20

Mr. Bergen. Your Honor grants us an exception to your ruling as to the last one?

The Court. Yes.

By Mr. Palmer.

Q. Mr. Marren, were you present at the organization meeting at the Ottomobile Company in January, 30 1912?

A. I was.

Q. Were you one of the incorporators of the company?

A. I was.

Q. Together with what other gentlemen?

A. Messrs. Jones, Irvin, Rendell and Dubell.

Q. I show you the minute book of the company which has been offered, and at the end or in the course of the certificate of incorporation as shown here appears your name, William D. Marren, subscriber for eight shares of common stock, William S. Rendell, subscriber for one share, and William S. Jones, as a subscriber for one share. Those were the names that were attached to
10 the certificate of incorporation?

A. Yes.

Q. And those gentlemen were present at the organization meeting held in January, 1912?

A. Yes, sir.

By the Court.

Q. Where did this concern carry on business?

A. In Philadelphia, at the Otto Gas Engine Works
20 factory.

Cross Examination.

By Mr. Tyler.

Q. And also in Mount Holly, Mr. Marren?

A. Never.

Q. Didn't they run a place here in Mount Holly?

A. They never carried on business there.

30 Q. No but they had a lot of goods there?

A. Yes.

Q. And at the time of the sale by the receiver they were too still in Mount Holly?

A. Yes.

Q. They rented a place there and paid \$75 a month for it?

A. Yes.

By the Court.

Q. You mean to say that the factory of the concern was at the—

A. Otto Gas Engine Works.

Q. Were you a director?

10

A. Yes, sir.

Q. After the concern was organized it went to work and took over the business of the Otto Gas Engine Works, did it, of Philadelphia?

A. Took over that part of it.

Q. The entire assets and good-will of the Otto Motor Car Sales Company of Philadelphia?

A. No, sir; we did not.

Q. You didn't take that over?

A. No, sir; the assets—can I answer that?

20

Q. Yes.

A. The assets only in as far as it related to a contract that Messrs. Jones and Irvin had with the Otto Gas Engine Company to dispose of their automobile business, but nothing to do with the previous contracts that Jones and Irvin had as to the sale of those cars; it was simply to take over a contract or an option that they had to buy their business for a certain sum of money.

Q. Then they carried out the original scheme, did they, of the Otto Gas Engine Works of Philadelphia?

30

A. Carried out the original scheme in what way, sir?

Q. Well, that is what the company was organized for, was it not?

A. Yes to take over their cars, and to continue the building of their cars.

Q. Did you do that?

A. We did that; yes, we did that.

Q. And it also says, "And the entire assets and good-will of the Otto Motor Car Sales Company of Philadelphia." What kind of a concern was that?

A. The Otto Motor Car Sales Company was a company organized to sell the product of the Otto Gas
10 Engine automobiles. Now we did not have anything to do with that at all. The contracts, I believe—the trustee has the contract there that will show absolutely what that was and what our part was. We had nothing to do with any of their liabilities or assets or anything else.

Q. But you did take over the good business of that concern; is that it?

A. We didn't take over that business at all.

Q. What became of that concern?

A. That concern went out of business. It was sold
20 to W. S. Rendell, or transferred to W. S. Rendell.

Q. What did he do with it?

A. Well, he became an agent to sell the cars.

Q. Was he one of the officers of this company.

A. Yes, he acting as an individual.

By Mr. Tyler.

Q. Well, Mr. Marren, they did take over the assets of the Ottomobile Motor Car Sales Company with the
30 exception of those contracts, didn't they?

A. No, sir; they didn't take over any assets further than those specified in that contract, which dealt with the Otto Gas Engine Works relative to taking over and manufacturing and automobile business.

Q. Well, they took over all that is relative to the

sale of automobiles except the agency contracts, didn't they?

A. Except the agency contracts? I do not want to answer that unless I answer it right. It is a long time ago. I just want to refresh my memory.

Q. Well, the minutes are clear on that, aren't they? The offer that was made and accepted at the organization meeting was that "all rights acquired by the Otto Motor Car Sales Company by agreement dated December 20, 1911, between the Sales company and the Otto Gas 10 Engine Company, and the good-will of said Sales Company and such of its agency contracts as the Ottomobile Company may in writing designate?" That was part of the offer made by the Otto Motor Car Sales Company and by Jones and Irvin and accepted at the organization meeting of both the stockholders and the directors, wasn't it?

A. Yes.

Q. And it was done in accordance with that written offer?

A. Yes, in reference to that contract of that day. 20

Redirect Examination.

By Mr. Bergen.

Q. Mr. Marren, did you take over the entire assets and good-will of the Otto Motor Car Sales Company?

A. We did not.

Q. What part did you not take over? 30

A. We did not take up any of their previous business, their liabilities or assets, as a selling organization.

By the Court.

Q. Had they any capital?

A. They had no capital. I don't know what their status was.

Q. You mean it was a mere sales agency, wasn't it?

A. It was a mere sales agency.

Q. Didn't you take over their contracts and goodwill?

A. No, sir; we did not.

Q. Why, wasn't it worth anything?

10 A. It wasn't worth anything.

Q. That is a good reason for not taking it over.

By Mr. Bergen.

Q. Did you take over all the automobile interests in the Otto Gas Engine Works?

A. We did.

Q. You took that over?

A. Yes.

20 Q. Wasn't the original scheme of this promotion to build a factory here in Mount Holly?

Mr. Tyler. That is objected to as immaterial, incompetent and irrelevant and no part of the organization. We threshed that over a dozen times.

The Court. The court will rule it is a matter of no significance.

30 The Witness. If I could make a statement to the court—

Mr. Tyler. I would object to that.

The Witness. All right. The court asked me a

question. I wanted to make it as clear to him as I could.

By Mr. Palmer.

Q. Mr. Marren, was any stock issued to Messrs. Jones and Irvin pursuant to the resolution set forth in the minutes?

A. I think there was.

Mr. Tyler. I object. The stock certificate book is in evidence and is the best evidence and only evidence that can be received as to what was done and what was not done. 10

Mr. Palmer. All right. We will show him the book then.

The Court. Well, is there any doubt about the stock that Mr. Jones got?

Mr. Tyler. It was all in the record this morning. 20

The Court. I understood he got 2,400 and odd shares.

By Mr. Palmer.

Q. What was your position in the company?

A. Treasurer.

Q. You signed all stock certificates as treasurer?

A. No, the president signed them. 30

Q. Didn't you also sign them as treasurer?

A. The treasurer didn't have anything to do with it.

Q. I show you certificate No. 19. Is that your name signed as treasurer?

A. But that was illegal.

Q. Well, you did sign some of the stock certificates?

A. Yes.

Mr. Bergen. I want to read from the minute book and spread on the record, the minute book having been offered in evidence, this resolution of the incorporators' meeting:

10 "Upon motion duly made, seconded and carried, the following preamble and resolutions were unanimously adopted:

Whereas, the Otto Motor Car Sales Company, William S. Jones and E. H. Irvin have offered to sell this company property as follows:

(1) All rights acquired by the Otto Car Sales Company under agreement dated December, 20th, 1911, between said Sales Company and the Otto Gas Engine Works.

20 (2) The good-will of said Sales Company and such of its agency contracts as the Otto Motor Company may in writing designate;

(3) All rights acquired by W. S. Jones and E. S. Irvin under agreement dated December 20th, 1911, between them and the said Otto Gas Engine Works;

In consideration of the issue of the stock of this company to the amount of fifty thousand dollars (\$50,000) preferred and two hundred and fifty thousand dollars (\$250,000) common par value.

30 Now, therefore, be it resolved that the Board of Directors of this company be and they are hereby authorized and recommended to purchase the said property above mentioned for the said price if in their judgment the property is necessary for its business and is of the value of three hundred thousand dollars (\$300,00) and

to issue said stock in payment therefor.

Upon motion duly made, seconded and carried the following preamble and resolution were unanimously adopted:

Whereas, it has been agreed between each of the incorporators and Otto Motor Car Sales Company, William S. Jones and E. H. Irvin, that the stock to be issued in payment of the property authorized to be purchased by the resolution set forth above shall include the stock subscribed by the incorporators as evidenced by the certificate of incorporation: 10

Now, therefore, be it

Resolved, that the Board of Directors be and they hereby are authorized and directed to accept said property as full payment of the subscriptions for stock of the incorporators or their assigns to the amount of their respective subscriptions.

Upon motion duly made, seconded and carried it was

Resolved, that the Board of Directors be and they are hereby authorized to issue capital stock of this company to the aggregate amount of two hundred and 20
fifty thousand dollars (\$250,000) par value of the preferred stock and two hundred and fifty thousand (\$250,000) par value of the common stock in such amounts and proportions as from time to time shall be determined by the board and as they may be permitted by law and to accept in full or part payment thereof such property as the board shall determine may be necessary for the business of the company.

And be it further resolved that the president and 30
secretary of the company be and they are hereby authorized and directed to executed in the name and on behalf of this company under its corporate seal such agreement as may be necessary for the sale of said property to this company."

Also the following resolution:

"Upon motion duly made seconded and carried it was resolved that in compliance with the resolution of the incorporators the company accept in payment of the share of stock subscribed by the incorporators the property agreed to be sold to the company as set forth in the preceding resolution and that full paid common stock be issued to them or to their assigns to the amount of their respective subscriptions;

- 10 And be it further resolved that the president and the treasurer be and they are hereby authorized to issue to the order of said Otto Motor Car Sales Company, William S. Jones and E. H. Irvin, certificates of full paid capital stock of this corporation for the remainder of the shares provided to be issued by the agreement between the said Otto Motor Car Sales Company, William S. Jones and E. H. Irvin and this corporation above referred to."

By Mr. Bergen.

20

Q. Mr. Marren, did Messrs. Jones and Irvin refuse to transfer any bonus stock to any of these preferred stockholders?

A. I think they did.

Q. When and where was that and how was that done?

A. At the time I thought it was the treasurer's duty to issue those certificates, and I had started to issue one or two to people who had paid in full for their stock.

- 30 Q. Who had paid in full under such an agreement as this?

A. Yes.

Q. That is, had paid for the preferred stock?

A. Had paid for the preferred stock.

Q. And you started to issue the common, their quota of bonus stock to them?

Mr. Tyler. Don't lead the witness.

Q. Is that correct?

A. Yes, that is correct.

Q. Go ahead.

A. And at a meeting held in the office of the company by John Bleakley, of Philadelphia, Commonwealth Trust Company Building, I was informed that I should not issue any more stock; that it was the president and the secretary's duties; and that Mr. Jones and Mr. Bleakley instructed Mr. Irvin not to issue any common stock. 10

Q. Why?

A. He said it was illegal.

Q. Where was that bonus stock to be obtained that was to be given to the preferred stockholders under that agreement?

A. From Messrs. Jones & Irvin.

Q. And they refused, therefore, under advice of their counsel, to issue it? 20

(Objected to as leading.)

The Court. Well, it is leading. What is the fact?

Q. What is the fact then as to their issuance of it?

A. He said that it would be illegal for them to issue that stock unless they had the value represented by it. 30

Q. Unless who had the value represented by it?

A. Messrs. Jones and Irvin; and so to give that to the subscriber of the preferred stock, he said it would exceed the value of the subscriptions, or in other words,

he did not think they had the value as represented by that issue.

Q. Who do you mean, the corporation or Messrs. Jones and Irvin did not know the value of it?

A. Messrs. Jones and Irvin.

Q. Had not put the value into the corporation?

A. Well, the common stock, yes.

Q. Was it understood that this bonus of common stock was to be given by Messrs. Jones and Irvin from the
10 stock which was issued to them?

A. Yes.

Q. For this property?

A. Yes.

Q. That was understood by you all?

A. Yes; no, I might modify that.

By the Court.

Q. Well, were Jones and Irvin to give from the
20 common stock which they had the three shares of stock to make up the stock which the subscriber to the preferred stock was entitled to get?

A. Yes, they were to give it from their bonus, from their common stock.

Q. That is the way the subscriber to the preferred stock was to get his share?

A. Yes.

By Mr. Bergen.

30

Q. And was extra value stock given to them for the purpose of so giving it out as a bonus?

A. Extra value stock?

Q. Yes. Did or did not your directors make a conscious valuation that the common property which was

coming to the corporation was worth \$250,000?

A. Yes, we did.

Q. How much did you consider it worth?

A. \$250,000.

The Court. What was that question?

The Witness. How much did we consider it worth.

The Court. What worth?

10

The Witness. The property that was to come to the corporation.

The Court. What kind of property was it?

Mr. Bergen. What Jones and Irvin offered to sell to them.

The Court. That does not answer the question. 20
Was there anything to it?

Mr. Bergen. That is what I asked him, was there anything to that property.

A. It was the property of the Otto Gas Engine Works. It was the contract that Jones and Irvin had with the Otto Gas Engine Works.

Q. And you people valued that as worth \$50,000 of preferred stock and \$250,000 of common stock? 30

A. I don't quite catch that.

Q. That is what was offered to them, to give to them?

A. They were to retain \$50,000 preferred stock and \$250,000 common stock; but a certain part of that

went back to the Otto Gas Engine Works in fulfillment of the contract. Now I don't remember just exactly what that was. The Otto Gas Engine Works got a part of that stock.

Q. And as part of the promotion scheme these promoters were to give of the common stock which went to them in this purchase, were to give common stock as a bonus to the preferred stockholder subscribers?

A. Yes.

10 Q. Therefore you didn't value the property as worth the full then \$50,000 cash and \$250,000 common stock; is that not true?

A. Well, I don't know that I want to answer that. I don't know whether we valued it that way or not.

Q. But the arrangement was by all of the promoters that those promoters should give that bonus and divest themselves of that much common stock?

A. That is it exactly.

Q. Was the factory ever built in Mount Holly?

20 A. No.

Q. Did Jones and Irvin turn over \$100,000 of stock subscribed?

A. Not any.

Q. Did this man Burns subscribe to \$10,000, or had he?

Mr. Tyler. I object to that as immaterial and irrelevant and incompetent for the reasons already stated.

30 The Court. I think that is so. I think it might be useful to know whether the corporation ever did have any money or not.

By the Court.

Q. You were treasurer, weren't you?

A. Yes.

Q. Did the corporation ever have any money?

A. Collected somewhere about \$9,000.

Q. And was that money paid by the preferred stockholders?

A. Entirely.

By Mr. Bergen.

10

Q. And none of them got common stock as a bonus with it?

A. There was no stock ever issued to my knowledge.

By Mr. Palmer.

Q. Either preferred or common?

A. Either preferred or common.

20

By the Court.

Q. Then all the money that ever went into the treasury came from these gentleman who took preferred stock?

A. Yes, sir.

BOTH SIDES REST.

30

Mr. Tyler. We move that a verdict be directed in favor of the plaintiff in each case for the sum of \$6,000,

that being the amount of the subscription in these cases. I do not think it is necessary to go into any detailed statement, at least a detailed statement of reasons.

Mr. Bergen. We move for binding instructions in favor of the defendant.

Mr. Tyler. I think the first motion should be disposed of first, not interject another motion while the first
10 one is pending.

Mr. Palmer. They both involve the same matter. We can get both of them on the record.

(After consultation by counsel and the court.)

The Court. It is agreed by counsel that a juror be withdrawn and the case decided by the judge without a jury. Gentlemen, you are relieved from this complicated
20 case with the thanks of the court.

(Adjourned till April 15, 1916, at the court-house at Camden, at 10.00 A. M., for final argument.)

BURLINGTON COUNTY CIRCUIT COURT

ROBERT Z. COLLINGS, TRUSTEE,
Plaintiff.

V.S.

WALTER ALLEN,

Defendant.

ACTION AT LAW.

10

REQUESTS FOR FINDINGS OF FACT
AND CONCLUSIONS OF LAW.

Defendant requests the learned Judge to make the following findings of fact:

1. On September 25th, 1911, Walter Allen, defendant, signed a paper as follows:

SUBSCRIPTION TO PREFERRED STOCK
OF
THE OTTOMOBILE COMPANY.

Par value \$100 per share.

September 25, 1911.

I hereby subscribe to four shares, of the par value of \$100. per share, of the

SIX PER CENT. PREFERRED STOCK OF THE OTTOMOBILE COMPANY, a corporation to be organized under the laws of the State of New Jersey with 30 au authorized capital of \$250,000. Six Per Cent. Preferred and \$250,000 Common Stock, ONE SHARE OF COMMON STOCK TO BE GIVEN AS A BONUS WITH EACH TWO SHARES OF PREFERRED. The purpose of the organization is to acquire

the automobile interests of the Otto Gas Engine Works, of Philadelphia, and the entire assets and good will of the Otto Motor Car Sales Co. of Philadelphia.

I agree to pay for said stock as follows: Twenty-five per cent upon notice to me of the completion of the organization of the corporation and the balance upon call of the Treasurer of said Corporation, in allotments of not to exceed twenty-five per cent. of my total subscriptions, at intervals of not less than thirty days after each succeeding call, stock certificates to be delivered to me upon
10 completion of payments.

Name Walter Allen,
Address Mount Holly.

Request No. 1 affirmed,

HOWARD CARROW, Judge.

2. Defendant by this paper offered to take stock in
20 a corporation to be organized for the purpose of acquiring the automobile interests of the Otto Gas Engine Works of Philadelphia and the entire assets and good-will of the Otto Motor Car Sales Company of Philadelphia.

Request No. 2 affirmed.

HOWARD CARROW, Judge.

3. The Ottomobile Company, of which plaintiff is
30 trustee, and on behalf of which this suit is brought, was organized on the day of , for the following purposes, as set forth in its charter:

To manufacture automobiles, automobile and motor car accessories and supplies of every class and description, including any and all parts of vehicles of all kinds or any

other goods pertaining to the automobile business or otherwise, which the corporation may determine to manufacture.

To buy, sell and deal in automobiles, automobile and motor car accessories and supplies of every class and description, as manufacturers' agents, jobbers, wholesale or retail, on commission or consignment or otherwise, including any and all parts of vehicles of all kinds or any other goods pertaining to the automobile business or otherwise in which the corporation may determine to deal. 10

To carry on the business of mechanical engineers and dealers in and manufacturers of plants, motors, engines and other machinery, tool makers, brass founders, metal workers, boiler makers, mill wrights, machinists, iron and steel converters, smiths, builders, metallurgists, electrical, civil and water supply engineers, and to buy, sell, manufacture, repair, convey, alter, let or hire and deal in machinery, implements, rolling stock and hardware of all kinds; to build, construct, and repair railroads, water, gas and electric works, tunnels, bridges, viaducts, 20
canals, hotels, wharves, piers or any like work of internal improvement, public use or utility.

To manufacture, purchase or otherwise acquire goods, merchandise and personal property of every class, and to hold, own, mortgage, sell, or otherwise dispose of, trade, deal in and deal with the same.

To acquire and undertake the good will, property rights and assets, and the liabilities of any person, firm association or corporation, and to pay for the same in cash, stock or bonds of the corporation or otherwise. 30

To enter into, make, perform and carry out contracts of every kind and for any lawful purpose with any person, firm, association or corporation.

To borrow or raise money without limit as to amount by the issue of or upon warrants, bonds, debentures and

other negotiable or transferable instruments, or otherwise.

To apply for, obtain, register, purchase, lease or otherwise acquire, and to hold, use, own, operate and introduce, and to sell assign, or otherwise to dispose of any trade-marks, trade-names, patents, inventions, improvements, and processes used in connection with or secured under letters patent of the United States, or elsewhere or otherwise, and to use, exercise, develop, grant licenses
10 in respect of, or otherwise to turn to account any such trade-marks, patents, licenses, processes and the like or any such property or rights.

To purchase, hold and re-issue the shares of its capital stock.

To conduct business in any of the States, territories, colonies or dependencies of the United States, in the District of Columbia, and in any and all foreign countries, to have one or more offices therein and therein to hold, purchase, mortgage and convey real and personal property
20 without limit as to amount, but always subject to local laws.

To do any or all of the things herein set forth to the same extent as natural persons might or could do, and in any part of the world.

The foregoing clauses shall be construed both as objects and powers; and it is hereby expressly provided that the foregoing enumerations of specific powers shall not be held to limit or restrict in any manner the powers of the corporation.

30 In general, to carry on any other business in connection with the foregoing, whether manufacturing or otherwise, and to have and to exercise all the powers conferred by the laws of New Jersey upon corporations formed under the act hereinafter referred to.

Request No. 3. affirmed.

HOWARD CARROW, Judge.

4. The purposes of the Ottomobile Company as organized are materially different and changed from the purposes for which the Ottomobile Company was to be organized as required and provided for by the subscription paper in suit signed by defendant in this cause.

10

5. There was a material change, alteration or modification in the plans of the proposed corporation after the signing of the subscription paper by defendant. The incorporation of the corporation and its charter materially differ in purposes and plans from the corporation as contemplated by the subscription paper signed by defendant before incorporation.

6. Both the subscription paper and the charter of the Company provide for a capital stock of \$250,000 of preferred stock and \$250,000 of common stock.

20

7. It was an implied condition to the subscription paper that all of the \$250,000 of preferred stock should be subscribed for before any liability attaches to the defendant by reason of his signing the subscription paper.

8. There was no change of the defendant's offer made by the subscription paper which would allow the corporation to accept it without performing its condition precedent of securing subscribers for all of its preferred stock.

30

9. Defendant never waived the implied condition of the subscription paper that it should not be binding on

him until all the stock mentioned was subscribed for.

10. All the \$250,000 of preferred stock of The Ottomobile Company was never subscribed for, and many shares remain unsubscribed for.

11. By corporation action of the incorporators and of the directors at meetings held by them the corporation agreed to sell all its common stock, totaling \$250,000 and
10 \$50,000 of preferred stock to Messrs. Jones and Erwin and another corporation, such stock to be sold as full paid stock, the corporation agreeing to purchase certain property which Messrs. Jones and Erwin had for the amount necessary to pay for such stock \$300,000 in cash.

12. Certificates for \$240,000 of common stock were issued full paid, to Jones and Erwin, and received by them.

20 13. After this corporation became insolvent and went into bankruptcy the trustee plaintiff, on the grounds that the common stock was illegally issued for an over valuation to Messrs. Erwin and Jones, secured the return of these \$240,000 of certificates to him as trustee and released them from liability on same.

14. The property of Erwin and Jones which was to be turned into the corporation as worth \$300,000, which was to be paid to the corporation for its \$50,000 of pre-
30 ferred stock and \$250,000 of common stock, was not worth \$300,000, the property having been fraudulently over-valued as against the corporation.

15. The promoters and officers of The Ottomobile Company entered into the following scheme to issue its

stock for less than par; the corporation was to sell and sold all its common stock \$250,000 as full paid stock to Messrs. Jones and Erwin and another corporation, \$240,000 of it to be issued and was issued to Messrs. Jones and Erwin. The other \$10,000 was to be issued to the other corporation. The corporation was to over-value and did over-value certain property of Messrs. Jones and Erwin as worth \$250,000 in cash to pay for this common stock and \$50,000 in cash to pay for the preferred stock, a total of \$300,000, this being an over-valuation of the 10 property which the corporation was to receive. Subscribers were to be gotten for the remaining preferred stock, the corporation agreeing by the subscription blanks that one-share of full-paid common stock was to be given as a bonus with each two shares of preferred stock. The subscribers were to pay at par in cash for the preferred stock, and to receive the bonus of full paid common stock for nothing. The bonus stock was to have been issued to Messrs. Jones and Erwin as full paid and the amount necessary for the bonus, one share of common with each 20 two shares of preferred, was to be given by Erwin and Jones to the subscriber.

16. The common stock agreed to be given as a bonus with the preferred stock, was to be full paid stock.

17. After the incorporation of the Ottomobile Company, and when the officers attempted to carry out this scheme, Messrs. Jones and Erwin refused on the ground that it was illegal and under advice of their at- 30 torney at law, to turn over the common stock to the subscribers under the agreement of the corporation as provided for in the subscription paper.

18. More than \$30,000 of preferred stock was sub-

scribed for under similar subscription agreements as that made by defendant.

19. The proof fails to show that The Ottomobile Company ever accepted the offer of defendant contained in the subscription paper.

20. There is no proof that the corporation which was in the minds of the promoters and the subscribers for
10 stock was ever incorporated.

21. The corporation had no common stock which would enable it to perform its part of the subscription offer and give one share of common stock with each two shares of preferred stock.

22. No stock of The Ottomobile Company was ever delivered or received by defendant.

20 23. Defendant is not and never was a stockholder of The Ottomobile Company.

24. Defendant never subscribed for common stock of The Ottomobile Company.

25. The subscription paper is not a subscription to common stock.

26. The Ottomobile Company, of which the Trust-
30 tee is plaintiff, is not the corporation in which defendant agreed by the subscription paper to take stock.

All requests for findings of facts after No. 3 where found inconsistent with findings of my memorandum are denied. Exception noted for defendant.

HOWARD CARROW, Judge.

Defendant requests the learned Judge to make the following conclusions of law :

1. This suit is brought to enforce liability created by the subscription paper. There is no averment in the pleadings or proof in the case of any liability on defendant by reason of ownership of stock or by reason of defendant being a stockholder.

2. A subscription to stock made before the corporation is organized is a mere offer and does not constitute a contract, hence the subscriber does not become liable on the subscription or as stockholder until the corporation is organized and the offer is accepted. 10

3. The purposes of The Ottomobile Company as set forth in the charter, being materially different and changed from the purposes of The Ottomobile Company as required and provided for by the subscription paper in suit signed by defendant, the incorporation of The Ottomobile Company was not an acceptance of the offer contained in the subscription paper . 20

4. There is no proof of any acceptance by the corporation after incorporation, of the offer made by defendant contained in the subscription paper.

5. The offer made by defendant contained in the subscription paper, never having been accepted by the corporation, the subscription paper never becomes binding agreement on defendant. 30

6. The purposes for which the Ottomobile Company was organized being materially different and changed from the purposes for which The Ottomobile

Company was to be organized as agreed between the parties, the subscription paper never became binding on defendant.

7. There having been a material change, alteration or modification in the plans of the proposed corporation after the signing of the subscription paper by defendant, the offer made by the subscription paper was not accepted by incorporation of the corporation, and there being no
10 proof of any other acceptance by the corporation, or proof of waiver of the terms of the offer by the defendant, the subscription paper never became a contract binding on defendant.

8. Defendant is not a stockholder of The Ottomobile Company.

9. There was an implied condition to the subscription paper in suit that it should not be binding upon de-
20 fendant until all the capital stock specified therein was subscribed for.

10. All the capital stock of The Ottomobile Company mentioned in the subscription paper, not having been subscribed for, and there being no proof of any waiver by defendant of the implied condition that all the stock should be subscribed for, the subscription paper in suit never became a contract binding on defendant.

30 11. By the corporation's sale of its common stock as full paid for property which was over-valued by its directors, and its agreement that the common stock so sold for over-valued property would be given by the purchasers to the subscribers for its preferred stock, the corporation attempted to issue its preferred stock at less

than par and therefore attempted to do an illegal act. The subscription paper for preferred stock is illegal and this Court will not enforce it.

12. By the subscription paper the corporation to be formed was to issue its full paid preferred stock at less than par to the signers, and even if the offer of the subscription paper was accepted by The Ottomobile Company when incorporated so that it became a contract, then the contract thus made was illegal and this Court will not 10 enforce it.

13. The corporation, not having any common stock to give as a bonus with the preferred stock as required by the subscription paper, never could have performed its part as required by the offer in the subscription paper and therefore never did accept the same, and therefore the offer of the subscription paper never became a binding contract on defendant.

14. Erwin and Jones having refused to turn over 20 the common stock as a bonus to the preferred stockholders as contemplated by the scheme of promotion, the corporation never was able to perform its part and give common stock as a bonus with the preferred stock, and therefore the offer made by the defendant in the subscription paper never was accepted by the corporation and never became a binding contract on defendant.

15. The Ottomobile Company never accepted the of- 30 fer of defendant contained in the subscription paper.

16. The subscription paper never became a contract binding on defendant.

17. The Ottomobile Company, of which the trustee is plaintiff, is not the corporation in which defendant agreed by the subscription paper to take stock.

18. Defendant is not and never was a stockholder of The Ottomobile Company.

19. Defendant never subscribed for common stock of The Ottomobile Company.

10

20. The subscription paper is not a subscription for common stock.

21. If by the subscription paper defendant offered to take common stock then it never became binding on him because the corporation had no unissued common stock to issue to him.

22. If by the subscription paper defendant offered
20 to take common stock then it never became binding upon him because the common stock of the corporation had been over-subscribed for.

23. The fact that the corporation has creditors does not render the subscription paper a contract and binding on defendant.

24. The fact that there are creditors does not make the illegal subscription paper signed in contemplation of a
30 scheme to illegally issue preferred stock for less than par enforceable in this Court.

25. Verdict must be for defendant on the claim of a subscription to common stock.

26. Verdict must be for defendant on the claim of a subscription to preferred stock.

27. Verdict must be for defendant.

V. Claude Palmer

Martin V. Bergen.

Morris Wolf

Attorneys for defendant.

All these requests for conclusions of law were found ¹⁰ to be inconsistent with finding of law in my memorandum are denied.

Exceptions noted for defendants.

HOWARD CARROW, Judge.

BURLINGTON COUNTY CIRCUIT COURT

	ROBERT Z. COLLINGS, TRUSTEE,	MEMO.
	Plaintiff,	
	V.S.	JOSEPH BECK
		TYLER,
		for Plaintiff.
10	ABRAHAM SALTZMAN AND	V. CLAUDE PALMER and MARTIN V. BERGEN, For Defendants.
	WALTER ALLEN,	
	Defendants.	

CARROW, J.

These suits are brought against the defendants by
 20 the Trustee of a bankrupt corporation upon unpaid stock
 subscriptions in pursuance of assessments made by the
 Federal Court.

The facts as I find them in both cases may be stated
 as follows: Late in September, 1911, each of these de-
 fendants subscribed for the capital stock of a contem-
 plated automobile corporation as follows:

SUBSCRIPTION TO PREFERRED STOCK

of

THE OTTMOBILE COMPANY

30

Par Value \$100 per share

Sept. 28th, 1911.

I hereby subscribe to four shares, of the par value
 of \$100 per share, of the

SIX PER CENT. PREFERRED STOCK OF
 THE OTTOMOBILE COMPANY, a corporation to be

organized under the laws of the State of New Jersey with an authorized capital of \$250,000. Six per cent. Preferred and \$250,000. Common stock, ONE SHARE of COMMON STOCK TO BE GIVEN AS A BONUS WITH EACH TWO SHARES OF PREFERRED. The purpose of the organization is to acquire the automobile interests of the Otto Gas Engine Works, of Philadelphia, and the entire assets and good will of the Otto Motor Car Sales Co. of Philadelphia.

I agree to pay for said stock as follows: Twenty-five per cent upon notice to me of the completion of the organization of the corporation and the balance upon call of the Treasurer of said corporation, in allotments of not to exceed twenty-five per cent of my total subscriptions, at intervals of not less than thirty days for each succeeding call, stock certificates to be delivered to me upon completion of payments.

Name, Abraham Saltzman,
Address, Mt. Holly.

Early in January, 1912, said Ottomobile Company was incorporated under the General Corporation Laws of this State. The Company, according to its certificates of incorporation was authorized to begin business with a paid-up capital of \$1,000. On January 16, 1912, defendants were properly notified of the incorporation of the Company and requested to pay the first installment of twenty-five per cent. as per the subscription paper. Defendants' offer to take stock was, in the light of all the circumstances of the cases, fully accepted. The Company, relying upon the good faith of its subscribers for stock, entered upon the specific business called for by the subscription paper without any objection whatever from defendants or any other subscribers, although defendants did not pay said installments of twenty-five per

cent or any of the other installments, but some of the other subscribers did pay, so that the Company had in its treasury funds considerably in excess of the \$1,000, &c., before beginning business.

The Company, while engaged in the prosecution of said business, that is, the specific business bargained for incurred debts aggregating \$60,000 without sufficient funds or assets to discharge the same; and as a result of this unfortunate situation insolvency proceedings were
10 begun in the Court of Chancery of this State and a Receiver was appointed in the month of July, 1912, to wind up the affairs of said Company. Said proceedings were afterwards superseded by an adjudication of bankruptcy in the Federal Courts, wherein the plaintiff was appointed Trustee of the bankrupt's estate. Assessments were afterwards made in proper proceedings by the Federal Court, for the full value of the stock, preferred and common, which defendants had agreed to take.

The peculiarity about the case is that defendants at
20 no time before the decree of insolvency objected to anything the Company did, nor did they do anything to rescind their subscriptions.

But defendants now contend as against the rights of creditors that their subscriptions were merely unaccepted offers to take stock, because the full amount of the authorized capital was not subscribed, and because the certificate of incorporation set forth more extensive powers than the subscription paper specified. That contention is answered by the fact that defendants acquiesced in all the
30 Company did, because, as I have said, they did not object to the Company's beginning business with less than the full authorized capital, nor did they object to the superfluous objects set forth in the certificate of incorporation. Besides, the Company did not engage in any outside business.

The subscriptions were not void because of anything the Company had done, and I am not sure ^{that} they were even voidable, but conceding they were, then it was at the option of the subscribers that the subscriptions could be rescinded, and if defendants intended to rescind, they should have done so within a reasonable time after receiving the notice of January 16, 1912, and before debts were contracted by the Company. Defendants allowed the Company to prosecute said business and incur debts, believing, as it had a right to, that defendants would honor the calls for the installments on their subscriptions; and creditors dealt with the Company upon the same theory; defendants therefore waived the objections which they here offer as a defence. 10

The truth, as I gather it, is that the defendants took a chance on the success of the enterprise, and thereby assumed the risk of failure, and since the rights of creditors have intervened, they are in no position to escape liability for the value not only of the preferred stock, but of the common stock as well. 20

"As against creditors, stockholders are not permitted to invalidate their subscriptions because the entire authorized capital stock was never subscribed."

4 Thompson on Corporations, page 4922.
Cyc. Vol. 10, page 495.

The subscriptions show that defendants agreed to take the common stock and there would have been no difficulty about their getting it if they had kept their part of the contract. They are now estopped from complaining. 30

Judgment must go against each defendant for \$600 with interest to be computed.

HOWARD CARROW, Judge.

BURLINGTON CIRCUIT COURT.

ROBERT Z. COLLINGS, TRUS-
TEE, ETC.,

Plaintiff.

vs.

WALTER ALLEN,

Defendant.

STIPULATION.

10

BURLINGTON CIRCUIT COURT.

ROBERT Z. COLLINGS, TRUS-
TEE, ETC.,

Plaintiff.

vs.

ABRAHAM SALTZMAN,

Defendant.

STIPULATION.

20

It is hereby stipulated and agreed between Joseph Beck Tyler, attorney for the plaintiff and Martin V. Bergen and V. Claude Palmer, attorneys for the defendant in the above stated causes that the extract from the minutes of the Otto-Mobile Company, entitled a Special Meeting of Directors, held March 16, 1912, as follows: "The first call on the subscription contracts was issued January 18, 1912, said call covering subscriptions in the

2

amount of \$40,000. The return from the first call was small" refers to a call that was made on a printed form of which the following is a true copy:

"THE OTTO-MOBILE COMPANY.

Mount Holly, N. J.,.....1912.

M

At a meeting of the Board of Directors of the Otto-Mobile Company, held January 5th, 1912, a resolution
10 was passed directing the treasurer to immediately collect from the subscribers to the capital stock of the company their various subscriptions, same now being due and owing.

You are therefore requested to forward to the undersigned of the amount of your subscription (\$.....) to the preferred stock of said company, for which a receipt will be forwarded.

Stock certificates will be issued when payment in full has been made.

20

Very truly yours,

W. D. MARREN,
Treasurer."

And that the aforesaid notice with the blanks properly filled in for a first call of 25 per cent. was sent to all of the stock subscribers of the said Otto-Mobile Company in accordance with the minute above referred to.

JOSEPH BECK TYLER,

Attorney for Plaintiff.

MARTIN V. BERGEN,

V. CLAUDE PALMER,

Attorneys for Defendants.

30

New Jersey Court of Errors and Appeals

ROBERT Z. COLLINGS, trustee,
Plaintiff-Appellant,

vs.

WALTER ALLEN,
Defendant-Respondent.

ROBERT Z. COLLINGS, trustee,
Plaintiff-Appellant,

vs.

ABRAHAM SALTSMAN,
Defendant-Respondent.

Appeal from
Supreme
Court.

BRIEF FOR APPELLANT

Facts

This case was tried at the Burlington County Circuit before Judge Carrow without a jury. The findings of Judge Carrow appear at page 96 of the state of case, which are summarized as follows:

(1) The defendants subscribed to stock of the Ottomobile Company. The subscription is set out in the opinion and dated September 28th, 1911.

(2) The company was organized under the general corporation laws of New Jersey in January 1912.

(3) The company began business and on January 16th, 1912, made an assessment and call on the defendants, with others, for the first installment of twenty-five per cent on their stock subscriptions.

(4) The stock subscriptions were accepted by the company.

(5) The company relying upon its stock subscriptions began business with a paid-in capital of more than one thousand dollars (\$1,000.00).

(6) The company incurred debts aggregating sixty thousand dollars (\$60,000.00), and in July, 1912, a receiver was appointed by the Court of Chancery and winding-up proceedings were begun.

(7) The receiver was afterwards substituted by a trustee in bankruptcy and assessment was made for the full amount of unpaid stock subscriptions, both preferred and common, by the United States District Court, to pay debts.

(8) The defendants at no time before insolvency proceedings were begun objected to anything the company did nor did they do anything to rescind their subscriptions.

(9) The claim of the defendants that they were not liable because the full amount of the authorized capital was not subscribed and because the certificate of incorporation set forth more extensive powers than the subscription paper specified are of no value against creditors for the reason that the defendants acquiesced in all that the company did and made no objection to the company

beginning business with less than the authorized capital, or to the superfluous powers contained in the certificate of incorporation.

(10) The company did not engage in any business outside of the purposes set forth in the subscription paper.

(11). The subscribers may have had an option to rescind their subscriptions before the rights of creditors intervened, but having allowed the company to conduct business and incur obligations, the subscribers waived the objections which they now offer as a defense.

(12) The defendants took a chance on the success of the enterprise and assumed the risk of failure, and since the rights of creditors have intervened, they cannot escape liability, either for the preferred stock or for the common stock.

(13) The subscriptions show the defendants agreed to take common stock, and further, that there would have been no difficulty about their getting it if they had kept their part of the contract.

The Trial Court then found a verdict for plaintiff against defendants for about \$600.50, in each case. Upon appeal to the Supreme Court these judgments were reversed. Plaintiff appeals to this Court from the judgment of the Supreme Court.

These findings of facts are especially important on the three following points:

(a) No objection was made by the defendants to the organization of the company or to its proceeding to do business.

(b) That the corporation was in a position to

keep their part of the contract and deliver the stock, both common and preferred, upon payments being made.

(c) That defendants made no effort to rescind their subscriptions prior to insolvency proceedings and the rights of creditors have intervened.

As to the incorporation of the company and acceptance of the defendant's subscription, the subscription provides as follows:

"The purpose of the organization is to acquire the automobile interests of the Otto Gas Engine Works, Philadelphia, and the entire assets and good will of the Otto Motor Car Sales Company, of Philadelphia" (State of Case, p. 10).

The organization minutes provide:

"Upon motion duly made, seconded and carried, the following preamble and resolutions were unanimously adopted:

"Whereas, the Otto Motor Car Sales Company, Williams S. Jones and E. H. Irvin have offered to sell this company property as follows:

"(1) All rights acquired by the Otto Car Sales Company under agreement dated December 20th, 1911, between said Sales Company and the Otto Gas Engine Works.

"(2) The good-will of said Sales Company and such of its agency contracts as the Ottomobile Company may in writing designate;

"(3) All rights acquired by W. S. Jones and E. S. Irvin under agreement dated December 20th, 1911, between them and the said Otto Gas Engine Works;

"In consideration of the issue of the stock of this company to the amount of fifty thousand dollars (\$50,000), preferred and two hundred and fifty thousand dollars (\$250,000), common par value.

"Now, therefore, be it resolved that the Board of Directors. * * *"

A lengthy resolution proceeds to accept said offer, which embraces all purposes mentioned in the subscription agreement.

The certificate of incorporation (p. 85, State of Case), provides that the company shall be organized for purposes as follows:

"To manufacture automobiles, automobile and motor car accessories and supplies of every class and description, including any and all parts of vehicles of all kinds or any other goods pertaining to the automobile business of otherwise, which the corporation may determine to manufacture.

"To buy, sell and deal in automobiles, automobile and motor car accessories and supplies of every class and description, as manufacturers' agents, jobbers, wholesale or retail, on commission or consignment or otherwise, including any and all parts of vehicles of all kinds or any other goods pertaining to the automobile business or otherwise in which the corporation may determine to deal."

Which embraces all purposes mentioned in the subscription agreement and then follows numerous general powers which embrace most all kinds of business. It is the usual form of certificate as taken from *Dill on Corporations*.

Argument

The Trial Judge found as a fact that the corporation accepted the stock subscriptions of the defendants and made calls for payment, and also found as a fact that while the certificate of incorporation contained superfluous objects yet the company did not engage in any business outside of that set forth in the stock subscription agreement.

Whether the subscriber assumes the status of shareholder and waives any objection to informality in the organization of the company is a question of fact and the finding of the Trial Judge is conclusive. There is no evidence to show that the subscriber objected to the proceedings to organize or to the form of the charter taken out. The Trial Judge has found as a fact that the stock subscription was accepted and acted upon by the corporation when formed. Assessment was made and formal calls sent to the defendants. The shareholder is not only presumed to know what was done in the way of organization, but as a fact had actual notice that the company had been organized and received a call for payment of his subscription. He knew that the company was proceeding to do business and to contract debts on the strength of his subscription.

“When a shareholder of a corporation is called upon to respond to a liability as such, and when a party has contracted with a corporation, and is sued upon the contract, neither is permitted to deny the existence or the legal validity of such corporation. To hold otherwise would be contrary to the

plainest principles of reason and of good faith, and involve a mockery of justice. Parties must take the consequence of the position they assume. They are estopped to deny the reality of the state of things which they have made to appear to exist, and upon which others have been led to rely. Sound ethics require that the apparent, in its effects and consequences, should be as if it were real, and the law properly so regards it."

Casey vs. Galli, 94 U. S., 680.

"Many of the cases rest the conclusion on the ground that the shareholder is estopped by his conduct from denying the fact of the regularity or legality of the organization of the corporation."

10 Cyc., 521, Par. D.

Slocum vs. Warren, 10 R. I., 116.

McHose vs. Wheeler, 45 Pa. St., 32.

Abbott vs. Aspinwall, 26 Barb., 202.

Mead vs. Keeler, 24 Barb., 20, 25.

Holyoke Bank vs. Goodman Paper Mfg. Co., 9 Cushing, 576.

Chester Glass Company vs. Dewey, 16 Mass., 94.

This rule operates to protect shareholders of *de facto* corporations from personal liability.

"In the absence of a statutory provision making a shareholder liable in case of failure to comply with the requirements of a charter, persons who have contracted with a *de facto* corporation as a corporation, cannot deny its existence in order to charge its shareholders individually as partners."

10 Cyc., 524, Par. (K).

“Where a corporation has gone into operation, and rights have been acquired under it, every presumption should be made in favor of the legality of its existence.”

Hagarstown Turnpike Road Co. vs. Kreeger, 5 H. & J., 122 (Md.).

Even if the defendants, as stock subscribers, had a right to rescind their subscriptions for the reason that all of the capital stock was not subscribed or for the reason that the certificate of incorporation of the company comprised superfluous objects and powers, yet with full knowledge that the company was proceeding to do business and incurring obligations and had acted upon their stock subscriptions and made an assessment and call for payment, they did nothing to indicate to the company an intention to disavow their liability upon the stock subscription.

“Persons dealing with the corporation have a right to assume that stock subscriptions have been paid in full, or that they can be reached for corporate debts.”

4 Thompson on Corp., Sec. 4935, p. 1343.

New Jersey Rule

“It has been the settled doctrine of this Court that the capital stock of a corporation is a trust fund for the payment of its debts; that the law implies a promise by the original subscribers of the stock, who did not pay for it in money or other property, to pay for the same when called upon by creditors; and that a contract between themselves and the corporation that the

stock shall be treated as fully paid and non-assessable, or otherwise limiting their liability therefor, is void as against creditors."

See *vs. Heppenheimer*, 61 Atl., 843.

"In this state the stockholders' liability to creditors does not depend alone or chiefly upon the theory of 'holding out'; it depends upon the stockholders' voluntary acceptance for consideration touching his own interest, of a statutory scheme to which watered stock, under whatever device issued, is absolutely alien, and which requires stock subscriptions to be made good for the benefit of creditors who had notice and those who had none."

Volney vs. Nixon, 68 N. J. Eq., 605.

"It has been held, under similar statutory provision (Sec. 21, *N. J. Corporation Act*), and we consider rightly, that such liability cannot be escaped, after a winding-up proceeding has been instituted and the corporation has been decreed insolvent, even though the subscriber was induced to purchase the stock by fraudulent misrepresentations made to him by the corporation or its duly authorized agent."

Roe vs. Oradell Farms Dairy Co., 96 Atl., 65. (Court of Errors and Appeals of New Jersey).

General Rule is Same

In *Newton Bank vs. Newbegin*, 33 LRA., 727, Justice Thayer, speaking for United States Circuit Court of Appeals, at page 737, said:

“If a considerable period of time has elapsed since the subscription was made; if the subscriber has actually participated in the management of the corporation; if there has been any want of diligence on the part of the stockholder, either in discovering the alleged fraud, or in taking steps to rescind when the fraud was discovered; and above all, if any considerable amount of corporate indebtedness has been created since the subscription was made, which is outstanding and unpaid, in all of these cases the right to rescind should be denied where the attempt is not made until the corporation becomes insolvent.”

50, also *10 Cyc.*, 495.

“Shareholders liable to creditors where corporation has commenced business without full amount being subscribed. For the fact that the shareholders suffered the corporation to embark upon its business, holding itself out to possess a stated capital without the amount of that capital being subscribed, works a fraud upon the general public and upon subsequent creditors. The general rule therefore is that a shareholder is liable to creditors upon his contract of subscription where the corporation has entered upon business and incurred debts, although the whole amount of the capital stock has not been taken up.”

Subscriber is a Shareholder

The subscriber having performed the act of signing a subscription blank in writing he has a duty to both the corporation and creditors and the general rule is stated as follows:

“The act of subscribing for a stated number of shares fixes the liability of the subscriber to creditors of the corporation as a *shareholder*, although he has not paid the treasury of the corporation any part of his subscription or done any act whatever in his character as a shareholder.”

10 Cyc., 381.

Spear vs. Crawford, 14 Wend. (N. Y.), 20.

“Nor is it necessary that the corporation should have issued, or even tendered to him a certificate, in order to enable it to maintain an action against him for assessments upon his shares. And for equal reasons a certificate is not necessary to make him liable to creditors for debts of the corporation. The theory is that it is the act of subscribing, or the registry of the shareholder's name upon the stock book of the company opposite the number of shares for which he has subscribed, which gives him his title thereto, and that the certificate neither constitutes his title nor is necessary to it, but is only a memorial or evidence of it, which he is entitled to demand from the corporation whenever he may desire. It is further reasoned that a subscription for stock does not stand on the same footing as a contract of sale, so that the company, like the vendor, must offer to deliver before demanding the price. Whenever the subscriber pays, or obligates himself to pay, he is the owner of stock in the company. It is the payment, or the obligation to pay, that makes him a shareholder, with all the rights of one, if the certificate were not issued at all.”

10 Cyc., 389-390, and numerous citations.

Company Could Deliver Stock

The fact that a corporation has issued all of its shares to the full extent authorized by its charter is no bar to proceeding on stock subscriptions, unless the shares were lawfully issued.

“When a corporation has issued valid shares to the full extent of all the shares, which, by its constitution or by the general law, it is empowered to issue, no Court can order it to issue others, because in that respect its powers have been exhausted. When all of the stock of a corporation is once subscribed for and taken, the corporation cannot issue any more unless it shall get back a portion of that which has been taken, by forfeiture or otherwise.”

10 Cyc., 402, Sec. 16.

Mechanics' Bank vs. New York, etc., R. Co., 13 N. Y., 599.

In the present case the entire common stock was issued to the promoters with the exception of one thousand dollars (\$1,000.00), but it was unlawfully issued and without a valid consideration. All of the stock was subsequently surrendered by the promoters and transferred back to the company through the trustee. The stock was transferred to the promoters for the purpose of making it fully paid stock so that it could be delivered to the preferred stock subscribers when it became due to them under their stock subscriptions. It was held by the president and secretary of the company for that purpose and before suits were

entered it was surrendered by them and returned to the company. The company has always had the power to forfeit these shares as being unlawfully issued and hence in a position to deliver shares to the stock subscribers. They were held by the officers of the company for that purpose up to the date of insolvency and after insolvency were surrendered to the company.

The subscribers never made any objection to this proceeding for the purpose of giving them common stock under their subscription. It was a matter of organization procedure with which the creditors had nothing to do. If it was informal and the stock subscribers desire to object thereto, action should have been taken by them prior to the winding-up proceedings.

Rights of Creditors are Superior

All of the objections or defenses which might exist between the subscriber and the corporation itself before insolvency are waived as to creditors and after insolvency or winding-up proceedings have been instituted, the subscriber is estopped to assert such defences.

“As shareholders have a remedy in equity against their unfaithful directors, for *ultra vires* conduct injurious to the corporation, it follows that the failure of the directors of a corporation to carry out the purposes of the charter, or the doing by them of *ultra vires* acts not warranted by the charter, will not afford ground for releasing a dissenting shareholder from his contract of subscription. It has accordingly been held that a corporation cannot be enjoined from enforcing a judgment for

a stock subscription on the ground of a departure from its charter in respect of matters not connected with the suit, or on the ground that the work of building a railroad which the corporation was chartered to build was not progressing in the manner prescribed in the charter, or that the company contemplated a departure from the route, or a change in the terminal designated therein. Nor will such shareholder of a corporation, created 'to build and maintain a flouring mill,' be so relieved because the corporation is expending its money in building a dam by means of which to obtain power to run its mill."

10 Cyc., 408, Sec. 2 (d).

Only material, fundamental or radical changes will release a dissenting subscriber and the burden is on the subscriber to show that the change was made without his consent. No such proof was offered in this case.

"Of course, the subscriber who seeks to avoid the payment of his subscription on the ground of a material change in the character or purposes of the corporation from that designated in the charter must show that the alteration was made *without his concurrence or consent.*"

10 Cyc., 411, Par. 3.

"The subscriber must ascertain within a reasonable time what are the contents of the memorandum and articles of association, and act upon the information so obtained immediately, if he considers that there is such a variance from the articles as will release him from his liability."

Wilkinson's Case, 36 L. J. Ch. N. S.,
489; 15 Week. Rep., 499; L. R., 2 Ch.,
536;

Note: 33 L. R. A., 724.

Certainly the safe and sane rule is to place the burden upon the stock subscriber to take action to rescind his subscription because he is in fact the company with whom the creditors are doing business.

Full Subscription no Bar to Rights of Creditors

The following case, referring to the fact that as between a subscriber and a creditor of the corporation the subscriber could not assert the defense that the entire capital stock of the company had not been subscribed, holds:

"After having permitted unquestioned the consolidation of the company and the consolidated company to make contracts and incur obligations, I do not see how this defense can be interposed.

"It is urged, in opposition to this view, that those dealing with the corporation are bound to know that all the stock has not been subscribed to. There is some force in this view; yet I think that those persons who originate a corporation should see that it does not act until the implied condition on which they subscribed has been complied with and that when it does act persons dealing with it have a right to assume that the precedent conditions have been complied with."

Hamilton vs. Clarion, etc., R. Co., 23
Atl., 53 (Pa. Supreme Court).

Further, as to the defense that the defendants cannot be held on their stock subscriptions for the reason that the entire capital stock had not been subscribed for, all of the above citations are in point and in addition thereto, the *Corporation Act of New Jersey* (Sec. 8), provides that the company may begin business with one thousand dollars (\$1,000.00), subscribed and in addition to that the certificate of incorporation in this case provides that the company shall begin business with one thousand dollars (\$1,000.00) subscribed. There was much more than one thousand dollars (\$1,000.00), subscribed and about eight thousand dollars (\$8,000.00), paid in when the company began business.

“The implication may be rebutted by the terms of the charter, articles of association or contract of subscription, as where the corporation is authorized to commence business before the whole capital stock is subscribed. And a subscriber may expressly or impliedly waive the condition. A waiver will generally be implied if the subscriber consents to the letting of contracts, the creation of debt, or the doing of any corporate act involving the necessity of calling in the subscribed stock, unless the charter expressly forbids the doing of any corporate act until the requisite stock is taken. So a waiver may be implied if a subscriber acts as a stockholder or officer of the corporation, or pays installments on his subscription, knowing that the entire capital stock has not been subscribed.”

Clarke on Corporations, Second Edition, p. 301.

This last citation refers to the relation between subscriber and the corporation and shows that even then a subscriber may waive the implied conditions. When the rights of creditors intervene, a waiver will be presumed.

If the shareholder permits the company to do business without objection, he is not in a position to object to the internal management of the company or to deny the validity of the issue of stock or of the stock subscriptions. If, as a fact, he did subscribe to the stock and there is a promise to deliver stock upon payment of a consideration therefor without any other express condition reserved to the subscriber, he cannot otherwise deny the validity of the subscription.

“The true reason for the decisions is, I think, that stock being the representative of money or money’s worth and being held out as such, the public have the right to deal with corporations on that assumption, hence, the holders of the stock certificates are estopped against the state in cases of taxes or as against creditors in a case of insolvency to deny the validity of the issue. In other words, the issue is unlawful, but the certificate holders are not in a position to say that it is.”

Tooker vs. Sugar Refining Co., 89 N. J. Eq., 305, by Stevens, V. C.

Also, the United States Supreme Court by Mr. Justice Harlan, at page 214, says:

“If the subscriber becomes a shareholder in consequence of schemes or frauds practiced upon him by others, whether they be officers of the bank or officers of the Government, he must look to them for such redress

as the law authorizes and is estopped against creditors to deny that he is a shareholder within the meanings of Section 5151, if at the time the rights of creditors accrued, he occupied and was accorded the rights appertaining to that position."

Scott vs. De Weese, 181 U. S., 202.

In *Gaff vs. Fisher*, 33 Ohio St., 107, it was held:

"If the corporation has been regularly organized, creditors having dealt with it, may enforce payment of subscriptions, although the subscribers may have notified the company that they would not be liable for debts, upon the assumption that the corporate existence was without authority of law.

"The subscription is a contract, which cannot be dissolved at the option of one party; the consent of both must be had."

The Ecuadorian Case

Of course, if the subscription blank contained an express reservation to the stockholder or contained an express condition precedent to the obligation to pay the consideration, the subscriber is not under any duty to act, but may rely upon his express contract and the right of the receiver cannot arise above the right of the corporation, because it is based upon the express contract. This was the situation in the *Ecuadorian vs. Ecuador Company*, 65 Atl. Rep., 1051, in our Court of Errors and Appeals, in which Mr. Justice Swayze delivered the opinion.

In that case a Mr. Pruyn relied upon an express condition in his contract that the stock which he

was to receive was to be fully paid, and the Court held that he, as a subscriber, could refuse to accept stock that was not fully paid, in other words, there was no binding contract to take the stock unless fully paid. The Court said:

“It was an essential and inseparable term of the agreement that the Ecuador Company stock should be fully paid. There was not an absolute contract to take stock, with an independent agreement to pay for it in property. All the terms of the agreement were mutually dependent, and one term was illegal.”

This is the substance of the decision in that case. In *Hickling vs. Wilson*, 104 Ills., 54, it was held that a stock subscription could not be defeated as to third persons by any conditions not in written contract.

The facts in the *Ecuadorian* case are entirely different from those presented in the present case, for the reason that there is here a bona fide subscription with no express condition that the company's stock shall be fully paid. On the contrary the subscriber agrees to take stock which as to common, is not fully paid and as against creditors the subscriber must know that he has a legal obligation to pay the par value of the stock which he receives or agrees to receive. There is no express condition to the contrary and the unlawfulness of the issuing of bonus stock is a matter that cannot be asserted by the subscriber.

“Where the condition annexed to the subscription is tainted with moral turpitude—where, from its very nature it is a fraud on the rights of other subscribers or upon the public—in other words, where it

is such a subscription as has been termed a fraud on the law, the law will for sound reasons discharge the illegal condition and hold the subscriber to his agreement as though no such condition had been annexed to it. This is well illustrated by the case of a subscription to which we annexed a condition that the subscriber was to receive back from the corporation its bonds secured by a mortgage upon its property, thus throwing the whole risk upon the public, and by another condition in another subscription that the shares should be issued as fully paid stock after forty per cent only had been paid, in which case, notwithstanding the recitals of the share certificates, the subscriber was held liable for the additional sixty per cent."

10 Cyc., 413, Sec. (III).

"Among the many devices which have been resorted to by the members of corporations to escape the liability assumed by their contracts of subscriptions, perhaps the most common and at the same time the most shallow and ineffective has been for the members to agree among themselves that their shares shall be deemed to be 'fully paid up,' when in fact they have not been so paid. Even in England, where these questions are generally considered solely with reference to the rights of the shareholders *inter sese*, such agreements as between the original parties and their privies have been declared invalid by the Courts. It follows that any agreement, secret or otherwise, between the corporation and its shareholders that its shares shall not be

paid in full, although possibly good as between the corporation and share holders, is void as to creditors of the corporation in the event of its insolvency."

10 Cyc., 463, Par. B.

"For the fact that the shareholders suffered the corporation to embark upon its business, holding itself out to possess a stated capital without the amount of that capital being subscribed, works a fraud upon the general public and upon subsequent creditors. The general rule, therefore, is that a shareholder is liable to creditors upon his contract of subscription where the corporation has entered upon business and incurred debts, although the whole amount of the capital stock has not been taken up."

10 Cyc., 495, Par. (II).

None of these defenses can be interposed after a winding-up proceeding has been started. They are all implied conditions, differing from the *Ecuadorian* case and the creditors have a right to assume that such conditions have been complied with or to assume that there are no such conditions to be complied with.

It seems that all of the defenses raised by the defendants come under one head where the rights of creditors have intervened and all of the authorities or citations above are in point under each defense.

There is no difference between the defendants permitting the corporation to proceed under its charter to do business without objection that the charter contained superfluous powers; or to permit the company to proceed without its entire cap-

ital stock being subscribed; or to permit the company as a part of its internal organization or management to unlawfully issue its common stock to the promoters without objection on their part; and not take any action on their part to prevent it or to rescind their stock subscription and permit creditors to deal with the company on the strength of their stock subscriptions.

“The general rule is that the subscriber cannot, when sued by the corporation to enforce his contract of subscription, set up as a defense an irregularity in the organization of the corporation; and the same rule obtains where the action is brought by or on behalf of creditors of the corporation. So, in an action by an insolvent corporation to collect an assessment for the purpose of paying their debts, the interests of the creditors will be so far regarded that no defense grounded on defects in the organization of the corporation can be maintained unless it could have been successfully set up in answer to a creditor’s bill against the shareholders to enforce their personal liability.”

10 Cyc., 519, Par. 6.

“When the shareholders in a body which has acted and held itself out as a corporation are proceeded against by creditors, they are equally estopped by their own conduct from denying that they are a corporation; for it would be palpably wrong to permit a defendant, who is one of the owners of the capital stock of a *de facto* corporation, which operates and sues for his benefit, to set up a failure of its organizers to per-

form a duty initiatory to its legal existence, when plaintiff, if sued by the corporation for defendant's benefit, could not set up the same fact as a defense to the suit. 'Their own acts,' says Brickwell, C. J., 'vitalized the corporation, gave it credit, invited and induced dealings with it; and it is true conservatism, and sound policy, promotive of right and equity, to seal their lips against contradiction and denial of that which they must be taken to have affirmed, to the injury of strangers who have trusted the affirmation.' "

10 Cyc., 523, Par. H, and numerous cases cited.

"It will be no defense that the corporation failed to deliver to defendant a certificate of his shares, since the certificate does not constitute the shares, but is merely an evidence or muniment of his title, especially where the subscriber has not demanded the certificates and the corporation has not refused to deliver them. Therefore, a paragraph of an answer in such an action setting up that the corporation has made to defendant no tender of a certificate of his shares is bad."

10 Cyc., 526, Par. (VII).

Statutory Powers of Corporation.

Moreover, Section 49 of the *Corporation Act* (2 Comp. Stat. 1630), permits:

"Any corporation formed under this act may purchase mines, manufactories or *other property* necessary for its business, or the stock of any company or companies owning, mining, manufacturing or produc-

ing materials, or other property necessary for its business. * * *,”

So that it is not altogether proper to say that the subscriber is liable only to the extent of the objects set out in the subscription paper. He is liable to the extent of the statutory authority conferred upon a corporation organizing under the general corporation act. In *Easton vs. Amer. Brick & Tile Co.*, 64 Atl., 1095 (1906), the Court of Errors and Appeals dealt with a case in which the general scheme or plant originally contemplated had been changed after incorporation, and refused to let the subscribers escape to the detriment of creditors.

See pages 1096 and 1097, and also comment by Walker, Ch., in *Holcombe vs. Trenton White City Co.*, Atl. Rep., p. 624 (affirmed, 91 Atl., 1069), Chancellor Walker held:

“A corporation, like an individual, cannot receive the benefit of a transaction, and repudiate its obligation under it. And it has been held heretofore that an issue of bonus or unpaid for stock was good as between the company and its stockholders in accordance with their agreement (*Hebberd v. Southwestern Land & Cattle Co.*, 55 N. J. Eq., 18, 31, 36 Atl., 122), yet it has since been decided that these contracts are not only voidable, but void, and cannot be laid hold of by either party, company, or stockholders, as a ground of action or defense (*Easton National Bank v. American Brick Co.*, 70 N. J. Eq., 722, 728, 64 Atl., 1095). Notwithstanding this, the stockholders still remain liable to a receiver for the benefit of creditors, as was expressly declared by

the Court of Errors and Appeals in the very case (*Easton Nat. Bank v. American Brick Co. supra*), which held the contract void as between the company and the stockholders.”

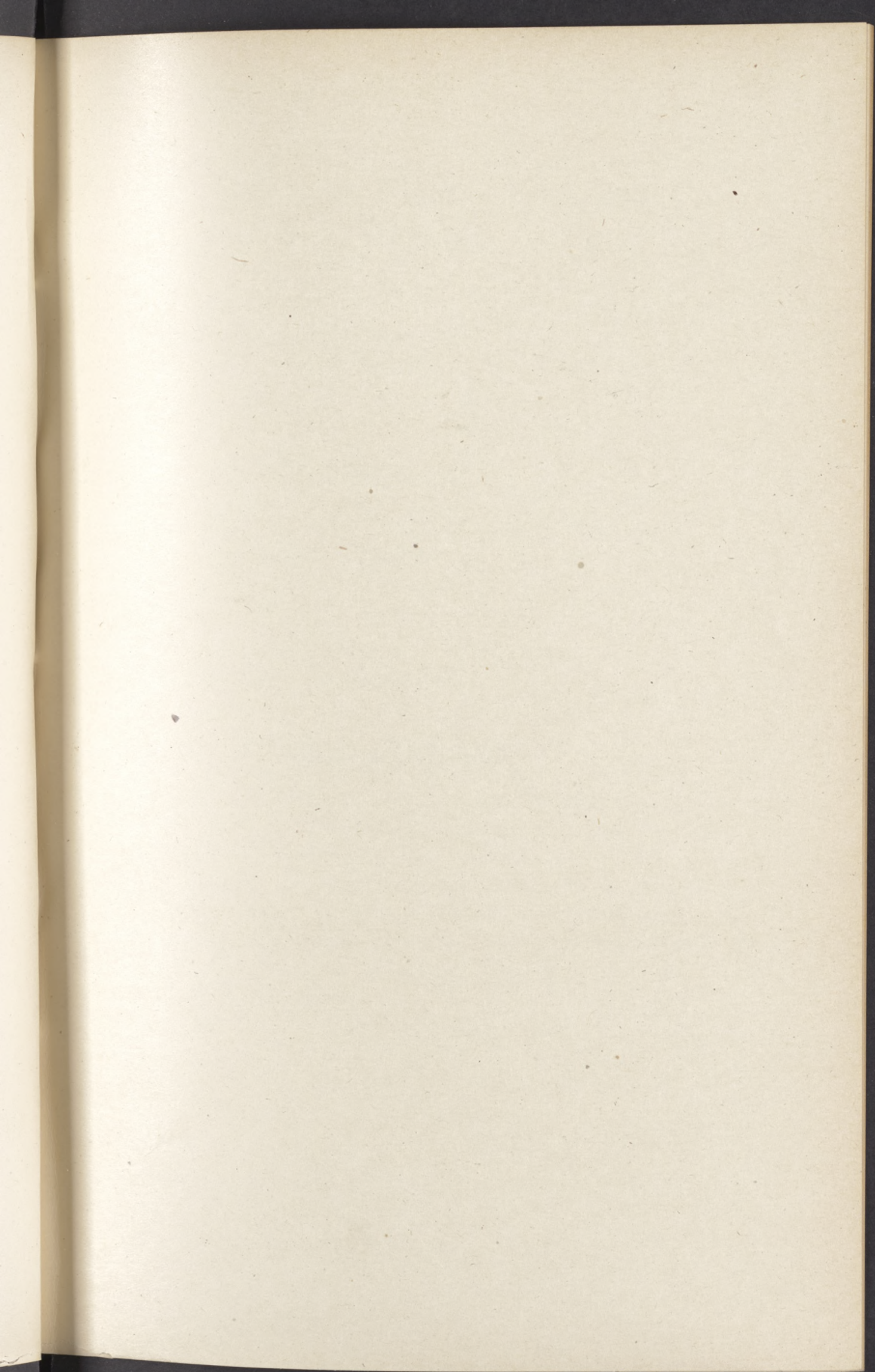
It is respectfully submitted that the judgment of the Supreme Court should be reversed and the judgment of the Burlington Circuit reinstated both as to the preferred stock and as to the common stock. The real gist of the defendant's position is stated by the Trial Judge on page 99 of the State of Case, where he says:

“The truth, as I gather it, is that the defendants took a chance on the success of the enterprise, and thereby assumed the risk of failure and since the rights of creditors have intervened, they are in no position to escape liability for the value not only of the preferred stock, but of the common stock as well.”

JOSEPH BECK TYLER,
Attorney for Appellant.

June Term, 1917.





THE ARTHUR H. CRIST Co., Cooperstown, N. Y.
New York Office, 220 Broadway

New Jersey Court of Errors and Appeals.

ROBERT Z. COLLINGS, TRUSTEE,
Plaintiff and Appellant,

vs.

WALTER ALLEN,
Defendant and Respondent,

ACTION AT LAW.

ROBERT Z. COLLINGS, TRUSTEE,
Plaintiff and Appellant,

vs.

ABRAHAM SALTZMAN,
Defendant and Respondent,

Brief for Respondents.

These two cases were tried together by the Circuit Court without a jury and judgment was given in each case for the full amount, \$600 with interest. These judgments the Supreme Court has reversed.

The suits are by a trustee in bankruptcy on an agreement set up as a subscription to stock. None of the stock was ever issued or received, and there is no claim that the averred subscribers ever became stockholders other than as by the agreement.

FACTS.

Each of respondents signed the following paper, and suit is brought on it as if a subscription for four shares of preferred and two shares of common stock.

SUBSCRIPTION TO PREFERRED STOCK OF THE OTTOMOBILE COMPANY.

Par value \$100 per share.

SEPTEMBER 25, 1911.

I hereby subscribe to four shares, of the par value of \$100, per share, of the

SIX PER CENT. PREFERRED STOCK OF THE OTTOMOBILE COMPANY,

a corporation to be organized under the laws of the State of New Jersey with an authorized capital of \$250,000. Six Per Cent. Preferred and \$250,000. Common Stock, one share of common stock to be given as a bonus with each two shares of preferred. The purpose of the organization is to acquire the automobile interests of the Otto Gas Engine Works, of Philadelphia, and the entire assets and good will of the Otto Motor Car Sales Co. of Philadelphia.

I agree to pay for said stock as follows: Twenty-five per cent. upon notice to me of the completion of the organization of the corporation and the balance upon call of the Treasurer of said Corporation, in allotments of not to exceed twenty-five per cent. of my total subscriptions, at intervals of not less than thirty days after each succeeding call, stock certificates to be delivered to me upon completion of payments.

Name (WALTER ALLEN.)

Address Mt. Holly.

Judgment was entered for the par value of both the preferred and common stock, \$600.

The corporation subsequently formed was not limited in powers to the purposes set out in this paper, but its charter states the following purposes:

"To manufacture automobiles, automobile and motor car accessories and supplies of every class and description, including any and all parts of vehicles of all kinds or any other goods pertaining to the automobile business or otherwise, which the corporation may determine to manufacture.

"To buy, sell and deal in automobiles, automobile and motor car accessories and supplies of every class and description, as manufacturers' agents, jobbers, wholesale or retail, on commission or consignment or otherwise, including any and all parts of vehicles of all kinds or any other goods pertaining to the automobile business or otherwise in which the corporation may determine to deal.

"To carry on the business of mechanical engineers and dealers in and manufacturers of plants, motors, engines and other machinery, tool makers, brass founders, metal workers, boiler makers, mill wrights, machinists, iron and steel converters, smiths, builders, metallurgists, electrical, civil and water supply engineers, and to buy, sell, manufacture, repair, convey, alter, let or hire and deal in machinery, implements, rolling stock and hardware of all kinds; to build, construct, and repair railroads, water, gas and electric works, tunnels, bridges, viaducts, canals, hotels, wharves, piers, or any like work of internal improvement, public use or utility.

"To manufacture, purchase or otherwise acquire goods, merchandise and personal property of every class, and to hold, own, mortgage, sell, or otherwise dispose of, trade, deal in and deal with the same.

"To acquire and undertake the good will, property rights and assets, and the liabilities of any person, firm, association or corporation, and to pay for the same in cash, stock or bonds of the corporation or otherwise.

"To enter into, make, perform and carry out contracts of every kind and for any lawful purpose with any person, firm, association or corporation.

"To borrow or raise money without limit as to amount by the issue of or upon warrants, bonds, debentures and other negotiable or transferable instruments, or otherwise.

"To apply for, obtain, register, purchase, lease or otherwise acquire, and to hold, use, own, operate and introduce, and to sell, assign, or otherwise to dispose of any trade-marks, trade-names, patents, inventions, improvements, and processes used in connection with or secured under letters patent of the United States, or elsewhere or otherwise, and to use, exercise, develop, grant licenses in respect of, or otherwise to turn to account any such trade-marks, patents, licenses, processes and the like of any such property or rights.

"To purchase, hold and re-issue the shares of its capital stock.

"To conduct business in any of the States, territories, colonies or dependencies of the United States, in the District of Columbia, and in any and all foreign countries, to have one or more offices therein and therein to hold, purchase, mortgage and convey real and personal property without limit as to amount, but always subject to local laws.

"To do any or all of the things herein set forth to the same extent as natural persons might or could do, and in any part of the world."

No stock was ever issued to the ^{respondents} ~~appellants~~ and ^{respondents} ~~appellants~~ never acted as stockholders, but the suit is limited to liabilities created by the subscription paper.

The testimony shows, that the scheme of promotion was as follows: The corporation was to be organized with an authorized capital stock of \$250,000 preferred and \$250,000 common. Certain contracts in the hands of the promoters were to be sold to the corporation for \$50,000 of its preferred stock and all of the \$250,000 of its common stock, this being a conscious overvaluation. That the remaining preferred stock was to be sold through the subscription agreement the promoters agreeing that from the common stock which thus came to them they would turn over to the subscribers for preferred stock the bonus stock called on by the subscription paper. This scheme was carried out in detail. \$240,000 of the common stock was actually issued to the promoters. Over \$30,000 of preferred stock was subscribed for. Subsequently, on advice from their attorney that the transaction was illegal, the promoters refused to turn over any of the common stock to the subscribers for preferred stock, and after bankruptcy the trustee, on the advice of his attorney that the issuance of common stock was illegal and void, persuaded the promoters to transfer the common stock to the trustee and cancelled any claim against them.

At the trial the ^{respondents} ~~appellants~~ attempted to prove by separate questions followed by formal offers, the following facts (Case p. 64):

"I desire to prove by this witness and other witnesses that Messrs. Jones and Irvin at meetings held during August and September, 1911, at the Market House, a house in Mount Holly, and also here in this court house, and at the Kelsey & Killie Building, at which meetings were present a large number of citizens of Mount Holly, some of which subsequently became subscribers for stock, in-

cluded in which are the two defendants in cases now before the Court, at which time Messrs. Jones and Irvin stated that the plant to be erected by the Ottomobile Company—

“That they proposed to erect at Mount Holly a plant for the manufacture of automobiles, which automobiles were to be those then manufactured by the Otto Gas Engine Works of Philadelphia, with which concern the Otto Motor Car Sales Company, represented by these gentlemen, Messrs. Jones and Irvin, had a contract to take over and manufacture the cars of the Otto Gas Engine Company; that a plot of land had been purchased or contracted for at Mount Holly, known as the Bidwell Tract, situate on West Washington Street, on the edge of Mount Holly, that these two gentlemen, Messrs. Jones and Irvin, had at the time of those statements secured from subscribers in Philadelphia and elsewhere subscriptions to capital stock to the amount of \$100,000 of the preferred stock of the proposed corporation; that among those subscribers Messrs. Jones & Irvin had secured a subscription of Mr. Edward S. Burns to preferred stock to the amount of \$10,000; that the engine to be placed in the cars to be manufactured by the Ottomobile Company was the engine as manufactured by the Otto Gas Engine Works of Philadelphia; that these statements were made by these gentlemen in the hearing of the two defendants here before the Court and that those statements induced these defendants to subscribe for this stock; that these men also stated that the corporation to be organized was to be organized for the purposes as indicated in these statements I have made.

(And p. 65):

“We also offer to prove at these meetings as stated in the previous offer these two promoters, Messrs. Jones and Irvin, stated that the corporation was to be formed for the purpose of erecting a factory in Mount Holly,

which factory was to be located upon the Bidwell Tract in Mount Holly, situate on West Washington Street, which Company was to manufacture automobiles known as the Ottocar, then being manufactured by the Otto Gas Engine Works of Philadelphia, which car was then a known product and upon the market under the name of the Ottocar."

to be followed by proof that they did not have the Burns subscription; that they did not have the subscription of the Philadelphia people; that they did not have the purchase of the Bidwell tract.

All the preferred stock was not subscribed for.

LAW.

I. There is no subscription to common stock, and the judgment cannot stand as far as common stock is concerned.

This case differs from the great majority of suits of this nature in that this is brought on a subscription agreement alone; all the others are based on liability as a stockholder. The authorities show that there are two distinct liabilities: (1) that which comes from the subscription paper; (2) that which comes from holding stock. In the case at bar the stock was never issued or received and the liability is limited to that accruing from signing the subscription paper. The first question is whether or not this paper is a subscription for stock. We admit that it is for preferred stock, but deny that it is for common stock.

There is no set form to a subscription to stock. Such an agreement is an ordinary contract subject to all the rights of a contract.

See 1 Parker on New Jersey Corporations, page 75.

The agreement in suit cannot be interpreted to mean an agreement to take unissued common stock and pay for it, for it expressly provides one share of common stock to be given as a bonus with each two shares of preferred. It is a subscription to preferred stock but not a subscription to common stock.

The agreement was in furtherance of a fraudulent and illegal scheme by the promoters by which all the common stock of the corporation, \$250,000, together with \$50,000 of the preferred stock, was to be turned over to the promoters for property consciously overvalued by them, the promoters agreeing to give a bonus as provided in this agreement.

Had the bonus stock actually been received by defendants, then they would be liable as stockholders, but there is no liability on the agreement to take a gift.

A judgment cannot be sustained on this paper as a subscription for common stock. It was not such an agreement.

II. A subscription before incorporation is merely an offer and requires acceptance to become a binding contract. The only acceptance proven in this case is the incorporation itself of the corporation, but this is not in the terms of the offer, and therefore was not an acceptance.

This suit was not brought and recovery had against the defendant as a stockholder, but was brought against

him on his "unpaid subscription to the preferred and common capital stock of the said The Ottomobile Company," and a copy of the alleged subscription paper was the sole evidence of liability.

This paper says:

"I hereby subscribe to four shares of the six per cent. preferred stock of The Ottomobile Company, a corporation *to be organized.*"

It is therefore, the subscription to a company to be formed in the future, not to a company already formed. The Company was subsequently organized, but no stock was issued to ^{*respondent*} ~~appellant~~ or accepted by him, and there is no evidence that ^{*respondent*} ~~appellant~~ acted as a stockholder or became a stockholder in fact other than by his alleged subscription, the suit and proof being based entirely on this paper.

This point goes to the fact that he has never become a stockholder; that this suit is in effect a suit to compel us to buy that which we have offered to buy by this contract, but this defense is based on the fact that the Ottomobile Company never accepted this offer so as to fasten the liability of a stockholder upon us.

It is true that where a corporation is already formed and a subscription to its stock made, at once on making the subscription the status of stockholder exists, but that is not true of a subscription to the stock of a corporation to be formed in the future. In the latter case the subscription to stock is merely an offer to take stock and does not create the status of stockholder until that offer is accepted by the corporation when it becomes such.

See the discussion in *Knox vs. Childersbury*, 86 Ala. 180.

Also 1st Thompson on Corporations, Second Edition, Sections 512, page 615, where Judge Thompson says:—

“Status of subscriptions made before corporation is organized.—Contracts for membership and subscriptions are often made before the corporation is organized.
* * * In such cases generally, a subscription is a mere offer, and constitutes no contract, and hence no membership, until the corporation is organized and the offer is accepted, and such subscription may be revoked at any time prior to the completion of the organization.”

Usually it is true that the offer is made by the subscription and mere creation of the corporation is acceptance, but our contention is that in this case the creation of this corporation was not an acceptance of this subscription agreement, for the following reasons:—

1. By the subscription paper the defendant offered to subscribe for stock of a corporation which was to be incorporated for the following purposes stated in the subscription agreement:—

“The purpose of the organization is to acquire, the automobile interests of the Otto Gas Engine Works, of Philadelphia, and the entire assets and good will of the Otto Motor Car Sales Co., of Philadelphia.”

That was the offer, and that limited the terms of the acceptance—the corporation had to be organized limited to those purposes, but the charter of the corporation which these promoters did organize is very different.

The incorporation of such a company is not an acceptance of our offer to purchase stock, for the acceptance must be under the terms as made in the offer. It is true, that if we accepted stock of this corporation or if we acted as stockholder we might have waived these terms, but there is nothing in the case showing any such waiver, nor is the complaint based against us as stockholder, but merely on our offer to buy stock coupled with the acceptance by reason of incorporation.

We call the attention of the Court to the cases collated in the following authorities, which show the effect of such a modification of plans after subscription.

1st Cook on Corporations, 6th Edit., Sect. 194;
1st Thompson on Corporations, 2nd Edit., Sects.
512, 535, 536, 537, 779, 780.

Under the finding of *Colgate vs. United States Leather Co.*, 75 N. J. Eq. 229, it is clear that two corporations organized, the one with the powers of the subscription paper and the other with the powers as set out in this charter, could not merge because they would not have been organized for the purpose of carrying on business of the same or a similar nature, and the same rule should apply in this case. ^{Respondents} Appellants should not be held to have agreed that their money could be used for building railroads, canals or water or gas works or purchasing mortgages.

2. The prospectuses, statements and contemplations of the company to be formed were that a factory was to be built in Mount Holly, New Jersey and there operated. This is not in the charter of this corporation and there-

fore, the charter *per se* is not an acceptance of our offer to subscribe,—evidently the plan was modified in this essential feature.

Proof of such is admissible to show the plan on which the subscription paper was based. The Court erred in excluding evidence of same.

“A material modification of the plan of a proposed corporation, so that the actual charter differs essentially from the corporation as contemplated by the subscription contract signed before incorporation, releases such of the subscribers as object thereto. Such also is the rule where the charter materially varies the plan as laid down in the prospectus.”

1 Cook on Corporation, 6th Edit., Sect. 194, p. 490;

1 Cook on Corporations, 7th Edit., Sect. 194;

Stern v. McKee, 70 N. Y. App. Div. 142.

“These subscriptions were obtained in connection with a prospectus which stated that the purpose of the corporation to be formed was ‘to acquire all patents and rights for all countries except the United States and Canada, to metal turning machines, known as the “Hoffmann machines,” and of which E. G. Hoffman is the inventor and patentee, as well as all improvements, additions, etc.’ The subscribers agreed to take stock in a corporation formed for this purpose. The corporation as organized by Shainwald, as appears from the certificate of incorporation, was ‘to make, contract for the manufacture, or purchase of, buy, use, sell, lease, rent or mortgage all mechanical or other apparatus, machinery and implements for metal turning machines, or any other article or articles connected therewith or incident thereto, or any or all of them, and in general to do a manufactur-

ing business.' This was a material departure from the agreement entered into by the subscribers, and to which, so far as appears, none of them ever assented. The corporation having been formed without their knowledge, or at least some of them, and they never having ratified the additions to the contemplated business of the corporation, certainly could not be called upon to pay their subscriptions, or take stock in such corporation. (*Dorris vs. Sweeney*, 60 N. Y. 463)."

Sterns vs. McKee, 70 N. Y. App. Div. 142, p. 147.

III. *There could be no acceptance of the offer unless the condition precedent of the obtaining of all the subscriptions was complied with.*

We also contend that the alleged subscription paper, where it mentions the amount of stock, contains an implied agreement that the subscriptions will not be binding until all the stock is subscribed for. All the preferred stock was not subscribed for.

See *Audenreid vs. East Coast Co.*, 68 N. J. Eq. 450, p. 457;

Converse vs. Governor, 174 Fed. 30;

Parker on Corporations, p. 77;

Cook on Corporations, 6th Edit., Sect. 176, p. 461;

4th *Thompson on Corporations*, Sect. 3845.

IV. *There could be no acceptance unless the corporation had the common stock to issue to us.*

It could not accept our offer and hold us when it did not have the stock to issue to us and it had already sold all of its common stock.

We had agreed to subscribe to four shares of preferred provided the corporation gave us two shares of common stock. The corporation did not have the common stock, hence if this is taken as a subscription to common stock it falls because the corporation had already sold all of its common stock. If it is taken as a mere subscription to preferred stock with the other stock to be procured for us, then the whole contract falls because the promoters who held the common stock refused, on advice of their attorney, to perform the contract and turn over the bonus to the preferred stock subscribers. In other words the corporation could not carry out its contract and deliver common stock, and therefore cannot hold the subscribers to perform their part. It is true that after bankruptcy the trustee secured title to the common stock and tendered himself as willing then to carry out this part of the contract, but the status had changed too much in the interim to hold the subscribers liable.

V. All the contentions so far are that there was no acceptance of our offer to subscribe; that there was therefore no binding contract of subscription and that therefore no liability on this agreement ever arose. Therefore, of course, such a contention can be set up as against creditors or any body else. The reason that certain defenses such as fraud are not accepted as against them is that the fraud in obtaining subscriptions on which stock is issued does not render void the contract of stockholder; it remains existent but is voidable at the option of the stockholder, and therefore that stockholders who keep their stock, permit creditors to give credit on the

supposition that they are stockholders and that there is a balance due on their stock, and where two people are responsible for a loss, the person who permits the act which caused the loss is the one who should suffer. Here we are not stockholders and never have been, and we are not subscribers because our contract never was accepted and therefore, of course, we can set up such defenses. There is no contract and never has been.

Thompson on Corporations, 2nd Edit., Sect. 5176, page 28, Vol. 5, expressly states:

"It is, of course, a good defense (to a suit by creditors) that the party sued was not a stockholder and hence not liable. He may, for example, show * * * that his subscription was not accepted by the corporation or he withdrew before its acceptance."

In the case of *Newport, etc. Co. v. Mims*, 103 Tenn. 465, cited in 1st Cook on Corporations, 6th Edit., Sect. 195, the Court expressly holds that where there is a material modification in the plan of the proposed corporation, in that case by the increase of its capital stock from \$30,000 to \$35,000, the Receiver has no greater rights for creditors than would the corporation have to enforce the subscriptions.

The argument of Mr. Tyler raises the direct point that rescission of our subscription contract is impossible after insolvency.

We respectfully contend that the authorities stated are limited to cases where the ground for rescission is fraud, it being well understood that fraud does not render a contract void but merely voidable. Mr. Tyler's argu-

ment tries to dispose of all of our defenses on this ground, but we submit that his authorities are limited to cases of fraud and where it is attempted to set aside the subscription to stock in an already incorporated concern, or to set aside a completed holding of stock on account of fraudulent representations, and that none of them reach to hold that where the offer of subscription was never accepted and the stockholders' status never arose by a completion of the subscription contract, such a defense could not be raised after insolvency, and they do not go beyond defenses of fraud.

And again we raise the point that we are not a stockholder. That stock has never been issued to us. We have never acted as a stockholder and the suit is not based on the contention that we are a stockholder. The suit is based simply on our offer to buy stock, and there is no reason why we cannot set up that this offer is void because of fraud leading to it, much less set up the other defenses.

VI. In the argument for plaintiff it is also contended:

1. That the fact that there was no unissued common stock would make no difference as the corporation might have purchased back its common stock so that it could have complied with this offer. But the suit is not brought on such a theory, but on the status of a subscription to unissued common stock. Stock so repurchased would not be unissued stock which could only be taken from the treasury at par, but would be treasury stock which could be sold by the corporation at any price it could get for it. If that is the status

then there is no liability on ^{respondent} appellant for the common stock; and plaintiff's case falls and his judgment should be set aside as to the common stock. We are answering a set of facts set up by his complaint.

2. But it was proven that the trustee, after bankruptcy, purchased the common stock, and hence had this stock to deliver. The trouble with this contention is that the conditions had so changed that we should not be held.

VII. Taking a step further in our chain of argument, and granting that there was an acceptance of our offer to purchase the stock, nevertheless we contend that even then there should be no recovery against ^{respondent} appellant on the following grounds:

1. That this agreement sued on is not in reality a subscription for stock, but is an agreement by which the corporation agreed for a certain sum represented by the par value of the preferred stock to give to the signers that amount at par of common stock.

(a) When the time came for the corporation to perform its part of said contract, it had no common stock to give, hence it was unable to perform its contract, and of course, it cannot hold ^{respondent} appellant to perform his part of his contract. This needs no citation of authorities.

(b) Because the agreement is illegal. The corporation attempted to sell its stock for cash at an amount which is less than the par of the stock. The particulars of the scheme are given in the evidence. The promoters sold certain assets to the corporation for \$50,000, preferred and the whole issue of \$250,000 common stock. This was

a conscious over valuation. The corporation was to sell its preferred stock through the subscription agreements and the promoters to turn over the bonus to the subscribers. The whole scheme was a conspiracy in which we entered to illegally issue its preferred and common stock at less than par. This is directly contrary to the New Jersey statutes, and defendant refuses to carry out his part of this contract. It is well settled law that the Courts will not help a person attempting to enforce an illegal contract.

We insist that the case of *Ecuadorian Association vs. Ecuador Co.*, 70 N. J. Eq. 277, same case on appeal, 71 N. J. Eq. 757, is all fours on our case on this point. In that case the Court distinctly states that the defendant, Pruyn, had not become a stockholder and therefore, the liability of stockholder did not exist, but that the suit was on his agreement to take stock, exactly as in this case.

In *Ecuadorian Association vs. Ecuador Co.*, the Receiver of the corporation for the benefit of creditors attempted to collect an assessment against the defendant, Pruyn, on a contract which both Courts held was in effect a subscription for stock which had never culminated into an acceptance of the certificates of stock. Both the Vice Chancellor and the Court of Errors, Judge Swayze writing the opinion, conceded that had the agreement in suit, which the Vice Chancellor in express terms holds to be equivalent to a subscription, been followed by the receipt by Pruyn of the stock itself, then his liability as a stockholder would have been before the Court, but this case shows that an agreement to take stock is a contract and subject to the laws of a contract. (See also *Kouse vs.*

Hudson Brewers, 79 N. J. Eq. 392.) That one of the terms of this contract to take by Pruyn was that the Ecuador Company's stock was to be fully paid. That this was illegal because there was no adjudication by the directors that the property which Pruyn was giving (stock in the Ecuadorian Association), was of the value of the Ecuador stock which he was to receive, hence the whole contract was illegal and unenforceable.

This is exactly our case. Our contract is that we are to receive preferred and common stock for cash equal to the par value of the preferred stock alone. That agreement is illegal and cannot be enforced.

The language of Judge Swayze in the Court of Errors is as follows:—

"The agreement was to exchange the Ecuadorian Association stock for the Ecuador Company stock to be issued, and one of the terms was that the Ecuador Company stock was to be fully paid. Both Pruyn and the Ecuador Company knew that this was an original issue of stock, and that the only payment to be made therefor was the Ecuadorian Association stock to be given in exchange. The evidence shows that the Ecuadorian Association stock issued to Pruyn could not be worth its nominal par.

"It had been issued in exchange for stock of other companies organized by Pruyn for the purpose, whose only valuable assets were Pruyn's agreement to acquire thereafter for them certain properties in Ecuador.

"Moreover, the board of directors of the Ecuador Company never adjudged, even in form, that the value of the Ecuadorian Association stock to be acquired from Pruyn was equal in value to the nominal par of the Ecuador Company stock to be issued therefor.

"It was an essential and inseparable term of the agreement that the Ecuador Company stock should be fully

paid. There was not an absolute contract to take stock, with an independent agreement to pay for it in property. All the terms of the agreement were mutually dependent, and one term was illegal. If Pruyn had sought an enforcement of the agreement, the company might properly have said that it was without power to issue fully-paid stock for the consideration proposed. *Donald vs. American Smelting Co.*, 62 N. J. Eq. (17 Dick.) 729.

"In an action by the company or its receivers Pruyn may, with equal propriety, urge the illegality of the contract in his defense. *Volney vs. Nixon*, 68 N. J. Eq. (2 Robb.) 605.

"The decree should be affirmed."

See also—

Volney vs. Nixon, 67 N. J. Eq. 457;
s. c. on appeal, 68 N. J. Eq. 605;
Strickland vs. Nat. Salt Co., 77 N. J. Eq. 328;
Easton Bank vs. Brick Co., 70 N. J. Eq. 722;
s. c. Green's App., 70 N. J. Eq. 732;
Carver vs. Southern Iron Co., 78 N. J. Eq. 81;
Tooker vs. Sugar Refining Co. 80 N. J. Eq. 305, p. 328;
Andrews vs. Guayaquil R. R. 73 N. J. Eq. 150;
s. c. on appeal, 75 N. J. Eq. 535;
Holcombe vs. Trenton White City, 80 N. J. Eq. 122.

We desire to call the Court's attention to where this case differs from the usual form of subscription and the usual cases which have been before the Courts on this subject. Judge Dill's form of the selling of stock for property shows that there is a two-fold transaction.

First.—There is a general subscription by the vendor of the property for so much stock.

Second.—There is an agreement by the corporation to purchase for so much cash the property at a certain price so that the stock is not issued directly for the property.

Our offer as the Pruyn contract differs from the usual form.

V. CLAUDE PALMER,
MARTIN V. BERGEN,
MORRIS WOLF,

Respondents
Attorneys for Appellants.

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NEW JERSEY COURT OF ERRORS AND
APPEALS

ROBERT Z. COLLINGS, trustee,

Plaintiff-Appellant,
vs.

WALTER ALLEN,

Defendant-Respondent.

SAME,

Plaintiff-Appellant,
vs.

ABRAHAM SALTZMAN,

Defendant-Respondent.

APPEAL FROM
SUPREME COURT.

REPLY BRIEF FOR APPELLANT

In reading the brief of respondent several inaccurate statements of the facts have been observed which will be noticed at the outset of this brief.

On page 5, line 15, respondent says:

“Subsequently, on advice from their attorney that the transaction was illegal, the promoters refused to turn over any of the common stock, and after bankruptcy the trustee, on the advice of his attorney that the issuance of common stock was illegal and void, persuaded the promoters to transfer the common stock to the trustee and cancelled any claim against them.”

On page 14, line 9, he says :

“ * * * * then the whole contract falls because the promoters who held the common stock refused, on advice of their attorney, to perform the contract and turn over the bonus to the preferred stock subscribers. * * * * ”

The fact is that the subscribers had never paid for their preferred stock and under their subscriptions were not entitled to either preferred or common stock until payment in full had been made to the company.

Further the shares which had been unlawfully issued by the promoters to themselves were always in their possession ready to deliver and upon insolvency were surrendered by them to the receiver (S. C. p. 26, line 30), so that it is not true, as stated by respondent, that neither the receiver nor the company, could not deliver the common stock to each subscriber *upon payment*. Nor is it true that they or either of them refused to deliver the stock.

Judge Carrow, who heard the case below, found as a fact (S. C. p. 99) :

“The subscriptions show that defendants agreed to take the common stock and there would have been no difficulty about their getting it if they had kept their part of the contract. They are now estopped from complaining. * * * * ”

STATUS OF SUBSCRIBER.

Respondent seeks to differentiate between the status of a subscriber to stock and a shareholder of stock (page 7 of respondent's brief).

Mr. John S. Parker, in “*Parker's New Jersey Corporations*,” Vol. 1, p. 81, says :

"A certificate of the number of shares subscribed for, or to which the subscriber is entitled, is not necessary to constitute the subscriber a shareholder, or to impose upon him a liability to pay the amount of his subscription. The certificate is merely an additional and convenient evidence of his ownership of stock which he may require for his own satisfaction, or to enable him to effect a transfer of his interest.
* * * * " Citing cases.

In *See vs. Heppenheimer*, 61 Atl. Rep. 843, at page 859, the late Vice-Chancellor Pitney, said:

" * * * * It seems to me that this statute is a simple expression of the rule of common law that the unpaid subscriptions to the capital stock of a corporation form an asset for the payment of the debts thereof, and, as we shall see further on, in equity, at least, one who receives stock as full paid, without paying for it, occupies the position of a subscriber to stock who has not paid his subscription."

10 *Cyc.*, page 653, the text is as follows:

"This Trust Fund Includes Unpaid Subscriptions For Shares.—a. In General.

"This capital stock, it has been said, consists of the money paid in, or authorized or required to be paid in, as the basis of the business of the corporation and the means of conducting its operations. It is an essential part of the doctrine of the preceding section that money agreed to be paid into the corporate treasury by the shareholders is a part of this trust fund when the liquidation of these unpaid subscriptions becomes necessary to pay the debts of the company, the shareholders cannot be allowed to re-

fuse the payment of them, unless they show such an equity as would entitle them to a preference over the creditors, if the capital had been paid in cash."

10 *Cyc.* 380, holds:

"What Makes Subscriber a Shareholder?—

a. Unconditional Subscription to Shares.

"As a general rule, applicable to all American schemes of incorporation, although not always assented to by the courts, whoever subscribes to an unconditional agreement to take a given number of shares becomes thereby a shareholder in the corporation in respect of that number, subject to any valid conditions named in the subscription paper and to those imposed by the general law. The act of subscribing for a stated number of shares fixes the liability of the subscriber to creditors of the corporations as a shareholder, although he has not paid into the treasury of the corporation any part of his subscription, or done any act whatever in his character as a shareholder."

Respondent admits, page 7 of his brief, that he was a subscriber for preferred stock, but denies that he was a subscriber for common stock. The subscription paper signed by respondent reads, in part, as follows:

"I hereby subscribe to four shares of the par value of \$100 per share of the six per cent. preferred stock of the Ottomobile Company, a corporation to be organized under the laws of the State of New Jersey, with an authorized capital of \$250,000, six per cent. preferred and \$250,000 common stock. One share of common stock to be given as a bonus with each two shares of preferred. * * * *"

Respondent seeks to escape liability for the common stock, because it was "bonus" stock.

In the case of *See vs. Heppenheimer*, 61 Atl. Rep. 843, the holders of "bonus" stock were charged for the shares so issued to them. At page 863, Vice-Chancellor Pitney said:

"I hold, as secondarily liable on all the shares issued as a bonus for bonds, such of the defendants as took them with notice that they had not been paid for in cash or its equivalent in property at a fair valuation. I believe that all of the defendants, who are charged because they hold bonus stock, subscribed for and in most cases paid for their bonds before the company was organized, and that they came in, so to speak, 'on the ground floor,' and were getting what in substance was an original issue of bonds and stock, and therefore do not and cannot occupy the position of a person who goes into the open market and purchases bonds and stock of a company organized for a considerable period of time prior to such purchase, and whose bonds and stock have become matter of daily merchandise. I hold further, that the fact that they were receiving for \$1000 in cash a mortgage bond for \$1,000 and a bonus of \$600 of stock of a company in process of formation was sufficient of itself to show them, or at least to put them on inquiry, that the stock so issued had not been paid for either in cash or its equivalent in property. This holding, of course, includes Mr. Heppenheimer, and also, I am sorry to say, Mr. Hall, who purchased his bonds and received therewith a stock bonus from Mr. Beard, who is now dead and insolvent. * * * * "

In *Holcombe vs. Trenton White City Co.*, 82 Atl. Rep. 618 (affirmed, 91 Atl. Rep. 1069), Chancellor Walker held:

“As above remarked, holders of bonus stock are always required to pay for their shares to satisfy the claims of creditors. Chancellor McGill in *Hebberd vs. Southwestern Land & Cattle Co.*, 55 N. J. E. 18, at page 31, 36 Atl. Rep. 122, at page 127, speaking to the subject said: ‘As to the bonus stock, the contract between the purchaser of bonds and the company was that he should not be called upon to pay for the stock. Such a contract is binding upon the company and its shareholders, but as the capital stock constitutes a trust fund for the payment of debts, it cannot be given away from the demands of creditors, and hence the holders of bonus stock may be required to pay for it in satisfaction of the demands of creditors, after the exhaustion of all other assets upon the ground that its issuance to them was a fraud in law upon the creditors. *Richardson vs. Green*, 133 U. S. 30; *Handley vs. Stutz*, 139 U. S. 417. * * * * ’”

Respondent further seeks to escape liability on the bonus stock on the ground, as he says (page 8, line 11), “The agreement was in furtherance of a fraudulent and illegal scheme by the promoters * * * * .” As between the subscribers and the company that, no doubt, would be a proper defense, but, when the subscribers, with such knowledge, stand by and permit the company to deal with the public as a bona fide corporation, contracting debts, it is too late for the subscribers to set up the defense of fraud, and the creditors rightly look to them for the payment of their debts.

In *Roe vs. Oradell Farms Dairy Company* (Court of Errors and Appeals), 96 Atl. Rep. 65, Chief Justice Gummere, at page 66, held:

“ * * * * This is made plain by the twenty-first section of the act, which makes each subscriber to the stock of a corporation, who has not paid the full par of his subscription, liable to pay over to the receiver the unpaid portion of the purchase money, when it is required to pay debts because of the insufficiency of other assets. It has been held under similar statutory provisions, and, as we consider, rightly, that such a liability cannot be escaped, after a winding up proceeding has been instituted and the corporation has been decreed insolvent, even though the *subscriber* was induced to purchase the stock by fraudulent misrepresentations made to him by the corporation, or its duly authorized agent.
* * * * ”

(B) VII, p. 17, respondent's brief, contends that the subscription agreement is illegal.

There is no evidence that the scheme was illegal.

There is a finding of fact by the trial Judge that the scheme was legal (S. C. p. 99). After deciding the facts against respondent, he said:

“The truth, as I gather it, is that the defendants took a chance on the success of the enterprise, and thereby assumed the risk of failure, and since the rights of creditors have intervened, they are in no position to escape liability for the value not only of the preferred stock, but of the common stock as well.”

ACCEPTANCE OF SUBSCRIPTION.

Respondent, page 9, line 23, of his brief, argues:

“It is true that where a corporation is already formed and a subscription to its stock made, at once on making the subscription the status of stockholder exists, but that is not true of a subscription to the stock of a corporation to be formed in the future. In the latter case the subscription to stock is merely an offer to take stock and does not create the status of stockholder until that offer is accepted by the corporation.”

There is no distinction between the status of a subscriber for stock and a holder of unpaid stock. 10 *Cyc.* 380.

The subscription in the case at bar was accepted. On January 5, 1912, the board of directors adopted a resolution directing the treasurer to collect the subscriptions from the various subscribers, and on January 18, 1912, the treasurer sent a written notice to all of the subscribers notifying them of the resolution of the board, and requesting them to make payment. See stipulation, S. C. 101, 102.

The stock subscription provided as follows (S. C. 97):

“I agree to pay for said stock as follows: Twenty-five per cent. upon notice to me of the completion of the organization of the company, and the balance upon call of the treasurer of said corporation, in allotments of not to exceed twenty-five per cent. of my total subscriptions, at intervals of not less than thirty days for each succeeding call, stock certificates to be delivered to me upon completion of payments.”

Suit will lie on a subscription to stock when call has been made by board of directors. *Braddock vs. Philadelphia, Marlton & Medford R. R. Co.*, 45 N. J. L. 363, Court of Errors and Appeals.

Respondent relies upon the Ecuadorian case, 65 Atl. 1051, as authority that the relation of stockholder did not exist, and that any liability which might exist was upon the contract itself.

In that case it was held that the subscriber was not liable because the stock which was to be issued to him in exchange for other stock was not fully paid, and, further, that the board of directors had never adjudged, even in form, that the stock to be so issued was equal in par to the stock to be exchanged.

The case at bar is different. The stock was to be paid for in installments, and, when fully paid for, was to be delivered (S. C. 97).

SUPERNUMERARY OBJECTS.

The certificate of incorporation is patterned from Judge Dill's forms, pages 164 to 175, "Dill on Business Companies of New Jersey," edition of 1910. The provision of the charter chiefly complained of by respondent is that which relates to the business of mechanical engineers, building, constructing, repairing railroads, etc. This provision is an exact replica of Judge Dill's form, page 170, form 9. The same provision was considered by Chancellor Pitney in *Colgate vs. United States Leather Company*, (Court of Errors and Appeals), 72 Atl. Rep. 126, 129, in which he said that that provision was merely incidental to the principal objects and purposes of the charter then under consideration.

Judge Carrow (S. C. 98) found, as a fact, that the company in the suit at bar did not engage in any outside business. He said:

“The peculiarity about the case is that defendants at no time before the decree of insolvency objected to anything the company did, nor did they do anything to rescind their subscriptions.

“But defendants now contend as against the right of creditors that their subscriptions were merely unaccepted offers to take stock, because the full amount of the authorized capital was not subscribed, and because the certificate of incorporation set forth more extensive powers than the subscription paper specified. That contention is answered by the fact that defendants *acquiesced in all the company did*, because, as I have said, they did not object to the company’s beginning business with less than the full authorized capital, *nor did they object to the superfluous objects set forth in the certificate of incorporation*. Besides the company did not engage in any outside business.”

The debts of the corporation aggregating \$60,000 were all contracted in furtherance of the objects set out in the original subscription paper.

NO FRAUDULENT REPRESENTATIONS.

At page 11, (2), respondent argues that the prospectuses, statements and contemplations of the company were that a factory was to be built in Mt. Holly, N. J., and there operated, and that there is nothing in the charter to that effect, and contends

that because of such omission the plan was modified in an essential feature, and cites *Cook on Corporations*, and a New York case as authority that such omission was a material departure from the original plan, thereby relieving the subscribers from the payment of their subscriptions. The text of *Cook*, 6th ed., sec. 194, p. 400 and 7th ed., 194, expressly holds that a material departure from the original plan releases the subscribers *who object*. The New York case, *Stern vs. McKee*, 70 N. Y. App. Div. 142, is not a binding authority in this state, because our Court of Errors and Appeals in *Braddock vs. Phila., Marlton & Medford R. R.*, 45 N. J. L. 363, has already adopted a rule different from the New York case.

In *Braddock vs. Phila., Marlton & Medford R. R. Co.*, *supra*, Chief Justice Beasley held:

"Proof that certain of the promoters of a railroad scheme guaranteed that the route would pass near to a certain tract of land, accompanied with proof of a deviation from such line, will not be sufficient to discharge a subscriber who had subscribed in reliance on such statement, there being no evidence tending to show any fraudulent intent."

Approved and followed by Court of Errors and Appeals in *Hudson Milling Co. vs. Higgins*, 88 Atl. Rep. 1079, 1080.

CONDITIONS PRECEDENT.

Respondent contends (p. 13, III) that a full subscription of the authorized capital stock is a condition precedent to a right to recover the unpaid

subscription of any subscriber, and cites *Audenried vs. East Coast Co.*, 68 N. J. Eq. 450, 457, (Court of Chancery), as authority for that proposition.

In that case Vice-Chancellor Bergen said (page 580):

“It is a general rule that it is an implied part of a contract for subscriptions that the contract is to be binding and enforceable against the subscriber only after the full capital stock has been subscribed. Cook on Corp., vol. 1, p. 327, sec. 176. This rule is subject to the qualification that parties may agree to commence business with a smaller subscription, as was done here; but, on the other hand, when a promoter induces subscriptions on the promise that in consideration of stock to be retained by him as a part of the plan he will furnish subscriptions to stock for the benefit of the subscribers, that promise is a part of the consideration entering into the contract of subscription, and a default on the part of the promoter avoids the contract.”

For the purpose of discussion the text just quoted will be divided into two sections:

1. Full subscription, and exception.
2. Promoter's representations.

As to the first: It is here contended that it was not a condition precedent that the whole of the authorized capital stock should have been subscribed for to entitle the receiver to recover, for the reason that the subscription paper expressly says:

"I hereby subscribe to four shares of the par value of \$100 per share of the six per cent. preferred stock of the Ottomobile Company, a corporation to be organized under the laws of the state of New Jersey with an authorized capital of \$250,000. * * * *"

Here is an express agreement that the company shall be organized under the laws of the state of New Jersey.

Sec. 8, (IV), of the Corporation Act, 2 Comp. Stat. 1603, provides:

"The amount of the total authorized capital stock of the corporation, which shall not be less than two thousand dollars, the number of shares into which the same is divided and the par value of each share; the amount of the capital stock with which it will commence business, which shall not be less than one thousand dollars; and, if there be more than one class of stock created by the certificate of incorporation, a description of the different classes with the terms on which the respective classes of stock are created."

As against creditors, stockholders are not permitted to invalidate their subscriptions because the entire authorized capital stock was never subscribed.

4 *Thomp. on Corp.*, p. 4922;

10 *Cyc.* 495.

Judge Carrow held (S. C. 97):

"Early in January, 1912, said Ottomobile Company was incorporated under the general corporation laws of this state. The company, according to its certificate of incorporation, was

authorized to begin business with a paid up capital of \$1,000 * * * * so that the company had in its treasury, funds considerably in excess of the \$1,000, &c., before beginning business.”

The total subscriptions to the capital stock at the time of incorporation were \$40,000. (S. C. 22.)

As to the second: Mr. Justice Parker, speaking for the Court of Errors and Appeals in *Hudson Milling Co. vs. Higgins*, 88 Atl. Rep. 1079, 1080, said:

“* * * * Moreover, it is plain that Berghoff in agreeing for an unformed corporation was acting substantially in the capacity of a promoter, and that unless and until his action was adopted by the new company when formed, or was connected with some special benefit to it, such company was in no way bound thereby.
* * * *”

In the case of *Roe vs. Oradell Farms Dairy Co.*, (Court of Errors and Appeals), 96 Atl. Rep. 65, a stockholder sought to change her status from a stockholder to a creditor because of certain misstatements made by the duly authorized agents in the promotion of the company, but Chief Justice Gummere said:

“Her right to participate as a creditor in the distribution of the assets of the defendant company depends, therefore, upon whether a stockholder who has been induced by fraud to become a member of the corporation, and who does not discover the fraud until just before the institution of proceedings for the winding up of the corporation as insolvent, can, after the

appointment of a receiver, exercise her option, repudiate her purchase of the stock, and thereby change her position as a stockholder in, to that of a creditor of, the corporation to the extent of the purchase money paid by her. We think that the right of a stockholder to so change her status (if such right exists) must be exercised while the corporation is a going concern, presumably solvent, and able to meet its engagements. * * * *

STOCK READY FOR DELIVERY.

Respondent contends (page 17) that the corporation had no common stock to issue.

The testimony shows (S. C. 26) that the company was fully able to issue such stock.

The findings of Judge Carrow (S. C. p. 99) are:

"The subscriptions show that defendants agreed to take common stock and there would have been no difficulty about their getting it if they had kept their part of the contract. They are now estopped from complaining."

The subscription agreement provides "stock certificates to be delivered to me upon completion of payments" (S. C. 97). Not even the first installment was paid upon call, nor was tender ever made by respondent for delivery of the stock.

It is respectfully submitted that the judgments of the Supreme Court should be reversed.
June Term, 1917.

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