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A CRITICAL STUDY OF THE REMEDIES FOR THE ENFORCEMENT OF STOCK SUBSCRIPTION UNDER THE CORPORATION LAW (ACT 1459 AS AMENDED)

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A. INTRODUCTION

Long before the Spaniards came, the Philippines had commerce and trade of her own; this was accelerated by the implantation of the Spanish sovereignty which, even with its shortcomings, was a priceless factor that helped in commercial development. Steady and fast in its progress, Philippine commerce has so grown that now this group of islands has gained the distinction of being called the "Pearl of the Orient Seas." Lately with the rapid increase of trade between the Filipinos and the rest of the world, a new scheme has been adopted to facilitate the association of persons for business ends. Corporations have been created by statute. They have greatly grown in size and increased in number that today most of the outstanding branches of commerce in this country are controlled by such entities. Banking, insurance, shipping, mining, transportation, and even education—only these need be mentioned in order to realize the stupendous role of corporations.

The Philippine Corporation Law has provided for the procedure for the creation of corporations but still in order to exist they must possess certain qualities and properties among which is capital. When a group of men by following the provisions of the statute, forms in accordance with law, an entity distinct from themselves, they all agree to contribute to a common fund with which they do business and upon reliance of which others deal with them. (Garcia v. Lim Chu Sing, 33 O. G., 201.) It is how the corporation or that personality formed by the members, can collect these contributions that is dealt with in the subsequent discussion.

I. STATEMENT OF THE PROBLEM

The Philippine Supreme Court, in several cases decided by that illustrous body since the enactment of our corporation law otherwise known as Act 1459, has brought to our attention the

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fundamental importance of the remedies for the enforcement of stock subscriptions as provided by statute. That a corporation has two remedies is patent upon a mere reading of the Law but whether those remedies exist independently of each other, such that the details of procedure for the enforcement of one has or has no relation whatsoever in the enforcement of the other, had not been decided squarely by that Court. Neither has that Body dwelled upon the nature of these remedies—that is, whether both or only one of them can be availed of at any one time. These and a few others are precisely the questions which the writer of this humble work will attempt to answer in the light of legal principles and doctrines deemed applicable to this jurisdiction.

II. Method of Development

Bearing in mind the similarity of the Philippine Corporation law and those of most of the States of the Union, there could be drawn only one inevitable conclusion: That the American members of the Philippine Commission which body passed said law and wherein they constituted the majority, implanted into this country statutory provisions from their homeland. The writer feels justified therefore to resort to the rules, principles and doctrines from the United States in order to back his development and conclusions of the subject of this thesis; and these, only in so far as they do not conflict with the other laws of this jurisdiction. Thus our own Supreme Court in the case of Alzua and Arnalot v. Johnson (21 Phil. 308) quoting from the case of U. S. v. Cuna (12 Phil., 241) held that

"* * * while it is true that the body of the common law as known to Anglo-American jurisprudence is not in force in these Islands, 'nor are the doctrines derived therefrom binding upon our courts, save only in so far as they are founded on sound principles applicable to local conditions and are not in conflict with existing law', nevertheless many of the rules, principles and doctrines of the common law have to all intents and purposes been imported into this jurisdiction, as a result of the enactment of new laws and the organization and establishment of new institutions by Congress of the United States or under its authority; for it will be found that many of these laws can only be construed and applied with the aid of the common law from which they are derived and that to breathe the breath of life into many institutions introduced in these Islands under American sovereignty, recourse must be had to the rules, principles, and doctrines of the common law under whose protecting aegis the prototypes of these institutions had their birth."

To the same end, the same court in a latter case ruled that "* * * the principles of the Anglo American Common Law are

to the Philippines just as they were for the State of Louisiana and just as the English Common Law was for the United States, of far reaching influence. The common law is entitled to our deepest respect and reverence. The courts are constantly guided by its doctrines * * *;" (U. S. v. Abiog and Abiog, 37 Phil., 137) in a still later case the same rule had been laid down, that "* * *in interpreting and applying the bulk of the written laws of this jurisdiction and in rendering its (referring to the Philippine Supreme Court) decision in cases not covered by the letter of the written law, this court relies upon the theories and precedents of the Anglo-American cases, subject to the limited exception of those instances where the remnants of the Spanish written law presents well-defined civil law theories and of the few cases where such precedents are inconsistent with local customs and institutions * * *." (In re Shoop, 41 Phil., 213.)

III. WRITER'S STAND

It must be borne in mind that the Philippine Corporation Law has barely set a foothold in our field of commercial jurisprudence. From its enforcement in April 1, 1906, there are only about seventy-six published cases dealing with its provision as reported in the fifty six volumes of the Philippine Reports and until the September 10, 1935 issue of the Official Gazzette. Of these reported cases, several dealt on the liability of subscribers under their stock subscriptions but practically only one—the case of Velasco v. Poizat (37 Phil., 802)—touched on the remedies for its enforcement under the above mentioned law. But the abnormal conditions consequent upon the insolvency of a corporation was a pivotal factor in the framing of its decision such that the writer of this work is of the opinion that: the law on the subject is not yet settled in our jurisprudence in spite of the holdings in the above entitled case; that the rulings laid down therein are not conclusive statements of the rule; and that portion of the opinion which reads "* * * where it appears * * * that a matured stock subscription is unpaid, none of the provisions of sections 38 to 48 of Act 1459 can be permitted to obstruct or impede the action to recover thereon * * *," holds true only in exceptional cases (as will hereinafter be shown). To show that the rule is different ordinarily and generally is one of the objects of this present investigation.

For a more systematic development and comprehensive understanding of the subject, the writer deems it beneficial to

follow these divisions. A. Introduction under which come I. Statement of the Problem, II. Method of Development, III. The Writer's Stand; B. General Considerations under which come I. Subscription to Stock, II. Calls or Assessment, III. Notice of Call or Assessment; C. Main Considerations, under which come I. Corporate Remedies in General, II. Corporate Remedies under Our Law, under which come (a) Forfeiture of delinquent stock, (b) Action to collect unpaid stock subscription; D. Restatement of the Problem; E. Conclusion.

B. General Considerations

I. SUBSCRIPTION TO STOCKS

(a) *In General.*—Stock subscriptions are contracts (when ratified or accepted by the corporation in case the same were in anticipation of its creation—14 C. J., Sec. 753, p. 507; Mt. View Dev. Co. v. Burnett, 46 S. W. [2d] 809) by which persons capable in law of assuming contract obligations agree to take certain number of shares of the capital of a corporation by paying for them in money, property or services, or promising to pay for the same expressly or impliedly. In an early case, however, it has been held that an agreement that a stockholder may pay for his stock in any other medium than money is void as fraud upon the other stockholders and upon creditors as well. (Henry v. R. R. Co., 17 Ohio, 87, quoted and approved in Sanger v. Upton, 91 U. S. 56). In the Philippines this rule is inapplicable by virtue of the express provision of Sec. 16 [1] of Act 1459 as amended which allows stock to be issued in exchange for "property actually received by it at a fair valuation equal to the par or issued value of the stock * * *"

(b) *Subscriptions Are Contracts.*—Authorities are agreed that stock subscriptions as a rule are contracts and being contracts, they must contain all the elements of contract in general such as "competent parties, mutuality, and consideration" (Elliott on Corp., 5th ed., Sec. 343, p. 380). By their contracts of subscriptions, upon acceptance by the corporation, the subscribers become stockholders in the corporation (Mt. Waterworks vs. Holme, 113 Pac., 501), that is, they acquire not only privileges to the extent of participation to which their subscribed shares are entitled therein, but also "to a corresponding liabi-

[1] A section *quoted* here subsequently without any designation of a particular Law is taken to mean one of Act 1459 as amended otherwise known as the Philippine Corporation Law.

lity to contribute the amount of their subscriptions when called upon in a legal manner" (Eastern Exposition v. Vails Estate, 121 Atl., 415), if they have not yet done so.

(1) *Id. Distinguished From Purchase.*—Subscription to stock must be distinguished from purchase of stock from a corporation because the former is a consensual contract whereas the latter is real. From the moment a subscription is accepted or consented to by the company the subscriber becomes a stockholder therein (Mt. Waterworks v. Holme, supra); in a sale of corporate stock, he does not become so until after the delivery of the stock certificates. Thus it has been said that * * * "Where a person agrees to take or purchase shares, many authorities hold it is the intention to buy the certificates of salable articles. The delivery of the certificates and payment of the price are considered concurrent acts; and, in a failure to carry out the contract, neither party can charge the other, without averring tender of performance." (4 Thompson sec. 3788, p. 368-369, quoting from Astoria R. Co. v. Hill, 25 Pac. 379).

The importance of this distinction is worthy of some note because it determines the necessity of issuance and tender of stock certificates before beginning an action for calls. Subscription has for its subject matter only those stocks which have not yet been issued to or passed into the ownership of outside parties; that is, such stocks which the company still owns and has not parted with (2 Fletcher on Corp., sec. 520, p. 1120); whereas in purchase of stock the subject matter may consist not only of these unissued shares but also those that have passed into outside ownership. This is the reason why "* * * previous to the organization of the corporation, one can only become a shareholder by subscription to the shares of stock to be issued. After incorporation he may do so by subscription or by purchasing directly from the corporation or from the individual owners thereof". (Id.) It has been held however, that the distinctions between purchase and subscriptions to stock exist only in cases of executory contracts of purchase as where the corporation agrees to sell and the purchaser agrees to buy and pay for stock at a future date. In such case, there is no actual sale in which the purchaser acquires a property right. (Gill Printing Co. v. Goodman, 139 So. 250). But in any case, whether a particular contract is a subscription or a sale of stock is a matter of construction and depends upon its terms and upon the inten-

tion of the parties. (2 Fletcher, 520, p. 1122; Salmon Dexter & Co. v. Unson, 47 Phil., 649). Neither the inclusion of the words "sale", "purchase", "subscribe", "subscriber" or "subscription" will be considered but the essential nature of the transaction as shown by the facts will govern (2 Fletcher on Corporations, sec. 520, pp. 1122-1124; see also 14 C. J. 754, p. 508-509).

(c) *Written Agreement; Necessity.*—A strict definition of the word "subscription" would imply the execution of a written agreement; but the contention is advanced that there is nothing in Act 1459 expressly or impliedly requiring subscriptions to be in writing. At first blush, an oral agreement would seem sufficient. Thus Mr. Cook has said that "* * * a contract for subscription may be made in any way in which other contracts are made. Any agreement by which a person shows an intention to become a stockholder is sufficient to bind him and the Corporation" (vol. 1, sec. 52) in the absence of express restrictions in the charter or act under which the corporation is organized. (Clark on Corporations, sec. 98) And indeed, by an examination of the authorities which assert the necessity of a written contract, Mr. Thompson has observed that in almost every case the writing is required only by either the governing statute or articles of incorporation. (vol. 1, sec. 574, p. 690) It is also true that subscription for shares of stock in an ordinary corporation is not a contract for the sale of goods, wares and merchandise, words which comprehend only corporeal movable property. But nevertheless, our Statute of Frauds covers not only these but also things in action within which shares of stock fall. It is for this very reason why in order to be enforceable, some note or memorandum of a stock subscription at a price not less than one hundred pesos must be in writing and subscribed by the party charged or by his agent. (Sec. 335, C. C. P., No. 4) Otherwise, though it be a valid subscription, the same is unenforceable by action.

(1) *No Express Promise To Pay Is Necessary.*—In some jurisdictions under the Common Law, an express promise to pay is required from the subscriber before he could be held liable on his subscription contract. This rule was adopted and still prevails in some of the New England States (4 Thompson on Corporations, sec. 3777). But although this doctrine is supported by the early cases, "* * * in the light of modern authorities, the reasoning of the court would now be regarded as un-

sound" (Id., sec. 3744). Hence it is now generally conceded that such express promise is no longer necessary (American Alkali Co. vs. Campbell, 113 Fed., 398), because in every stock subscription, the law implies not only the existence of a promise to pay (Buffalo v. Dudley, 14 N. Y., 336; Upton v. Tribilcock, 91 U. S., 45; In re Grand Rapids Furniture Co., 209 Fed., 438; Velasco v. Poizat, 37 Phil., 805, and cases cited)—but also the consideration therein. (Fordyse v. Humphrey, 131 N. W., 686)

(d) *Conditional Subscription.*—That a subscription to corporate stock is a contract is settled (14 C. J., sec. 753; Elliot on Corp., sec. 343, p. 380; 2 Fletcher on Corp., sec. 520, p. 1120), and whether like other contracts it could be entered subject to conditions is an interesting question. White on Corporation citing numerous cases says (White on Corporation, sec. 67, p. 1086):

> "Conditional agreements to take shares of stock in a corporation are contrary to public policy and are void. The statute prescribes the manner of subscribing for stock and authorizes only absolute subscriptions."

But there could be conditional subscriptions which would not be void because against public policy as those upon conditions subsequent or special terms inasmuch as though they are appended with conditions the subscription is still absolute, since the subscriber becomes a stockholder as soon as his subscription is accepted by the corporation. (Elliott on Corporations, sec. 360, p. 399). "The subscription is valid and enforceable whether the conditions are performed or not. The condition subsequent is the same as a separate collateral contract between the corporation and the subscriber for the breach of which an action for damages is the remedy." (Id.) Thus it has been held that in the absence of restrictions in its charter or governing act, "a corporation under its general power to contract, has the power to accept subscriptions upon any special terms not prohibited by positive law or contrary to public policy provided they are not such as to require the performance of acts which are beyond the powers conferred upon the corporation by its charter and provided, they do not constitute a fraud upon other subscribers or stockholders or upon persons who are or who may become creditors of the corporation." (Talbot v. Automobile Identification Underwriters, Inc., 43 S. W. [2nd] 220).

Conditional subscriptions as here understood may, however, possess some similarities with that class of contracts that

give rise to conditional obligations provided for in the Civil Code because notwithstanding what has been stated above, there is a state of things wherein, because of the existence of a condition, the subscription does not become a completed contract till after the performance of said condition. This occurs in the case where in the body of such subscriptions, there is found a stipulation for a particular enterprise, "such stipulation forms a condition precedent and unless strictly complied with by the corporation, the party subscribing will be absolved from his obligation to pay." (Perry Hotel Co. v. Courtney, 136 So. 691).

(e) *Person Liable.*—In general, the persons liable in a subscription agreement are the subscribers—those who agree to take and pay for shares of stock in an existing corporation or when the corporation is not yet in existence, upon its formation (7 R. C. L., sec. 192). At this juncture it is interesting to note that not all classes of subscribers are stockholders, the persons against whom, strictly speaking, the liability on the subscription contracts could be enforced, because even if in the former case, the subscriber upon the conclusion of the subscription agreement with the corporation or its authorized representative, becomes a stockholder therein, in the latter case, the mere signing of the subscription papers does not make him a stockholder (Badger Paper Co. v. Rose, 70 N. W., 302). As Justice Stone has said, "Such an agreement is in no sense a subscription to stock. Something more must be done before it can be affirmed that the subscription is a complete contract." (Knox v. Land Co., 80 Ala., 180, cited with approval in Badger Paper Co. v. Rose [supra]). There is needed a further act on the part of the corporation upon its organization, that is,—its acceptance of the subscription and which further act was necessary to make the subscribers, stockholders. They become so from the instant of acceptance by the corporation, not before (McClure v. Railway Co., 90 Pa. 269). There is, however, authority to the effect that when a group of persons sign a subscription paper of a corporation to be thereafter formed by them, though assent of the company upon its coming into existence is necessary to make them stockholders, still in the first instance, there is created a contract between the subscribers themselves (Minneapolis Threshing Machine Co. v. Davis, 41 N. W., 1026). But this contract, it must be borne in mind, if it exist as claimed, is between the subscribers themselves and

not with the corporation, hence is not of the writer's concern in the treatment of the subject under study. A further reason for not giving much weight if weight is to be given at all to this decision, is that the law in force in the Philippines makes no distinction in respect to the liability of the subscribers between shares subscribed before incorporation is effected and shares subscribed thereafter (National Exchange Co. v. Dexter, 51 Phil., 601; Positype Corp. of America v. Flowers, 36 F. [2nd] 617).

(1) *Subscriber, Stockholder, Purchaser, Distinguished.*—The terms "subscriber" and "stockholder" have been used by text writers extensively and interchangeably. From the above discussion, it must have been observed that the term "subscriber" has a meaning different from that of "stockholder," in cases of subscriptions to the stock of a proposed corporation. Again, a purchaser of stock may be a stockholder upon the delivery of the certificate of stock purchased (2 Fletcher on Corporation, sec. 520), yet, he is in no sense a subscriber. It could not but be noticed that though ultimately all subscribers and purchasers of corporate stock become stockholders, no ties of obligation bind them with the corporation as long as they remain subscribers and purchasers merely. For our purposes therefore, it is the term "stockholder" that is of pivotal significance since the remedies for the enforcement of stock subscriptions are null unless there is an obligation to be enforced; and this obligation do not arise till the relation of corporation and stockholder is created by any of the means allowed by law as by subscription, purchase from original subscribers, or by purchase from the corporation.

(f) *Nature of Liability.—In General.*—As a general proposition, it may be stated that the liability of a stockholder arises by virtue of his relations with the corporation, but as regards each subscriber this liability does not arise strictly from such relations but upon his contract of subscriptions (Andrews v. National Foundry, 36 L. R. A., 139, citing Christensen v. Eno, 106 N. Y., 97). In the absence of express or implied prohibitions to the contrary, in the charter or governing act, each subscription agreement may be concluded upon such terms which are not contrary to law, morals, or public policy, and which the parties thereto may deem just. Thus it has been held that each such agreement should be considered an independent contract, in no way connected with or dependent upon the terms or

agreements contained in other subscriptions (Connecticut v. Bailey, 58 Am. Dec., 181). Again as regards subscribers, it is a fundamental principle of law that they must pay for the amount of their subscription (Amick v. Elliot, 2 S. W. [2d], 367). The same holds true of a purchaser.

(1) *Payment of Subscription.*—Capital stock has been defined as that sum fixed by the corporate charter as the amount paid in or to be paid in by stockholders for the conduct of its business and payment of its debts (Loveland v. Doernbecher Mfg. Co., 39 p. [2d], 668); and so long as each stockholder (he may become so by subscription or purchase) has not paid for his stock or his proportionate share in that fund for the prosecution of the company's purposes which he, by becoming such, consented to bear, his relations with the corporation, it has been said, is that of an ordinary debtor (Edwards v. Schillinger, 91 N. E., 1048; Velasco v. Poizat, 37 Phil., 805). So long as the stock remains unpaid, the liability to pay for them subsist in favor of the company and against the original stockholder or against anybody to whom said stock may have been transferred in the books of the corporation because such liability is inseparable from the ownership thereof (Union v. Willard, 88 Pac., 1098). But even if the liability for payment of the stock attach to whomsoever the same stand in the books of the corporation, it does not seem to be a necessary conclusion that only the owners thereof can pay for them. Payment by a third party in full, it has been held, would discharge the subscriber or whoever according to the corporate records stand liable (Stevens v. Davenport, 19 S. W. [2d], 445); and though the same consist in payment of the par or issued value of the stock, it is "generally payable at such time and in such sums as the corporation through its board of directors may determine. (4 Thompson on Corporation, sec. 3687). This is the practice even if under our Corporation Law, this body may at any time declare due and payable, all amounts that remain unpaid on such stock (Sec. 38, Act 1459).[2]

In view of the fact that no corporation can issue stock except in exchange for actual cash paid to the corporation or for property actually received by it at a fair valuation equal to the par or issued value of the stock, (sec. 16) whether the payment should be in cash or in installments, the satisfaction of the ob-

[2] Any section cited here subsequently should be taken to mean one of the Philippine Corporation Law.

ligation shall be in that medium provided for by statute—money or property. Before the passage of Act 2792 in 1919 it was doubtful whether payment could be made with property, but since then property has been expressly recognized as one of the mediums of payment, provided such property be such as the corporation is authorized to own and which is necessary in the pursuit of its business and provided further that the same is taken in good faith at a fair valuation. (Russel v. Tennessee & Ky. Tobacco Co., 65 S. W. [2d], 256). It has been contended that stock may also be issued in payment of services inasmuch as a credit based upon compensation due for services rendered is property. (Fisher,—Phil. Law of Stock Corporation, sec. 66, p. 101). This has been recognized by the case of State ex rel. Corinne Realty Co. v. Becker, (8 S. W. [2d], 970). Issuance of stocks to corporations' creditors in consideration of the cancellation of indebtedness is not violative of the prohibition above referred to because it is equivalent to the payment of cash by the creditor to the corporation for the stock. (Rodgers v. Kerbaugh Inc., 190 N. Y. Supp., 245). So also when the company purchases lands necessary for the pursuit of its business and pay for them in stock, not within the prohibition. (Strong v. Efficiency Apartment Corp., 17 S. W. [2d], 1).

Authorities conflict in their opinions as to whether the association can or cannot issue stock in exchange for commercial papers whether negotiable or not. To the writer's mind, the weight of authority sustains the rule that it cannot. Most states of the Union uphold this in view of the existence therein of a prohibition similar to section 16 of our Corporation Law. (Furlong v. Johnson, 239 N. J., 141; Shafer v. Home Trading Co., 52 S. W. [2d], 462), and the only exception which has so far been upheld by the courts is that the corporation may accept notes in exchange for stocks not originally issued though, but for stock which has been issued and reacquired by the corporation. (Furlong v. Johnson, 239 N. Y., 141). The reason for this rule (reprohibition to corporations in issuing stocks for commercial papers), an authority has stated, is that the purpose of the law is "to provide the corporation with the capital to carry out the legitimate purposes of incorporation * * * "and" * * * to prevent organizations of corporations upon mere paper capital; the security of the persons dealing with them require that such organizations should not be permitted". (White on Corporation, sec. 67, p. 1085).

(2) *When Liability Accrues.*—Under the Common Law, it was necessary that the whole number of shares fixed and authorized by statute or the articles of incorporation be subscribed for or paid before the company can enforce payment on the shares. (McCarty v. More, 186 Pac., 140). When the capital is increased the amount fixed becomes the capital which must be subscribed before the subscribers of the original shares can be held liable. (Writers v. Armstrong, 37 Fed., 508). On the other hand, however, in case the amount of shares to be subscribed before the association can begin business has been fixed in the charter and the same is reduced without the consent of the subscriber, such reduction does not bind him since that would not constitute an acceptance of his offer. (Wallace v. Duel, 79 S. W. [2d], 595). However, this Common Law rule has been reformed by statutes which require merely a portion of the authorized capital stock to be subscribed (Denny Hotel v. Schram, 32 Pac., 1002) in order that it be legally competent to collect on the subscription. Moreover, under our Corporation Law, it would be impossible for a corporation to exist as an entity unless twenty per centum of the entire number of authorized shares of capital stock has been subscribed and at least twenty-five per centum of the subscription has either been paid to the treasurer in "actual cash for the benefit and to the credit of the corporation or that there has been transferred to him in trust and received by him for the benefit and to the credit of the corporation, property the fair valuation of which is equal to twenty-five per centum of the subscription." (sec. 9). When these conditions exist each subscriber may at any moment be called upon to pay for the shares listed in his name. As has already been intimated above, though the subscribers' obligation consist in the payment of the subscription price of the shares, the whole amount is not usually collected in one lump sum but in such sums as the corporation may, through its board of directors, determine. (4 Thompson, sec. 3687, p. 259). Such action on the part of the corporation is called an "assessment" or a "call".

II. "CALLS" OR ASSESSMENTS

(a) *In General.*—The authorities are not uniform in their definitions of what an "assessment" is, as distinguished from a "call". Some use these two terms interchangeably and it has been said that in England it is the assessment that makes the call (10 Cyc., 496). An early Illinois case defines assessment

as a rating or fixing of the proportion, by the board of directors, which every subscriber is to pay on his subscription when notified of it and when called on (Spangler v. Indiana & Ill. Central Ry. Co., 21 Ill., 276). But then it was also said that when a levy on the shareholders to pay in proportion to the number of shares owned by them is declared by the corporation, a notice is also given to them and that this notice usually passes under the name of "call" (10 Cyc., 484). Again another authority has this much to say (6 Cal. Jur., 333, p. 947):

"There are two classes of assessments made by corporations or by the directors thereof. The first of these is more properly distinguished as "calls" upon subscriptions within the amount of the sums unpaid upon the shares subscribed. (This is what is undoubtedly referred to in sec. 38 of Act 1459). The other is an assessment made upon the corporators, not merely as part of their subscription but to raise a sum of money beyond the amount of the subscription for the use of the corporation in order to sustain its existence." (This latter kind does not seem to be referred to in our Corporation Law).

Thompson on Corporation, however, made a good distinction between the two terms when he said that the term "call" is more limited especially to payments required on the subscription, while the term "assessment" means a demand upon stockholders for payment above par value of stock to meet the money demands of creditors of the corporation. But still on the other hand, even this great jurist considers the term "call" possessed of more than one meaning in jurisprudence. As he says, it may refer to the resolution of the directors requiring a part or the whole of the subscription to be paid, or to the notice to the subscriber of such fact, or it may refer to all steps taken making the subscriber liable to an action for non-payment of his subscription. (Vol. IV, sec. 3686, p. 259).

Whatever may have been said by the authorities in distinguishing these two terms, the treatment of our present subject do not necessitate the maintenance of such a distinction. In this work, the two terms will be used interchangeably though always, it must be borne in mind that here, we are concerned only by that resolution of the board of directors declaring due and payable a certain percentage of the unpaid subscription, when, where and to whom payable, the date of delinquency, and the date when the delinquent stock will be sold. (Sec. 38, Act 1459).

(b) *Id. Necessity.*—Generally, a call or assessment or some equivalent act of the corporation is necessary in order to make subscriptions due and payable (Omaha v. Cornell, 75 N. W., 837; Coast Amusement v. Stineman, 2 Pac. [2d], 447), because until such call is made the shareholder's liability under the subscription agreement cannot be fixed (Somerset v. Cushing, 45 Maine, 524; Mountain Timber v. Case, 133 Pac., 92). This necessity of a call in order to recover on the subscription is taken for granted in practically all subscriptions, it apparently partaking the nature of a demand such that no action to recover thereon can be maintained till after a call has been made (Brookline v. Evans, 146 S. W., 828). The only exceptions to this are in cases where the subscription price is payable on demand or in installments at a certain specified date or dates (7 R. C. L., sec. 220), or when the corporation is insolvent, since the making of the same in an insolvent corporation has become impracticable and the obligations in its favor are to be treated as due on demand. (Velasco v. Poizat, 37 Phil., 807; Edwards v. Schillinger, 245 Ill., 231).

(c) *Conditions Precedent.*—In any sense of the term, a call is a corporate act and for its performance there need not only exist an organized corporation but also the presence of a duly constituted board of qualified directors. It has been held however that assessments or calls made by a "de facto" board of directors are valid because the right of a person assuming to act as a director could be questioned only in a quo warranto proceedings (Consumer's Salt Co. v. Riggins, 282 Pac. 956). This seems to be a freak holding in the face of what an eminent author has said:

"* * * Stockholders are not third persons with respect to their relations to the corporations; and the person who usurps the duties of directors without the acquiescence, knowledge, or against the wishes of the stockholders are not officers and their acts cannot be deemed valid when invoked for their own protection. * * * The validity of a forfeiture must ultimately depend on the validity of the election of the persons who, assuming to be directors, declare the forfeiture of non-payment of calls; and the rule is well established that there must be properly appointed directors to make a call and to declare a forfeiture for non-payment. A call made by directors duly elected and qualified is essential to creating a liability upon the stockholder. It is now, well settled, that the illegality of the election and the validity of the acts of the board of directors de facto and their authority as such to make a valid call or assessment on stock, may be set up and called in question by any stockholder who

has not acquiesced therein, whenever such are detrimental to his interest, affects property rights or impose liability upon him and when the rights of third persons do not intervene." (4 Thompson, sec. 3704, p. 279-280).

Again it is not enough that there is a board of qualified directors; the call must have been made at a valid meeting thereof (Brookline v. Evans, 146 S. W., 828), which may either be at any of the regular ones or at a special meeting called for the purpose; and the right to levy such an assessment can be legally exercised only in the manner provided by law or by the charter of the corporation (Raisch v. M. K. I. Oil, 95 Pac., 662). A strict compliance with such provisions must also be observed (Id; Cheney v. Canfield, 32 L. R. A. [N. S.], 16); Concoran v. Sonora, 71 Pac., 127). And in making a call, a formal act of the directors does not seem to be necessary (Hanger v. International Trading Co., 214 S. W., 438); some act or resolution which evinces a clear official intent to render due and payable a part or all of the subscription is sufficient (Budd v. Multonah, 15 Pac., 659). The call need not even be signed by the directors in the absence of a provision in the governing statute or corporate charter requiring such formality; (North v. Christ, 53 Am. Dec., 258) but it cannot be made by a mere street conversation between the president of the corporation and its directors in which they agree that the former may call in subscriptions as needed (Branch v. Augusta, 23 S. E. 128). The proper number of directors also must concur in the resolution authorizing the assessment (Jensen v. Northwestern, 159 N. W., 611) and one levied at what purported to be a meeting of the board of directors by less than a quorum thereof is unenforceable (In re Election of Directors, 130 N. Y. Supp., 414) though it has been held by an early case than such an irregularity may be validated by a full quorum of directors (4 Thompson, sec. 3704, p. 278).

Of prime importance and fundamental necessity in the levying of an assessment is that the same must be made for a corporate purpose only (Seely v. Huntington, 75 Pac. 367). The reasons given by the courts are that:

The "* * * right of assessment rest within the discretion of the board of directors and the same should be levied for one or more of the purposes permitted by the terms of the statute or charter. * * * Should an assessment be levied for an unauthorized purpose, no foundation would have existed for the exercise of discretion; and when it appears that an assessment has been made for any other purpose, neither the good faith of the directors in levying the assessment nor the probability that the action of the board was for the best interest of the corporation, nor any

other reason may be permitted to prevail over the timely and legal objection of a protesting stockholder. * * *" (Kehlor v. Chesley Finance Co., 10 Pac. [2d] 801).

Of similar nature and effect is where the body of the subscription to the stock of a corporation to be thereafter formed is found a stipulation for a particular enterprise, such a stipulation forms a condition precedent and unless strictly complied with by the corporation, the party subscribing will be absolved from his obligation to pay (Woods Motor Vehicle Co. v. Brady, 181 N. Y., 145; Perry Hotel Co. v. Courtney, supra). But though a radical change in the corporate enterprise has been made, it is however the subscriber's burden, when sued upon his subscription, to show that he dissented from such change a reasonable time before any debts have been incurred or any rights of third parties have accrued (Perry Hotel Co. v. Courtney, 136 So., 691).

Still another condition precedent may be considered; The stock to which the assessment or call refers, must have been one of those issued within the corporation's powers—that is, within the authorized limit since it is beyond the corporation's power to issue stock in excess of its authorized capital (World Oil Co. v. Hicks, 19 S. W. [2d], 605), and neither the acquiescence of the subscriber can give it validity nor bind him or the corporation (Randall v. Mickle, 138 So., 14).

The last but not the least requirement in order to levy a valid assessment is that the call must be uniform in its operation (Imperial Land Co. v. Oster, 168 Pac., 1159; Geary St. P. & O. R. Co. v. Ralph, 207 Pac., 539), so as to prevent the directors from exercising favoritism (North Milwaukee v. Bishop, 45 L. R. A., 174). Thus a call or assessment which requires some of the stockholders to pay a higher rate than the others will not be enforced (Great Western v. Burnham, 47 N. W., 373). But this do not mean to prevent a corporation from making a call "against the stock of only two stockholders such an amount of their subscription as would produce enough money to make their payments equal to the payments already made by other stockholders. This, the corporation had undoubtedly had the right to do as no inequity would result. It has been held that assessments may be so equalized." (Brockway v. Gadson etc. Co., 15 So., 431; Cook on Corp., sec. 114; Imperial Land Co. v. Oster, 168 Pac., 1159).

(d) *Id. Nature of the Power.*—The board of directors is the governing body of the corporation and even in the absence of statutory authority, it would seem that this body still possess the power to call in unpaid installments on the stock subscriptions. In this jurisdiction, by express provision of statute, the power to make assessment is conferred on either the board of directors or trustees of the corporation (Sec. 38), and it would seem that this body cannot delegate such power (Jensen v. Northwestern, 159 N. W., 611), on the ground that discretionary authority cannot be delegated to one or more of their members or to the subordinate officers of the corporation unless authority to delegate is conferred by statute (4 Thompson, sec. 3700, p. 276).

When these directors exercises this power, they are not even "required to state that it is made for corporate purposes, nor are they required to show that the business of the corporation was such as to make it necessary that the subscription should be paid. The power to make calls is vested in the directors and none but creditors can object to its lawful exercise" (4 Thompson on Corporation, sec. 3699, p. 275). In fact the whole question of the necessity of making calls is left to the sole discretion of the board of directors and unless an assessment was made in excess of its authority, the courts will not inquire into the wisdom thereof, it being an act purely connected with the internal management of the corporation (Oglesby v. Attrill, 105 U. S., 605); nor in the absence of fraud will the judicial tribunals review the action of the corporation taken in accordance with law, in ordering an assessment on its unpaid stock (Car Trust v. Metropolitan, 184 Fed., 443) and always, courts presume that a call was regularly made and do not require proof to show that money was needed on the part of the corporation (Nashua v. Anglo-American, 189 U. S., 221). Thus, not even the stockholders can question the necessity or advisability of the making of such calls (Fitzgerald v. Union, 90 N. W., 994; Weber v. Dalla, 94 Pac., 441). But on the other hand, the corporation assumes the risk of whether the facts justifying the assessment on capital stock exist or not; and this may be determined by the courts (Kehlor v. Chesley Finance Co., 10 Pac. [2d], 801). The order of assessment is conclusive (Saetre v. Chandler, 57 Fed. [2d], 957).

Though the determination of the necessity of levying assessment rest with the directors, their power may be subjected to certain limitations. If the charter provides that no assess-

ment beyond $100 per share shall be made, any assessment beyond that amount is void for the excess; (Lewey's Island v. Balton, 77 Am. Dec., 236); Undoubtedly the same must also be true when the stipulations in the subscription agreement limit the amount of single assessments to a certain percentage; when the same contract contains terms to the effect that after payment of 20% of the shares, no further assessment shall be made and certificates of full-paid shares shall be issued, such an agreement is binding in the corporation provided no creditor's rights are invaded. (Scovill v. Thayer, 105 U. S., 143). If the corporation had issued the stock as non-assessable, it is bound by such agreement and therefore no assessment can be levied thereon. (Whicher v. Delaware Mines Co., 15 Pac. [2d], 253; Dickerman v. Northern Trust Co., 176 U. S., 181), and therefore is authority to the effect that such an agreement need not be written in the certificate because such fact can be proven by any competent evidence (Reinertsen v. Idaho Power Co., 182 Pac., 851). But in a case where by the terms of the contract, assessments are limited to $10 each, the directors may levy several assessments aggregating more than that amount but to be called at different times (Ruthland v. Thrall, 35 Vt., 536).

III. NOTICE OF CALL OR ASSESSMENT

(a) *In General.*—Though it has already been stated somewhere in this work that the term "call" may also mean the notice sent to the subscriber informing him of the assessment, for practical purposes, the writer adapts instead the term "notice of call" or "notice of assessments" inasmuch as these terms convey the idea intended more clearly. It must be noted that the Philippine Corporation Law speaks of two kinds of notices—a "notice of call" and a "notice of delinquency." We are at this moment concerned with the former only—the latter will hereafter be discussed in connection with the first remedy of the corporation in enforcing stock subscription as already mentioned. A "notice of call" may be defined as that information served on a stockholder whose stock subscription is unpaid, bringing to his knowledge that a certain percentage thereof has been declared due and payable at a specified date and that unless they are paid on or before another fixed date, they will be declared delinquent and be sold at public auction to pay the amount of the subscription and accrued interest, together with the costs of advertising and expenses of sale. (sec. 38).

(b) *Form and Sufficiency.*—The manner, form and contents of the notice of call are expressly prescribed by statute (secs. 38 and 40), and only a few principles need here be cited in order to settle a few questions liable to arise and which are not covered by our laws. By express mandate of the law, the notice must name the persons, time, and place where payment is to be made yet still it has been held that an omission of such facts in the notice is not a prerequisite to the validity of the call (American v. Gummey, 61 Fed., 41), and that in such a case, the installment or amount called in is payable on demand at the office of the corporation to an officer authorized to receive the same (Western v. Des Miones, 72 N. W., 657). If the notice failed to name the person to whom payment is to be made, impliedly it is to the treasurer since he is the only proper officer authorized to receive and keep moneys of the corporation (Danbury v. Wilson, 22 Conn., 435) or if it failed to name the place, impliedly it is at the office of the treasurer (Muskigum v. Ward, 42 Am. Dec., 191). The reasons for this would seem to be, as it has been said in an early case is that in respect to the manner of giving such notice the statute may be regarded as directory (Mississippi v. Gaster, 20 Ark., 455). But such notice of assessment must be specific enough so as not to mislead the stockholders; a mere general notice is not sufficient, (Id.) and with the single exception of those stockholders actually appearing, one who did not receive sufficient notice of call may raise all questions and interpose all defenses except perhaps those concerning the amount, propriety, and necessity of the assessment (Chandler v. Manifold, 22 Pac. [2d], 870).

(c) *Who are Entitled Thereto.*—Since the corporation can look only to the stockholders whose names are registered on its book for the purpose of ascertaining those liable to it for assessment (Prudential Petroleum Co. v. Peck, 22 Pac. [2d], 559; In re Sutherland, 21 Fed. [2d], 667; Clarke v. Kelley, 19 Fed. [2d], 920) they are entitled and by provision of statute they are so entitled to be notified of the assessment (sec. 40). It has also been held that the notice must be served not only to the original subscriber but also to those who may become possessed of the stocks as legatees of kin of a deceased subscriber whenever a by-law provides service of notice to successors in interest of subscribers (South Milwaukee v. Murphy, 58 L. R. A., 82). But stockholders who may have become possessed of actual notice of the call or those who, upon knowing the existence of an

assessment on their stock notified the corporation that they would not pay and denied all liability thereon, are not entitled to a formal notice of the call (Chandler v. Manifold, 22 Pac. [2d], 870; Louisiana Purchase v. Shurmacher, 132 S. W., 326).

C. MAIN CONSIDERATIONS

I. CORPORATE REMEDIES TO ENFORCE STOCK SUBSCRIPTION

In General.—An assessment having been levied in the manner and form provided by law and the delinquent stockholder having been notified thereof, the corporation, upon arrival of the date of delinquency fixed in the notice of call and the installment not having been paid, acquires jurisdiction to exercise any of the remedies for the enforcement of the stock subscription (sec. 39). In general, the corporation has several methods of collecting from the contract.

Mr. Cook on his valuable work on Corporations gives us the following:

"* * * First, there is the common law action to collect the subscription as a debt * * *. The corporation may sue on the subscription, obtain judgment and then proceed to sell the stock under an execution levied to collect the judgment or may collect the judgment in the usual way. Second, the corporation may bring an action at law for breach of the contract, the measure of damages being the difference between the value of the stock at the price which the subscriber was to pay and the market value at the date of the refusal to pay. A third and very important remedy is that of forfeiture.[3] It is effected in one of two ways: the forfeiture may be by strict foreclosure of the stockholders stock—that is, the taking of his stock by the corporation itself; or it may be by a public sale of the stock for non-payment of the subscription * * *" (8th ed., sec. 121, p. 468 —See also Thompson, sec. 3735, p. 308).

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[3] Strictly speaking, there is not really a "forfeiture of the stock when the same is sold through public auction for non-payment of the subscription. Even in those jurisdictions wherein this process is termed "forfeiture," the stockholder do not lose what belongs to him just to become vested in the corporation; in its true sense, this is what the term "forfeiture" implies. As will hereafter be shown, the stock has to be sold, and in order to acquire it, the corporation must bid; it has no alternative. The writer is not therefore unaware of this anomaly; to his mind, what really occurs is an extra-judicial foreclosure of the corporation's claim. It is only for practical purposes that the term forfeiture is retained in this discussions since to do otherwise will be to invite confusion of authorities.

But since the Philippine Corporation Law has provided for only two remedies, namely—that of forfeiture effected by public sale of the stock for non-payment of the subscription (sec. 42) and that of action in a court of proper jurisdiction (sec. 49)—it may well be doubted whether an association incorporated in accordance with Philippine laws can utilize other means of enforcing the stockholders' liability under their subscriptions. Thus our discussions are limited to these two corporate remedies.

II. ID. UNDER OUR CORPORATION LAW

(*a*) *Forfeiture.*—The remedy of forfeiture may be exercised in either of two ways, but since the power to forfeit shares of stock must be pursued in the strictest in accordance with the terms of the statute (Jent v. Friggeri, 40 Pac. [2d], 343), and that it can be exercised only in the manner prescribed by law (Westcott v. Minnesota Mining Co., 23 Mich., 145), forfeiture in this jurisdiction can be exercised only by a public sale of the stock as provided by section 39 and sections 41 to 47 of our Corporation Law. There being no express statutory prohibition, the remedy of forfeiture may be reformed in several ways. Hence where in a subscription contract it was provided—"that default in any payment shall operate as a forfeiture to the company of all payments previously made and the stock issued therefor" such stipulation must be given effect and there need not be any public sale at all (Denman v. Country Club Realty Co., 220 S. W., 824). Effect may also be given to a provision in the by-laws of the company prescribing that from the shareholders' dividends, the board of directors may apply money due on the subscription although such stipulations do not oblige the corporation from using that remedy to the exclusion of the remedies provided by the Corporation Law (De Silva v. Aboitiz & Co., 44 Phil., 755).

It must always be borne in mind that a corporation has no inherent right to forfeit or sell the shares of stock owned by delinquent stockholders (Budd v. Multnomah St. Ry. Co., 15 Pac., 661) neither is the right to forfeit a common law remedy (Id.), but must come from the law and can only be exercised in the manner prescribed by it. (Westcott v. Minnesota Mining Co., 23 Mich., 145; People ex rel. Pulford v. Fire Dept., 31 Mich., 458). So the courts are constant in maintaining the rule that a corporation has no power to forfeit delinquent stocks unless that power is given by statute (Minehaha v. Legg., 52 N. W., 898; Puget Sound v. Ouellette, 34 Pac. 929), and though the

power be given by statute, the exercise of such power must be in strictest compliance therewith (Jent v. Friggeri, 40 Pac. [2d], 343), and one made not in that manner is invalid (Schwab v. Frisco, 60 Pac., 940).

(1) *Id. Nature of the Right.*—Forfeiture is a corporate act involving the exercise of judgment and discretion such that it must be by action of the board of directors lawfully convened; it cannot be considered a purely ministerial act in the ordinary conduct of the business of the corporation which the secretary can perform. (In re Election Directors, 130 N. Y. Supp., 414).

(2) *Id. Conditions Precedent.*—Since forfeiture is a remedy of the corporation wherein an obligation is sought to be enforced, and since, as we have already seen, a call is necessary before that obligation could be fixed or considered due and demandable, a forfeiture cannot be declared except for valid calls. It must also appear that all the conditions precedent to the levying of a valid assessment has been pursued in the regular form and manner including the notification of the defaulting stockholder in accordance with the procedure prescribed by section 38 of our Corporation Law. If upon arrival of the date of delinquency as fixed in the notice of call, "the whole or any part of the subscription on unpaid capital stock with interest accrued is unpaid," the same is declared delinquent; but even if on such date, such stock is already subject of sale (sec. 39) still such sale cannot validly take place until after a publication of the notice of delinquency in the newspapers wherein the notice of call has been published (sec. 41). Such publication if made "* * * in a daily newspaper must be published in ten successive issues of said newspaper previous to the day of sale, and, when published in a weekly newspaper, must be published two weeks previous to the sale and the first publication must be fifteen days prior to the day of sale" (Id.).

In view of the "must" terminology of sections 39 and 41 of our Law, nothing therein contained can be dispensed with whenever a valid forfeiture is sought. In fact none of the conditions precedent to forfeiture including those pertaining to valid assessments, notice of call and notice of delinquency can be so dispensed with; not even the courts possessed of the powers to do so (Ruck v. Caledonia Silver Mining Co., 92 Pac., 195). Even the early cases hold that in order to sustain a valid forfeiture, every condition precedent must be strictly and literally complied with (Morris v. Mettalline, 20 Atl., 240). It must

be noted however that upon failure of payment of the assessment, the rights of the stockholder in the shares are not ipso facto forfeited in favor of the corporation; the corporation has a remedy—that is forfeiture of the delinquent stocks through public sale of the same. (Anthony v. Hillsboro, 114 Pac., 95).

(3) *Id. By Sale of Delinquent Stock.*—The law expressly provides that the delinquent stock becomes subject of sale (sec. 39) but the corporation acquires jurisdiction to sell the same only after notice of delinquency and sale of the stock has been duly advertised (sec. 42) and the date of sale has arrived. (Imperial Land Co. v. Oster, 168 Pac., 1159). Again, all the provisions of the law as to the notice of forfeiture or sale must be strictly followed (In re Election of Directors, 130 N. Y. Supp., 414; Shannon v. Tooker, 140 Pac., 10). And if the notice of forfeiture by public sale of the stocks which must be published in accordance with sec. 41 of the Law, is not done in such manner, the company would acquire no right to sell (San Bernardino v. Merrill, 41 Pac., 487) since that right is conferred only after due advertisement and further, that the date of sale has arrived (Imperial Land Co. v. Oster, 168 Pac., 1159).

(4) *Date of Sale.*—Our statute prescribes the time or duration of the notice of delinquency and sale of stock for unpaid subscriptions; it also provides the manner of giving it (secs. 41 et seq.). These requirements, it has been held, must be strictly followed for if not, the sale will be void (Lewey's Island v. Balton, 77 Am. Dec., 236). The sale must be made on the day, at the place and on the hour designated in the notice (sec. 43). However, the date of sale may be postponed by order of the board of directors provided always that the notice of postponement or extension is appended with the notice to which the order relates and is thereafter published with it (sec. 46). This provision, it has been held is mandatory (Mantle v. Jack, 135 Pac., 854) and if not complied with, by express statutory provision, the order of extension or postponement is ineffectual (sec. 46). And it has also been declared that though the statute provides an extension from time to time for not more than 30 days, it does not authorize an indefinite number of extensions provided each was for a period less than 30 days but only authorized extensions the aggregate of which is 30 days in all (National Parafin v. Chapellet, 88 Pac., 506).

(5) *Purchase at Forfeiture Sale.*—The sale must be by public auction. Only so many of the stocks described in the

notice as may be necessary to pay the amount due on the subscription with interest accrued, expenses of advertising and cost of sale, shall be sold and the same must be awarded to the person offering in cash for such amount, the smallest number of shares or fraction of one of them (sec. 43-44). The sale is conducted by the corporation through its secretary or clerk and by this it has been said that the corporation acts as the agent of the defaulting stockholder, and that therefore the purchaser therein takes, not the title of the corporation, but that of the delinquent shareholder (6 Cal. Jr., sec. 358, p. 973). Thus, the shares purchased remain charged with the liability for the unpaid subscription price; but though he (the purchaser) takes the title of the former owner, he is not his transferee but of the Corporation itself, that is—he comes in on the footing of an original subscriber and can claim from the corporation all the privileges necessary for him to enjoy the fruits of his purchase (Id.).

The sale being by public auction, the usual rules governing such sales are followed and anybody equipped with the necessary cash may bid. Even a director of the corporation itself may be a purchaser at such sale and the fact of his purchase raises no presumption that he was acting for the corporation (Stephens v. Lemoore Canal & Irrigation Co., 135 Pac., 707), although statutory authority is given to the corporation to be a purchaser therein through its secretary, clerk or president (sec. 44) or undoubtedly through any of its directors. However, the corporation cannot always bid; it can do so when, and only when, no bidder offers to pay the amount due with expenses of advertising and cost of the sale (sec. 44). Yet still it seems that even in this case the corporation cannot make such a purchase unless it has a sufficient surplus capital to retire the stock without prejudice to the rights of creditors at the time regardless of its good faith or condition at the time of the purchase (Robinson v. Wangemann, 75 Fed. [2d], 756). The reason given is that the assets of the corporation which include amounts due on unpaid subscription (Yardley v. Courthersville Motor Co., 35 S. W. [2d], 971) are the common pledge of its creditors and the stockholders are not entitled to receive any part of them unless the creditors are first paid in full (Robinson v. Wangemann, supra). Still another restriction to the corporation's right to bid in the instance given is that it must bid not less than the entire amount due from the delinquent stockholder because our law expressly provides that if the corporation

bids in the delinquent stock "* * * the amount of the subscription due, together with the expenses of advertising and costs of sale, shall be credited as paid in full on the books of the corporation and entry of the transfer of the stock to the corporation made" (sec. 44).

(6) *Effects of the Sale.*—If the delinquent stock is purchased by a third person, "* * * the status of the stock is the same as in the hands of a new purchaser as in the original holder; and such purchaser is liable for calls." (4 Thompson, sec. 3762, p. 340). But if the purchaser be the association, the title to the same is vested in the company and thereafter "* * * may be disposed of by the stockholders in accordance with law and the by-laws of the corporation by a majority vote of all the remaining shares" (sec. 45).

Whatever may be the rule as regards deficiency liability if the amount realized from the sale is short of the amount due when the purchaser at the auction sale is a third person, it is certain that if the corporation be the purchaser, no such deficiency liability exist inasmuch as the corporation cannot bid by less than the total amount due. As regards the former of the above propositions, it must be noticed that our law declares that the secretary or clerk of the corporation (conducting the sale) shall sell or cause to be sold at public auction, so many of the delinquent stock advertised as would be necessary to pay the entire amount due to "* * * the person offering at such sale to pay the unpaid subscription, with interest accrued, together with expenses of advertising and costs of the sale, for the smallest number of shares or fraction of a share * * *" (sec. 54-44). Such person is what is termed the "highest bidder"; but there is nothing in the law which limits such highest bidder to such person only. Must the corporation's right to enforce the stockholders' liability through the remedy of public sale of the delinquent stocks be hampered by the fact that it could not find a highest bidder as defined by statute even when nothing in the statutory definition shows that the same is intended to be exclusive? What, if due to failing business the stocks are valueless in the market and the corporation, due to lack of surplus, financial difficulties or otherwise, be unable to make a bid? Even if no bidder offers to pay the amount due with expenses of advertising and costs of sale, the corporation is not required to bid but "may" only (sec. 44). The writer does not deem it to be straining the rules of statutory construction to allow the

corporation, under such circumstances, to award the stocks to a highest bidder but the proceeds from which do not sufficiently cover the total amount due.

(7) *Deficiency Liability After Sale to Third Persons.*— Some doubt is entertained as to whether a deficiency liability subsist against the delinquent stockholder in case the proceeds at the sale is insufficient to cover the entire amount due. Mr. Thompson in his noted work on Corporations made a lengthy investigation of the authorities on this point; the authorities he has cited reveal that the practice in the different states of the United States is not uniform because of the existence of some differences in their respective statutes (sec. 3758, p. 332-336). It may safely be stated however, that his cited authorities denying the subsistence of such a liability are in those states wherein, by statutory provision or otherwise, the relation of Corporation and stockholder is completely severed upon forfeiture of the delinquent stock besides the absence of an express provision in the statute books affirming the existence of such a liability after the sale or forfeiture. An excerpt from Mr. Thompson's work, nevertheless, says:

"* * * *The rule as stated on this subject is that statutes affirmative of an existing right and prescribing other than the usual remedies for its enforcement, or conferring cognizance of it in other tribunals, not negativing the pre-existing remedies or jurisdiction, in their very nature are merely cumulative and not exclusive.* On this analogous principle some courts have very wisely and properly held that the stockholder is liable for any balance after due forfeiture and sale of his stock * * *." (follows a recital of the various practices in the different states) (Id.).

Again Mr. Cook has said that though the general rule may be otherwise, there are cases wherein:

"* * * it is held that the *forfeiture of shares of stock is like the foreclosure of a mortgage; and that, just as a mortgage may have judgment against the mortgage for a deficiency, so many a corporation have its action of assumpsit against a subscriber whose stock, having been forfeited, has failed to sell for enough to pay his entire indebtedness to the corporation on the subscription.* This rule is held to apply equally to original subscribers or their transferees; and any stockholder is liable under this rule for the balance due upon assessment after deducting the amount realized at the forfeiture sale." (Cook on Corp., 8th ed., sec. 125-126, p. 473).

Expressed in other words, Mr. Elliott has said that "* * * The sale in such case is in the nature of the foreclosure of a lien held by the corporation upon the shares * * *" (sec. 388, p. 427)

On the other hand the general rule regarding this question is expressed by Mr. Fletcher in his work entitled "Cyclopedia of Corporations" thus:

"Whether or not a corporation * * * can maintain an action to recover the balance on a subscription after the shares have been regularly forfeited or sold for non-payment of assessments *depends upon the terms of the statute authorizing forfeiture or sale and the effect thereof.* As a general rule, after the shares are regularly forfeited for non-payment of an assessment and *belong to the corporation* * * * there is no further liability on the part of the subscriber either to the corporation or its creditors in case of insolvency * *." (Sec. 665, p. 1498-99).

Mr. Elliott's exposition on the subject is to the same effect—that is "* * * If there is an absolute forfeiture, his (the subscriber's) liability ceases * * *" (sec. 388, p. 427)

In the absence of an express statutory declaration terminating the relation of Corporation and stockholder after forfeiture of delinquent stocks, the only reason given by the courts in sustaining the above stated rule, is that by implication from the legal provisions authorizing forfeiture, such relation is terminated. Another way of expressing it is that "* * * the forfeiture operates as a recission of the subscription contract and the contract being thereby ended, no foundation remains for an action to rest upon * * *" (White on Corp., sec. 67, p. 1099). Thus the Supreme Court of California in American Well & Prospecting Co. v. Blakemore (193 Pac., 779) has declared that:

"* * * we are not referred to nor have we been able to find any case in this state in which it is held that where there is no fraud or collusion, the directors in good faith have forfeited the shares, the stockholders liability for the unpaid balance on his stock is not thereby terminated * * *"

Thus far, we have exposed what pro and con authorities have said; only a short explanation is needed for a determination of the rule which ought to prevail in this jurisdiction. The following must be noted: First, in the forfeiture sale, the corporation, as has been stated earlier in this work, merely acts as the agent of the delinquent shareholder and that the purchaser at such sale acquires, not the title of the corporation but that of the original owner; Second, that when in accordance with our Corporation Law, the shares are sold to a third person, the association is not in duty bound to credit the said shares as paid in full; neither is there an *"absolute forfeiture"* in the true sense for then, the shares do not belong to nor acquired by the corporation and therefore does not fall within the rule declared by both Mr. Fletcher and Mr. Elliott (already cited) wherein

the stockholder is relieved of further liability; And Third. sections 38 and 49 of our Law dealing with the remedies for the enforcement of stock subscriptions are *affirmative of an already existing right, prescribes other than the usual remedies for its enforcement and do not negative the pre-existing remedies or jurisdiction.* (4 Thompson, sec. 3758, supra)

From the above exposition and comparison of authorities, together with a recital of our own statutory provisions, since there is no "absolute forfeiture" if the shares are awarded to a third person, since there is nothing in our laws which expressly or impliedly terminates the relation of Corporation and stockholder in such case and since nothing in our Corporation Law "* * * shall prevent the directors from collecting by action in any court of proper jurisdiction the amount due on any unpaid subscription * * *" (sec. 49) the only necessary conclusion must be that if the proceeds at the sale of the delinquent stock be insufficient to cover the amount due on the subscription, together with accrued interest, cost and expenses incurred, the stockholder may, after being credited with the amount realized, be held answerable for the balance.

(b) ACTION TO COLLECT UNPAID SUBSCRIPTIONS

(1) *In General.*—We have just noted that the remedy by judicial action may be utilized by the corporation in order to collect any deficiency which may result from the public sale of the delinquent stocks. The same will now be discussed as a separate and independent remedy and not one in addition to or supplementing that of forfeiture by public sale of stocks.

Our Corporation Law by providing that nothing contained therein "shall prevent the directors from collecting by action in any court of competent jurisdiction, the amount due on any unpaid subscription * * *" removed all doubts as to the existence of the corporate remedy of collecting unpaid subscription by suit before the judicial tribunals. Nevertheless, it seems that even in the absence of this express provision in our statute, the right of the corporation to sue and recover any amount due on any unpaid subscription still co-exist with any other remedy which may have been provided by statute (Ruthland v. Thrall, 35 Vt., 551; Instone v. Frankfort Bridge Co., 5 Am. Dec., 638 cited in Velasco v. Poizat, infra). However, it is important to distinguish between two possible kinds of actions to collect unpaid subscriptions.

(2) *Two Kinds Of Actions.*—"* * * If by the terms of the subscriptions or by the charter * * * or by a valid by-law previously adopted, subscriptions, either expressly or impliedly, are to be payable on call, then a valid call is necessary to mature the subscriptions and is a condition precedent to an action to enforce them * * *" (4 Thompson, sec. 3687, p. 260; 2 Fletcher, sec. 669, p. 1510-1511). But then the action is for the recovery of the amount of the calls only. Though a call is unnecessary yet still similar to the foregoing is, when, by like provisions, the subscriptions are to be payable in fixed installments at certain specified dates: in this instance, the action is for the recovery of particular installment or installments only. In contrast with the aforementioned two similar actions is when, by like provisions, the subscriptions are to be payable when the corporation is organized, or on a specified day or on demand, the action is naturally, not for any particular assessment or installment, but for the full amount of the subscription; and in this case, emphasis must be given to the fact that no call is necessary. Thus we have two possible kinds of actions for the recovery of unpaid subscriptions, namely: (1) an action for the recovery assessments based on calls and (2) an action for the recovery of the full amount due which undoubtedly must be based on the contract of subscription.

(3) *Actions Based On Calls.*—The obligation assumed by the stockholder by subscribing to the capital stock of a corporation is to pay the subscription price thereof and ordinarily, the time and mode of payment are fixed by the contract or provision in the charter or by-law wherein the same may be expressly or impliedly inferred. In the absence of such provisions, such price may also be made "payable at such times and in such sums as the corporation, through its board of directors, may determine" by the declaration of a call. This is so by virtue of the provisions of section 38 inasmuch as the subscriber, by his subscription in the absence of stipulations therein to the contrary, agreed to abide by the charter of the corporation which, by the way, consists not only of the articles of incorporation but also all general statutes applicable to that class of corporations (Loveland v. Doernbecher Mfg. Co., 39 Pac. [2d], 668). The Charter therefore, including the provisions of the Corporation Law may constitute a portion of the subscription contract.

It must be noted that the obligation to pay calls or on call, though not any particular call, is assumed right from the be-

ginning of the subscriber's membership in the Corporation and is already existing when a call is made. Thus it has been said that: "* * * The call does not fix the liability in the sense of creating the obligation to pay for stock. That is created by the subscription contract; but the contract is not to pay at all events (in the absence of expressions or implications to the contrary); it is to pay upon a contingency, upon a condition of a call being made according to the contract. The call makes what was before contingent absolute" (That in parenthesis ours) (South Milwaukee Co. v. Murphy, cited in 2 Fletcher, sec. 670, p. 1515).

Since the making of a call may be considered a stipulation in the subscription agreement and because, generally, a call is necessary to mature any installment in a stock subscription, in order to collect any assessment, a valid call must have been declared by the board of directors in proper form and notice thereof sent to the stockholders in the manner prescribed by statute, that is—in accordance with sections 38 to 48 inclusive of Act 1459 as amended. This is only logical, the action being for the recovery of a particular assessment or assessments. A representative opinion of the authorities on this point is an excerpt from Mr. Thompson's work which reads:

"* * * If * * * the subscriptions * * * are payable on call, then a valid call is necessary to mature the subscription and is a condition precedent to enforce them * * *." (Sec. 3687, p. 260).

In another portion he says:

"In an action to recover calls, the complaint should sufficiently allege * * * and aver that the call has been made and the required notice given * * *. Unless the contract of subscription is payable absolutely and without call (and which is the exception to the general rule), an allegation that the directors had made a call is essential in order to entitle the corporation to recover * * *" (that in parenthesis ours) (sec. 3775, p. 348-349; see also 2 Fletcher, sec. 669, p. 1510; 1 Cook, sec. 105, p. 448-449.)

This rule has been impliedly recognized by our Supreme Court in the Poizat case when it cited the case of Rose-Mecham Shoe Co. v. Southern Maleable Iron Co. (72 Fed. 957) because this latter case affirms the rule that the suit for a recovery of an amount on an unpaid subscription, when brought by a solvent going corporation, must be preceded by a call or an assessment and that until this is done, no right of action accrues.

But before leaving the topic being considered here, the writer desires to call attention to section 49 which if given an off-hand construction will render useless all that has been said

in this work regarding the necessity and utility of calls or assessments. On the face of the provisions of this section, a call to be made in pursuance of and under authority of section 38 and the notice thereof which is an indispensable adjunct of the same provided for in section 40, can be disregarded by the directors if they choose to collect the amount due on any unpaid subscription by action in a court of proper jurisdiction. If that then be the meaning section 49 is to be given, will it not be a glaring error on the part of the lawmaker to first provide that the parties to a contract are free to stipulate conditions not contrary to law, morals or public policy and afterwards declare that the other party may disregard such conditions and may at once seek enforcement of the contract before the legal tribunals? The writer does not think this construction is warranted by the statutory provisions for only one reason but one which goes to the very root of the question. If a call is to be made as agreed, the provisions of sections 38 and 40 must be obeyed not because those were what the Legislature provides but because they, by agreement of the parties, were incorporated in the contract stipulations between them. And the corporation, when so bound to declare a call before collecting payment has no other alternative but follow the provisions of the above mentioned sections from which its very authority to act in such cases is derived.

Whether or not a call is indispensable when the parties failed to make an agreement in that regard will be considered later.

(4) *Actions Based On The Contract.*—It has already been mentioned that subscriptions to stock are contracts and being so, the terms thereof may be upon such as the parties may deem wise provided they are not contrary to law, morals or public policy. The parties therefore to a subscription contract may stipulate that payments for the stock should be paid immediately or when the corporation is organized or in fixed installments on specified dates. In these instances no call is at all necessary and the right of action accrues immediately after demand therefor or upon organization of the corporation or upon the arrival of the fixed dates respectively. This is elementary in our law of contracts; so it has been said by our Supreme Court: "no attempt is made in the Corporation Law to define the precise conditions under which an action may be maintained upon a

stock subscription as such conditions should be determined with reference to the rules governing contract liability in general * * *" (Velasco v. Poizat, 35 Phil., 805).

In the instance given above, the amounts which may be sued upon, *become due and payable independent of any act of the corporation.* If the subscriptions remain unpaid on the dates they mature, the corporation may bring an action for the collection thereof and if it ever does, it undoubtedly bases its suit upon the subscription contract. Again in the case of insolvency of the association, whether or not the subscriptions are to be payable on calls, they become payable on demand and are at once recoverable in an action instituted by the assignee or receiver appointed by the court without the necessity of a prior call whatever (Velasco v. Poizat, 37 Phil., 806-807; Lumanlan v. Cura, 32 O. G., 1457).

Only in these exceptional cases therefore—when by the very nature of the subscription contract the action to recover must be based thereon and in the case of the company's bankruptcy—where it ought to be that the provisions of sections 38 to 48 of Act 1459 should not be permitted to obstruct or impede the action to recover unpaid subscriptions since as we have already noted, the general rule is that the action to recover thereon must be preceded by an obedience to the above mentioned sections of our Corporation Law. It is for this reason why the writer of this work is of the firm but honest opinion that the sweeping and all-embracing statement of our Supreme Court which reads: "* * * where it appears * * * that a matured stock subscription is unpaid, none of the provisions contained in sections 38 to 48 inclusive of Act 1459 can be permitted to obstruct or impede the action to recover thereon * * *" (Velasco v. Poizat, supra) should have been qualified since, in view of the foregoing discussions, the same is true only as regards the exceptions to the general rule.

Notwithstanding what has been said above, a case is nevertheless liable to arise wherein great uncertainty exist as to whether an action to recover need or need not be preceded by a call. Such is the case when in the contract of subscription, no time for payment is fixed and which at the same time is complemented by an absence of provisions in the charter or by-law wherein the time of payment could be inferred. Then how and when should payment be made?

Regarding this "* * * some courts hold that such a subscription is equivalent to an agreement to pay for stock at such

times and in such amounts as the board of directors may decide and that the liability of the subscriber is conditional and does not become absolute until call by the directors. Others take the view, that such subscription is due immediately and hence that no call is necessary * * * on the theory that such a subscription is payable on demand and that the bringing of the suit is in itself a sufficient demand * * *" (2 Fletcher, sec. 669, p. 1513).

Indeed if we would follow the laws declaratory of the principles of contracts in general, the obligation to pay in such a case may be demanded immediately (Floriano v. Delgado, 11 Phil., 154) inasmuch as the fulfillment thereof could never be said to be dependent "upon a future or uncertain event or upon a past event unknown to the parties in interest." (Art. 1113, C. C.) This conclusion will be more strengthened if we consider the fact that when one subscribes to the capital stock of a corporation under the condition that the subscription price of said stock will be paid as called in by the directors of the corporation, such condition is inserted precisely for the benefit of the stockholder; but if when subscribing, he asks nothing and the corporation grants him nothing, it would be the height of absurdity to contend that after such waiver, he is still entitled to the benefit of paying only upon calls.

But even in this rather unique case we are here considering, the stockholder's lot is not so and as it seems for the reason that the corporation may not choose to collect the total amount promised in the subscription but only a percentage thereof as it may deem necessary by the declaration of a call. Undoubtedly the company can do this in view of the language of section 38 which reads:

> "the board of directors * * * may at any time declare due and payable to the corporation unpaid subscriptions to the capital stock and may collect the same with interest accrued thereon or such percentage of said unpaid subscription as it may deem necessary."

Moreover, as we have already said, the above mentioned provisions have been agreed to by all subscribers upon their membership in the association such that the obligation to pay on calls exist prior to, and is independent of, the declaration of any particular call. And when the directors choose to do this, since the authority to levy assessments is derived from statute, the stockholder can then demand that the requisites (we have already noted) essential for the validity of the exercise of such

power be followed. The same can be said if the corporation elects to enforce the payment of such an assessment through the public sale of the stocks for as we also have already noted, such mode of enforcement can be valid only after strict compliance with the statutory provisions.

However, should the directors choose to bring an action to collect the full amount of the subscription, basing the same not on any particular call but on the subscription contract, the obligation assumed thereon being immediately demandable, it would be wise to precede such action by a previous demand for payment upon the stockholder in order to place him in default. The obligation is demandable immediately, not payable immediately says the law (Art. 1113, C. C.) such that unless the obligee makes the demand, the cause of action in his favor could not be said to have accrued. This conclusion is also supported by the weight of authority. (13 C. J. 742, p. 660-661) But if the action brought be for the collection of a particular assessment, such a demand would no longer seem necessary inasmuch as the notice of call served on the subscriber sufficiently apprises him of the company's demand.

Therefore, in the unique case we have here at hand, the subscription may be collected through calls and forfeiture in accordance with sections 38 to 48 inclusive or, in accordance with section 49, by action in a court of proper jurisdiction whether for the full amount promised in the contract or only a part thereof called in by the directors and in any case, at their option.

D. Restatement of the Problem

Having viewed the pertinent provisions of our law regarding the corporate remedies for the enforcement of stock subscriptions in the light of the principles and doctrines of the jurisdiction wherein said law had its origin, it becomes necessary for us, at this moment, in order not to harbor any uncertainties in the problems we have attempted to solve, and in order to acquaint ourselves more with the same, to restate some features of our own Corporation Law wherein due to gaps in its provisions, doubts of their concept and nature, have caused many a brilliant kind to declare unintended statements of their true meaning. Our law, from sections 38 to 48 inclusive, has provided for the form, manner and procedure of a particular remedy for the enforcement of stock subscriptions; but in the same chapter, in section 49, it expressly provided that

nothing in it shall prevent the corporation from collecting any amount due on an unpaid subscription by action in a court of proper jurisdiction. This form of phraseology and choice of expression has given rise to controversies a few of which are still unauthoritatively settled in the jurisprudence of this country.

The first of these unsettled problems whether the corporate remedies provided for in Act 1459 are in the nature of cumulative or exclusive remedies; second, whether the phrase; "nothing in this Act * * *" in section 49 really meant what it says that is, literally—such that nothing provided in the procedure for the use of the first remedy provided for in the preceding sections would hinder or be an obstacle to the utilization of the second; third, if the above quoted phrase of section 49 is not to be construed literally, how far or how much of the other provisions of the Act should obedience be rendered by the corporation in order to avail itself of the remedy by action; and fourth, if the same quoted phrase really meant to convey its ordinary literal meaning, only in what cases could it be legally given effect or could it be given such effect in all cases.

E. Conclusions and Recommendation

The above recited problems have been answered by the foregoing expositions which have given due regard not only to the dicta, principles and doctrines enunciated by the courts but also to the theories and opinions of men, who had conscientiously devoted their lives to the hazardous investigation and examination of what has been said judicially or extra-judicially on the subject of these problems. To summarize the conclusions arrived at, we have: First, that the remedy by forfeiture (effected by public sale of the stocks) unless the delinquent stocks have been bid in by the corporation at the public sale, is merely cumulative—that is, only in addition to the remedy by action—and will not therefore bar any judicial proceeding which the corporation may choose to institute in order to enforce any further liability arising from the stock subscription; second, even if the stocks are to be paid for only upon calls, the corporation may avail itself of a judicial action as an independent and separate remedy; third, with few exceptions, a call is as a rule necessary before an action for recovery of unpaid subscriptions can be maintained before the legal tribunals; and fourth, the

only exceptions to this last rule are (1) When by the terms of the subscription, or the charter or a valid by-law. the stocks, either expressly or impliedly are to be payable on demand, in fixed installments on specified dates, or upon organization of the corporation and (2) when the corporation has been judicially declared insolvent.

In deducing the above conclusions, incidentally, we have also arrived at the following:

(1) That though the remedy by forfeiture can be exercised in either of two ways, in this jurisdiction, it can be done only by public sale of the delinquent stocks for the account of the defaulting stockholder in the absence of agreement to the contrary;

(2) That forfeiture can be declared only by the board of directors duly convened;

(3) That in the forfeiture sale, the delinquent stocks can be bid in by the corporation but it cannot do so for less than the entire amount due;

(4) That in case the stocks have been awarded to a third person in the public sale and the amount realized is less than the total amount due, the delinquent stockholder is answerable to the corporation for the balance.

(5) That there are two kinds of actions for the collection of unpaid subscriptions; the first is based on calls and the second is based on the contract of subscription, charter or by-law; and

(6) That in case no time or mode of payment is fixed in the subscription contract, charter or by-law, the stocks are payable on demand; and

(7) That in this last case, after a previous demand, the corporation may enforce payment by judicial action although it may also collect by the declaration of calls and enforcement of the same by public sale of the stocks.

The whole difficulty of the writer before he could maintain any of the above rules, as warranted by the legal provisions, is due to the faulty wording of Section 49 of our Corporation Law. To clarify its intent and to remove all doubts as to its real meaning, the writer of this work, humbly recommends the amendment of said section to read as follows:

Section 49—"Unless the stocks are payable on calls, nothing herein contained shall prevent the directors from collecting by action in any court of proper jurisdiction, the amount due on any unpaid subscription together with interest and cost and expenses incurred; Provided, nevertheless, that if upon the collection of any particular call or calls by public sale of the stocks, the proceeds realized therein be insufficient to cover the entire amount due, the corporation may collect the balance as above provided."