

The case relied upon by the complainant's counsel in 1 *Caine's Rep.*, 381, *The Union Turnpike Company vs. Jenkins*, is entirely unlike this case in some of its most essential features. In that case, which was an action of assumpsit brought by the company against the defendant, to recover certain payments called for pursuant to the act of incorporation, the court decided that the payment of ten dollars on each share, required to be paid at the time of subscribing, was essential to the consummation of the contract; and that without such payment the court was at a loss to see any consideration for the promise to pay the remaining instalments. The subscription and payment were both regarded as necessary to perfect the contract. That unless the concurrence of both could be shown, the defendant could not be regarded as entitled to the rights of a stockholder. And the Chief Justice remarked, that if the speculation had been an advantageous one, and before the first call of the president and directors the stock had risen considerably in value, they could have refused to consider the defendant as a stockholder, on account of his not having made the payment required by the act, at the time of subscribing. This want of mutuality, therefore, was the ground upon which the defendant was held not responsible for the payments called in. This constituted the want of consideration necessary to maintain the action.

But this case is not at all like that. Here, the Elysville Company have received a certificate for the stock subscribed by its president, and have executed a deed to the defendant, of property, as the equivalent for, and in payment of, the stock. The contract, therefore, is no longer executory, but is an executed contract on both sides; and the attempt here is, not to resist the performance of an executory agreement, upon the ground that some act was not done, essential to give it legal validity; but to cancel and abrogate a contract carried into full and complete execution by both parties. Suppose in the case referred to, the defendant had paid up the instalments as they were called in, and had received a certificate for the stock; would it have been possible for him, or the company, thereafter to repu-