

# Corporations: Agreement to Purchase Stock: Subscription or Executory Contract

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or only a pretended one. See, *General Motors Acceptance Corp'n. v. Ferguson*, 191 N.E. 834 (Ohio App., 1934); *Tripp v. Shawmutt Bank*, 263 Mass. 505, 161 N.E. 904 (1928). If a certificate of title had been issued to the original vendee, it is not likely that the dealer in the instant case would have tried to sell the car to a second purchaser. The assignee of the first contract ought to find out whether the certificate of title has been issued. If the purported vendee has a certificate of title, and if the assignee has filed the contract in the proper district, he ought to be protected against any subsequent claimant to the automobile, even against a subsequent claimant like the second vendee or like the second assignee as in the instant case, conceding that what is not likely to occur does happen, that another certificate of title is issued to a second purchaser because of the connivance or mistake on the part of the administrative officials in the office of the secretary of state. If the assignee takes an assignment when no certificate of title has been issued he has failed to protect himself against a second sale which no administrative official can detect. It is submitted too, that filing in the proper district ought not be enough to protect this assignee against a second purchaser or an encumbrancer through the second purchaser where the automobile is a new car. It is easy to understand why a second purchaser might not examine the records to find if there are encumbrances on new automobiles in the hands of a dealer. As between the first assignee and the second purchaser in this situation the first assignee has made the first, and it is suggested, the more important mistake.

JOHN C. QUINN.

CORPORATIONS—AGREEMENT TO PURCHASE STOCK—SUBSCRIPTION OR EXECUTORY CONTRACT.—The claimant was the employe of the insolvent corporation. He seeks to recover from the receivers thereof money paid under a contract with the corporation whereby he subscribed for \$20,000 of capital stock in the corporation and agreed to pay for the same in installments. When the receivers for the corporation were appointed, claimant had paid in \$17,600 under the contract. The corporation needed no funds when the subscription was taken; the stock was issued to the corporation's agent in one block and he in turn transferred the required number of shares to the employes when their subscriptions were fully paid. The directors never specifically authorized the issuance of the stock to the agent; and the balance sheet did not reflect such issuance. *Held*, the claimant was a stockholder and not a creditor of the corporation and could not recover the payments made. *Hegarty v. American Commonwealths Power Corp.*, (Del., 1934) 174 Atl. 273.

A stockholder is one who appears on the books of the corporation as the owner of shares, and is, therefore, entitled to a voice in the management and burdened with the liabilities incident to that relation. See, *Ludden v. Bates*, 18 Ala. App. 652, 94 So. 239 (1922); *O'Brien v. Fulkerson*, 75 Mich. 554, 42 N.W. 979 (1889). A subscription for stock is to be distinguished from a contract to purchase stock from a corporation. *Walter A. Wood Harvester Co. v. Jefferson*, 57 Minn. 456, 59 N.W. 532 (1894); *Peninsula Leasing Company v. Cody*, 161 Mich. 604, 126 N.W. 1053 (1910); *Fletcher Cyclopedia Corporations*, (1933), Perm. Ed., §§ 1363-73. The distinction between the sale of corporate stock and a subscription thereto is that a subscriber has certain attributes in the way of rights, privileges, and liabilities, including title, that do not attach to a purchase. See, *Walter A. Wood Harvester Company v. Jefferson*, *supra*. The subscriber becomes, by virtue of the subscription and its acceptance, a stockholder with all the rights and subject to all the liabilities, common law and statutory, which

belong or attach to the stockholders. *Buller University v. Scoonover*, 114 Ind., 381, 16 N.E. 642, 5 Am. St. Rep. 627 (1888). But a contract for the sale of stock does not make the purchaser a subscriber or a stockholder until it is executed by delivery of the stock. See, *Palais Du Costume Company v. Beach*, 163 Mo. App. 499, 143 S.W. 852 (1912). Whether or not a particular contract is a subscription to or a sale of stock is to be determined by the intention of the parties and the terms of the agreement. *Lincoln Manufacturing Company v. Sheldon*, 441 Neb. 279, 62 N.W. 480 (1895); *Louisiana Oil Export Company v. Raskob*, 2 Harrington Rep. 564, 127 Atl. 713 (Del., 1925); *Mountain View Development Co. v. Burnett*, (Tenn., 1932), 46 S.W. (2nd) 809. It was contended, and successfully, in the instant case, that the claimant assumed the status of a stockholder by signing the subscription agreement. But it does not necessarily follow that if a corporation sells its stock the agreement under which the sale is made is a subscription agreement. *Crichfield-Loeffler Inc. v. Taverna*, (N.J. Sup. Ct. 1926), 132 Atl. 494. Nor does a subscription to the stock of a corporation in itself make the subscriber a shareholder. His rights and the conditions of his becoming a shareholder must be determined in each instance by the contract of subscription. *Kruse v. Hudson County Consumers Brewing Co.*, 79 N.J. Eq. 392, 82 Atl. 104 (1912). And it has been held that a partial payment contract for the sale of corporation stock is an executory contract for the sale and not a subscription for capital stock. See, *Stern v. Mayer*, 166 Minn. 346, 207 N.W. 737 (1926); *Boroseptic Chemical Company v. Nelson*, 53 S.D. 546, 221 N.W. 264 (1927). But see, *Lincott v. Northwest Union Shoe Co.*, 68 N.H. 260, 44 Atl. 392 (1902). Although the word "subscribe" or "subscriber" or "subscription" may be used it is not conclusive, though the fact that the contract refers to the transaction as a "subscription" will be considered. See, *Bates v. Great Western Telephone Company*, 134 Ill. 536, 25 N.E. 521 (1890); *First Caldwell Oil Company v. Hunt*, 100 N.J. Law 308, 127 Atl. 209 (1925).

The contract in this case refers to the employe-purchaser as the "subscriber" and the agreement was referred to throughout as the "subscription agreement." However, the device under which the stock was issued is significant since no subscriber received stock from the corporation's agent until payment therefor was made in full. A stock subscription unexecuted by payments and delivery of the certificate has been held to be an executory contract for sale. See, *Steele v. Singletary*, 120 S.C. 132, 110 S.E. 833 (1922); *Kappers v. Cast Stone Construction Company*, 184 Wis. 627, 200 N.W. 376 (1924). On the other hand a subscriber who has made payments on his subscription has been held to be a "stockholder" whether or not he received his stock certificate and his equities against the corporation, if he has any, have been said to be inferior to the rights of creditors who became such after the date of his subscription. See, *Gilder v. Eagleson*, 66 Col. 364, 181 Pac. 539 (1919). In view of the device above referred to, and likewise in view of the terms of the agreement, which provided that the employe, who left the corporation voluntarily before payments were completed, was entitled to receive the payments made, plus 6 per cent interest, and which provided also that the employe who was discharged before completing payments had the option of taking as many full shares of stock as his payments would "purchase" at the subscription price or of receiving payments made, plus interest, it does not appear that there was an intention to constitute the subscriber as a stockholder. In *Stern v. Mayer*, supra, it was said that in construing a contract for the taking of stock in a corporation, if the contract is such as to convey the present rights of a stockholder, it is a subscription in the strict sense, but if the contract indicates an intent that the title of the stock and the rights of a stock-

holder shall not pass until some future time, it is to be construed as an executory contract of purchase and sale.

Can the employe in the instant case be called a stockholder where it does not appear that he has been in a position to exercise any of the privileges of a stockholder? Here the agent to whom the board of directors authorized the issuance of shares which were to be ultimately transferred to the employe does not appear to have been treated as the agent of the employe but rather as the agent of the corporation. Exercise of corporate privileges by the agent could no be construed as the act of this employe. It is a universally accepted proposition that when stockholders are indebted to a corporation on account of their stock and the corporation becomes insolvent, they may be compelled to pay the amount due for the benefit of its creditors insofar as such judgment may be necessary to satisfy their claims. See, *Fletcher Cyclopedia Corporation*, (1933), Perm. Ed., §§ 6051-6059. But it does not seem in the instant case that the employe has received any of the rights of a stockholder upon which might be predicated his liability to respond for unpaid stock subscriptions which might be called in by the receiver for the benefit of creditors of the corporation. Also, it is at least open to doubt that the agent of the corporation could still legally transfer the stock to the "subscriber" where the corporation is insolvent. That is to say, the corporation is no longer in a position to perform. See in this regard *Stern v. Mayer*, supra. In view of these considerations a decision of the Court declaring that the employe-purchaser had assumed the status of a stockholder appears somewhat arbitrary.

CLIFFORD A. RANDALL.

CRIMINAL LAW—HOMICIDE—COMMON LAW LIMITATION ABOLISHED.—The deceased was shot in July, 1928, and died July, 1932. The defendant was subsequently indicted and found guilty of murder in the first degree. The defense was that an indictment for murder will not lie when the death occurs more than a year and a day after the assault. On appeal from the conviction, *Held*, affirmed. The common law limitation that death must follow within a year and a day of the wound is not effective in New York. *People v. Brengard*, 265 N.Y. 100, 191 N.E. 850 (1934).

At common law the death must have occurred within a year and a day after the infliction of the fatal injury. 1 Wharton, Criminal Law, (12th Ed. 1932), sec. 437. If the death happened after that time it was conclusively presumed that it occurred from some other cause. *State v. Orrell*, 12 N.C. 139, 17 Am. Dec. 563 (1826). The common law requirement has been adopted in some states and disregarded in others but the numerical weight of authority clearly follows the common law rule. Note, 20 A.L.R. 1006. In Indiana the court reasons that the legislature, by its silence on the subject of time between the inflicting of the wound and the death, intended that the common law rule should govern. *State v. Dailey, et al.*, 191 Ind. 678, 134 N.E. 481, 20 A.L.R. 1004 (1922). Some states have incorporated the common law rule into the statutes. Montana is one of these. Rev. Code of Mont., (1921) sec. 10961.

In the instant case the court goes back to the intention of the commissioners who revised the Penal Code (Consol. Laws, c. 40) for a basis on which to make its holding. The commissioners, in a preliminary note, expressed the desire to render each definition complete in itself and mentioned the uncertainties which result from following the definitions and conflicting authorities of the common law. *People v. Brengard*, 191 N.E. 850, 852. The court, relying on this language