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POST-INCORPORATION SUBSCRIPTIONS IN PENNSYLVANIA

We are perhaps best acquainted with the transaction involving subscription to shares of an already existing corporation. In many instances, however, subscriptions are solicited prior to incorporation in order to provide funds for organization. Within the scope of these two situations—and in particular of the former situation—the problem presented for solution is whether the subscription agreement should be interpreted as a contract to make the subscriber a shareholder at a future day or whether he becomes a shareholder as soon as he subscribes. The chief object of this note is to consider how the Pennsylvania courts have dealt with this problem in interpreting subscription contracts which have failed to stipulate clearly the rights and legal relationships of the parties.

Before discussing the point at which a subscriber becomes vested with the status of "shareholdership" it is necessary to understand various terms with which we will be dealing.

"Shareholdership" is a status consisting of certain legal relations between a person and a corporation and symbolized by the term "corporate share". A "share" implies a number of separable legal relations of which the following are the legal incidents: (1) right to vote; (2) right to participate in "capital distributions"; (3) right to participate in "net earnings" or "surplus"; (4) right to examine the corporate books; (5) right to maintain a representative suit; (6) duty to pay "calls" or "assessments"; (7) responsibility to corporate creditors to the extent of "capital contributions"; (8) further responsibility to corporate creditors where imposed by statute.¹

The terms "creation of shares" and "issuance of shares" have been used interchangeably by courts with consequent confusion as to their particular significance. A more precise meaning of these terms should be formulated. The expression "creation of shares" is frequently used to describe an increase in the corporation's authorized capital stock but this increase, in fact, merely results in the corporation's having an additional *power* to create shares. The shares themselves are "held in the treasury" and require a further act by the corporation to place them on the market. As stated by the Tentative Draft of the Restatement of the Law of Business Associations: "Shares are units of *existing* legal relations".² Hence the "creation of shares" should *bring into existence* new units of legal relations, between the corporation and the persons who have subscribed to the shares. The term "creation of shares" is most accurately used, therefore, with reference to a "transaction purporting to result in a change in the number or character of shares outstanding".^{2a} The term "issuance of shares" imports a

¹Frey, *Post-incorporation Subscriptions and Other Contracts to Create Shares at a Future Time*, (1929) 77 U. OF PA. L. R. 750-83, 754.

²Tentative Draft No. 2, (1929) Chap. 3, Topic 4—Special Note at p. 9.

^{2a}*Ibid.*

transfer by the corporation of something already in existence and, therefore, should be used only "in connection with 'share certificates', the tangible evidence of 'shares' ".^{2b} The Pennsylvania courts³ and the Pennsylvania Business Corporation Law⁴ have adopted this distinction.

The problem of when the subscriber to stock becomes a shareholder is easily solved by a carefully drafted written contract in which the intention of the parties is set out. Or a statute might establish a convenient rule that only those persons whose names appear on the register of shareholders shall be deemed actual shareholders, as distinguished from those persons who have agreed to become shareholders. Unfortunately, the criterion for determining the status of a shareholder is not so simple in the absence of a statute establishing such rules and where the written contract fails to indicate the intent of the parties in this respect.

All that is necessary to constitute a person a shareholder under the common law view is a manifested present intention on his part and on the part of the company that the relation of shareholder and corporation exist between them. When that intention exists, the relationship is at once established without further formalities.⁵

According to the Pennsylvania cases we must first distinguish between a contract of membership in an existing corporation and a contract to subscribe for shares at a future day in an existing corporation. The case of *Bole v. Fulton* points out that the contract among the members of a corporation already in existence "gives the contracting parties the status of shareholders; it invests them with the continuing rights of shareholders, together with the corresponding liabilities; and the performance of this contract will always be specifically enforced, though a failure to perform rarely presents a ground for an action for damages".⁶ On the other hand, a contract to subscribe for shares at a future day is an executory contract which must be executed in some manner in order to give the subscriber the status of a shareholder. The Pennsylvania court at this point distinguishes between a contract to become a shareholder in a corporation not yet created (a pre-incorporation subscription) and a contract to purchase shares in an

^{2b}*ibid.*

³*Cooke v. Marshall*, 191 Pa. 315, 43 A. 314 (1899); *see*, *Yetter v. Del. R. R. Co.*, 206 Pa. 485, 489 (1903); *Grange Nat. Bank v. Collman*, 306 Pa. 200, 203, 159 A. 26, 26 (1932).

⁴Act of May 5, 1933, P.L. 364, 16 PS 2852. The act defines shares as "units into which the shareholders' rights to participate in the control of a business corporation . . . are divided": section 2. "Every business corporation shall have power to create and issue one or more classes or kinds of shares . . .": section 601. The act thereby impliedly recognizes that the creation of shares brings into existence new units of legal relations. "Unless otherwise provided in its articles, a business corporation may issue shares, . . . without first offering them to shareholders of any class or classes": section 611. In order to offer shares to shareholders the shares must have been already created, thus the issuance of shares must mean that shares are in existence and thereafter "Every shareholder of record shall be entitled to a share certificate representing the shares owned by him": section 607D.

⁵*Machen on Corporations*, § 173.

⁶233 Pa. 609, 611, 82 A. 947 (1912).

already existing corporation (a post-incorporation subscription).

In the former contract, since there is no corporation in existence with which the subscriber may contract, he becomes a member of the corporation, entitled to all the rights and liabilities of membership, as soon as incorporation takes place.⁷ The theory is that since the corporation was created on the strength of the subscriptions, the subscriber becomes a shareholder on incorporation subject to an absolute duty to pay for the shares subscribed as well as other concomitant liabilities of a shareholder.⁸ The early Pennsylvania cases held that no condition in a pre-incorporation subscription would be recognized.⁹

In the latter contract—a post-incorporation subscription—a completely organized corporation has "created" new shares. The subscription itself, however, does not make the subscriber a shareholder; it is a mere contract by the corporation to sell shares to the subscriber. That is, the subscription is but the contract to purchase and payment for the shares is all that is required to execute the contract and to transform the subscriber into a shareholder, whether or not a certificate has been issued.¹⁰ The Pennsylvania courts have consistently adopted this requirement of payment for shares as the solution to the problem of the time at which a post-incorporation subscriber assumes the status of shareholder. In one case part payment was deemed sufficient to vest the subscriber with this new

⁷Muncy Traction Engine Co. v. Green, 143 Pa. 269, 13 A. 747 (1888); Auburn Bolt & Nut Works v. Shultz, 143 Pa. 256, 22 A. 904 (1891); Hawthorn Bottle Co. v. Cribbs, 51 Pa. Super. 555 (1912); Garrett v. Dillsburg & M. R. Co., 78 Pa. 465, 468 (1875); Schmitt, Rec. v. Kulamur, 267 Pa. 1, 6, 110 A. 169, 171 (1920); South West Pennsylvania Fair Assoc. v. Greer, 11 Pa. Super. 103, 107 (1899).

⁸Garrett v. Dillsburg & M. R. Co., 78 Pa. 465 (1875); Jeannette Bottle Works v. J. P. Schall, 13 Pa. Super. 96 (1906); Commonwealth v. Mfrs. Mutual Fire Insurance Co., 11 Phila. 550 (1875). The cases base this theory on the doctrine of estoppel.

⁹Pittsburgh & S. R. Co. v. Biggar, 34 Pa. 455 (1859); Bedford R. Co. v. Bowser, 48 Pa. 34 (1864); Caley v. Phila. & C.C.R. Co., 80 Pa. 363 (1876); Boyd v. Peach Bottom Ry. Co., 90 Pa. 169 (1879); see, Pittsburgh & C. R. Co. v. Stewart, 41 Pa. 54, 58 (1861); McCarty v. The Selinsgrove & N.B.R. Co., 87 Pa. 332, 336 (1878). The court in Jeannette Bottle Works v. Schall, 13 Pa. Super. 96, 102 (1906), refuses to follow the railroad cases and holds that a subscription agreement "may embrace any condition which does not involve a violation of law or of the rights of future creditors, and by a condition thus appearing upon the face of the agreement, all the associates and the corporation, when formed, are bound."

The courts have recognized conditional *post-incorporation* subscriptions. Phila. & N.C.R. Co. v. Hickman, 28 Pa. 318 (1857); Pittsburgh & C. R. Co. v. Stewart, 41 Pa. 54 (1861); Hanover Junction & S. R. Co. v. Haldeman, 82 Pa. 36 (1876); see, Caley v. Phila. & C.C.R. Co., 80 Pa. 363, 368 (1876); McCarty v. The Selinsgrove & N.B.R. Co., 87 Pa. 332, 336 (1878); Jeannette Bottle Works v. Schall, 13 Pa. Super. 96, 102 (1906).

¹⁰Bole v. Fulton, 233 Pa. 609, 82 A. 947 (1912). The reason for this rule is found in the explanation that "if by a mere subscription for new stock the subscriber becomes a stockholder, he at once becomes clothed with all the rights of a stockholder, and without the payment of a dollar he would be at liberty to vote his stock, and entitled to claim dividends upon it. Hence, the policy of a corporation might be molded or controlled by mere subscribers, who have paid nothing upon their subscriptions to the prejudice or loss of the full-paid shareholders, whose money, contributed in the beginning, had actually developed the enterprise." Baltimore City Pass. Ry. Co. v. Hambleton, 77 Md. 341, 26 A. 279, 280 (1893).

status;¹¹ in other cases, full payment was required.¹²

Should payment for the shares subscribed be essential to vest in the subscriber the rights of a shareholder? The answer to this question is to be found in the Pennsylvania Business Corporations Law, which confers the status of "shareholder" on a subscriber to shares¹³ and requires full payment only as a condition precedent to the issuance of a certificate.¹⁴ In the face of this statute, the Pennsylvania courts have continued to follow the rule of *Bole v. Fulton*. Moreover, the authorities generally agree that payment is not a prerequisite to assuming the status of shareholdership.¹⁵ The early Pennsylvania case of *Curry v. Scott* held as to subscribers after incorporation, "if one has not paid his subscription in full he is a debtor for so much as remains unpaid, but he is none the less a shareholder".¹⁶ In *Greer v. Chartiers Railway Co.*,¹⁷ Greer was active in soliciting subscriptions for the company and entered his own name in the subscription book. After a dispute with the company over payment for his services, Greer erased his name from the book. The court, however, permitted the company to collect for the shares originally subscribed for on the fundamental contract principle that the company made an offer to sell shares to whomsoever should agree to buy them by entering his name in the subscription book; and since Greer was acting as agent to solicit shares and had subscribed for shares in

¹¹In *Bell's Appeal*, 115 Pa. 88, 8 A. 177 (1877) as to a *pre*-incorporation subscription the court refused to permit the subscriber to disaffirm his contract once he had paid for one share and transferred others since he had thereby recognized and affirmed his contract of subscription. To the same effect as to *post*-incorporation subscriptions: *Phila. and Gulf Steamship Co. v. Clark*, 59 Pa. Super. 415 (1915); *Franklin National Bank v. Kennerly Coal & Coke Co.*, 300 Pa. 479, 150 A. 902 (1930).

¹²*Bender v. Wiggins*, 323 Pa. 182, 185 A. 730 (1936); *Schwartz v. Mfrs.' Casualty Insurance Co.*, 335 Pa. 130, 6 A.(2d) 299 (1939). The lower court in *Bender v. Wiggins*, 23 Pa. D. & C. 646, 647 (1935) distinguishes *Phila. and Gulf Steamship Co. v. Clark*, *supra* note 11, on the ground that "Apparently in that case, defendant paid \$900 on account of his total subscription. In the case before us, . . . he paid in full for the stock issued to him and paid nothing on account of the unissued stock." The court therefore treats the subscription as divisible and follows *Bole v. Fulton* in denying the corporation recovery on the shares not yet paid for.

¹³Act of May 5, 1933, P.L. 364, Art. VI, 15 PS 2852. Section 604: "Unless otherwise provided in the subscription agreement, subscriptions for shares, whether made before or after the organization of a corporation, shall be paid in full at such time, or in such installments and at such times, as shall be determined by the board of directors. . . . If a shareholder be indebted to a business corporation on account of unpaid subscriptions for shares, the corporation shall have a lien on shares for such indebtedness." Section 605: "When any shareholder fails to pay any call upon his shares properly made by the directors, at a time when such payment is due, the directors may proceed to collect the amount due in the same manner as any debt due the corporation. . . ."

¹⁴Act of May 5, 1933, P.L. 364, § 606(A): "Every shareholder of record shall be entitled to a share certificate representing the shares owned by him, but a share certificate shall not be issued by a corporation to any shareholder until the shares represented thereby have been fully paid for."

¹⁵"It goes without saying that, in general, payment for the shares subscribed for is not necessary in order that the subscriber may become a shareholder. Indeed, frequently in England and sometimes in the United States, corporations carry on business for years although only a fraction of the nominal value of their outstanding shares has been paid in. . . . It is difficult to say that as an unbending rule of law, new shares created by way of increase of capital" (as was the situation in the Pennsylvania cases) "can never be issued until paid for". 1 *Machen on Corporations* (1908) § 174.

¹⁶54 Pa. 270, 276 (1867).

¹⁷96 Pa. 391 (1880).

the book, he declared his acceptance and was bound to pay for the shares subscribed for.

In regard to the necessity for issuance of a share certificate, Frey points out that this can be answered only by determining the importance of such certificate in the commercial world in which it is to be used.^{17a} The importance of the possession of a share certificate has been increased by the provisions of section 10 of the Uniform Stock Transfer Act as adopted in Pennsylvania in 1911.¹⁸ The certificate is "merely the written evidence of the stockholder's rights as such" and its nonissuance does not deprive him of any of his rights or relieve him of any of his liabilities.¹⁹

Like many corporation problems, the question of whether one who is designated in the contract as a "subscriber" was intended to become a shareholder immediately or merely contracts to become a shareholder at a future date, cannot be confined to convenient rules. Each case presents a different situation, the solution of which is dependent on the terms of the contract or conduct of the parties, interpreted in the light of all the circumstances.²⁰ One court has stated: "Whether the instrument indicates an intention to become a stockholder prior to the party thereto fully performing his contract is the important element".²¹

As noted previously, the Pennsylvania courts, when confronted with an action by the corporation to obtain the contract price of the shares, have characterized the transaction as a "subscription" or as a "purchase and sale", depending on the facts of the particular case.²² The intent of the parties may be more accurately ascertained, however, by looking at the legal relations between the

^{17a}"In the case of a small, closed corporation, possession of a share certificate may be of relatively slight importance to the other party once he has acquired the shareholding contracted for. But where the transaction involves a large corporation whose shares are listed on a recognized exchange and are actively dealt in, the commercial correlation between a share certificate and the shares it evidences may be so great that without a certificate the other party would be seriously handicapped in the enjoyment of that which he sought by the contract, even though technically he had acquired the contemplated shareholding. Under these latter circumstances the courts might well deem the corporation's performance as not substantially complete until it had tendered to the other party a share certificate or an instrument which those dealing therein would regard as its equivalent." Frey, *supra* note 1, at 771.

¹⁸Act of May 5, 1911, P.L. 126, § 10, 15 PS 310: "An attempted transfer of title to a certificate or to the shares represented thereby without delivery of the certificate shall have the effect of a promise to transfer, and the obligation, if any, imposed by such promise shall be determined by the law governing the formation and performance of contracts."

¹⁹*Keystone Wrapping Mach. Co. v. Bromeyer*, 42 Pa. Super. 384 (1910); *FLETCHER, ENCYCLOPEDIA OF CORPORATIONS* (1931) § 5094.

²⁰"What the rights are of one who subscribes to capital stock must, in each instance, be determined by the contract between him and the company; and the words 'subscriber to capital stock' cannot be held to have a fixed, definite and unchangeable meaning. In one case by the terms of the contract the so-called 'subscriber' may have immediately become a stockholder; in another case he might not become a stockholder until he paid certain sums of money; and so through all the variations that contractual relations are subject to as regulated by their terms." *Kruse v. Hudson County Consumers' Brewing Co.*, 79 N. J. Eq. 392 (1911).

²¹*Stern v. Mayer*, 166 Minn. 346, 207 N.W. 737 (1926).

²²*Bole v. Fulton*, 233 Pa. 609 (1912); *Schwartz v. Mfrs. Casualty Insurance Co.*, 335 Pa. 130 (1939); *Phila. and Gulf Steamship Co. v. Clark*, 59 Pa. Super. 415 (1915); *see, McDowell v. Lindsay*, 213 Pa. 591, 593, 63 A. 130, 131 (1906).

parties at the time for performance of the contract. Frey in his article "Post-Incorporation Subscriptions and Other Contracts to Create Shares at a Future Time" raises the following three questions pursuant to this inquiry:²³

First, "When the date to perform the contract arrives does the party automatically become the holder of the shares contracted for, or is some further act, either on his part or on the part of the corporation or both, a prerequisite to the existence of such shareholdership?" As was stated *supra*, a carefully drawn written contract will clearly define this relationship. In the absence of this, we might proceed on the theory that the subscription contract is a continuing consent on the part of the subscriber to become a shareholder which is automatically accepted by the corporation on the date for performance of the contract.²⁴

Second, "If the status of a shareholder does not automatically vest at the date for performance of the contract, what further acts by the corporation are required in consummating the contract?" Is sending the subscriber notice of a shareholder's meeting or entering his name on the shareholder book sufficient, or is tender of a share certificate essential? The ultimate issue, however, is solely what constitutes performance of the agreement itself. Where no specific intention is manifest, Frey feels the determination of this issue depends upon "the customs of the particular economic 'institution' involved".²⁵

Third, "Are the promises of the parties independent or mutually dependent?"²⁶ That is, where the corporation promises to deliver the share certificate and the other party promises to pay the price on an agreed date, under what circumstances may the corporation collect the price without first tendering the certificate and, conversely, when does the other party have the right to the certificate without tendering the price? It is acknowledged by the Pennsylvania courts²⁷ and by the text-writers²⁸ that tender of a certificate is not essential to

²³Frey, *supra* note 1, at 765.

²⁴The Pennsylvania cases have adopted this theory: *Garrett v. Phila. Lawn Mower Co.*, 39 Pa. Super. 78 (1909). See also cases in note 7, *supra*. *Greer v. Chartiers Ry. Co.*, 96 Pa. 391 (1880) adopted a similar contract principle in stating at p. 394, "The Chartiers Railway Company made a continuing offer which became an agreement with each acceptant for the number of shares for which he subscribed." The cases have also held that until the articles of incorporation are filed with the Secretary of Commonwealth the subscriber may withdraw or revoke his subscription on the ground that the subscription is not a contract but a mere expression of the subscriber's intention to subscribe: *Strasburg R. Co. v. Echnacht*, 21 Pa. 220 (1853); *Donaldson v. Rollman*, 23 Pa. Dist. 802 (1913); *see*, *Phipps v. Jones*, 20 Pa. 260, 264 (1853). Other cases hold that the subscription agreement is an absolute agreement from which the subscriber cannot withdraw: *Edinboro Academy v. Robinson*, 37 Pa. 210 (1860); *Shober v. Lancaster C. Park Asso.*, 68 Pa. 429 (1871); *Jeannette Bottle Works v. Schall*, 13 Pa. Super. 96 (1906); *Steamship Co. v. Murphy*, 6 Phila. 224 (1867). In *McClure v. People's Freight Ry. Co.*, 90 Pa. 271 (1879) the court held that if the subscription is to existing companies which are contemplating consolidation it cannot be withdrawn on the ground that the consolidated company is not in existence, if the only thing necessary is to file the agreement for consolidation with the proper officer, who has no discretion to reject it.

²⁵Frey, *supra* note 1, at 765.

²⁶*Ibid.*

²⁷*Keystone Wrapping Mach. Co. v. Bromeier*, 42 Pa. Super. 384 (1910); *Citizens Bank v. Rand*, 1 D. & C. 380 (1922).

²⁸FLETCHER, *ENCYCLOPEDIA OF CORPORATIONS* (1931), § 5094.

creating the status of shareholder. The court in *Bole v. Fulton* citing *Baltimore City Passenger Railway Co. v. Hambleton*, asserts: "Payment when called by the company, and when made by the subscriber constitutes him a shareholder, whether a certificate has been issued or not."²⁹ Having dispensed with this requirement, the court proceeds to solve its problems by conferring the status of "shareholder" on a subscriber who comes in prior to incorporation, and by treating the subscriber to new or additional shares of an existing corporation as merely a party to a contract—which becomes fully executed on payment. In this latter situation, the case of *Bender v. Wiggins*³⁰ takes the view that the right of the corporation to the contract price is dependent on the "issuance" or "tender" to the prospective member of the "balance of the stock". The court is following the proposition in *Bole v. Fulton* that as between the parties "mutual obligations resulted—an obligation on the part of the company to furnish the stock, and an obligation on the part of the defendant to pay for it when delivered. These, as we have seen, were to be concurrent acts, tender and payment . . ."³¹

Both Pennsylvania appellate courts have indicated in some cases that they realize the real issue raised by the problem: whether the right to payment by the subscriber is independent of or dependent on further "performance" by the corporation, granting that tender of a certificate is immaterial. The other decisions³² which have followed *Bole v. Fulton* failed to see this issue. They have looked upon the status of the subscriber, either as "shareholder" or as "party to a contract", as decisive of his duty to pay. The Pennsylvania courts which allow non-payment of the purchase price as a defense to a suit by the subscriber to enforce his rights as a shareholder, should do so not on the ground that he has not become a "shareholder", but because they regard payment as an essential element in the performance by the subscriber of his part of the bargain.³³

Where the written contract of subscription fails to state categorically under what circumstances the party will become a shareholder, it is necessary to interpret the intention of the parties from their conduct and from the other terms of the contract. The Tentative Draft of the Restatement of the Law of Business Associations³⁴ has formulated the following rules to aid in determining this intent. They are not to be regarded, however, as absolute indications of the intent

²⁹233 Pa. 609 at p. 613, 82 A. 947 at p. 948 (1912).

³⁰323 Pa. 182, 185 A. 730 (1936). The court, at p. 184, says, "Inasmuch as the promises were mutually dependent and the consideration for the payment of the second \$5,000 was to be the issuance of the balance of the stock, the burden was upon plaintiff to show such issuance, or a tender thereof, before a recovery of the remainder of the subscription price could be had." It is difficult to ascertain from the use of the word "tender" as an alternative to "issuance" whether "issuance of the balance of the stock" refers to the issuance of the tangible evidence of the shares—the certificate, or to the increase in the number of shares outstanding. (See previous discussion in this Note on "creation" and "issuance" of shares.)

³¹233 Pa. 609, 613, 82 A. 947, 948 (1912).

³²*Schwartz v. Mfrs. Casualty Insurance Co.*, 335 Pa. 130, 6 A.(2d): 299 (1939); *Phila. and Gulf Steamship Co. v. Clark*, 59 Pa. Super. 415 (1915).

³³*Frey*, *supra* note 1, at 771.

³⁴Tentative Draft No. 2, (1929) § 42.

of the parties.

The following facts tend to show that the agreement is a transaction for the *immediate* creation of shares:

- a) "a provision in the agreement at once according to the person one or more rights normally possessed only by shareholders, such as the right to vote, the right to participate in dividend payments, the right to attend shareholders' meetings, the right to receive reports, the right to examine the corporate books and records, the right of pre-emption, or other similar rights;³⁵
- b) "a provision in the agreement requiring an act by the corporation or an act by the corporation with the consent of the person though not required by the agreement, normally consistent only with the conclusion that the person is a shareholder, such as an act showing that payments made by the person prior to the time for the delivery of the share certificates are regarded as present additions to its capital."³⁶

The following facts tend to show that the agreement is a contract for the *future* creation of shares:

- a) "a provision in the agreement withholding from the person one or more of the rights normally possessed by shareholders;
- b) "a provision in the agreement at once according to the person one or more rights not normally possessed by shareholders, such as the right to interest to the time for the delivery of the share certificate on all payments made prior thereto;³⁷
- c) "a provision in the agreement requiring or permitting an act by the corporation, or an act by the corporation with the consent of the person though not required by the agreement, normally inconsistent with the conclusion that the person is a shareholder such as an act showing that payments made prior to the time for the delivery of the share certificate are not regarded as present additions to its capital, or a provision for forfeiture of advance payments

³⁵In *Sarbach v. Kansas Fiscal Agency Co.*, 86 Kan. 734, 122 Pac. 113 (1912) M gave a note in payment of a subscription to stock with the option of subsequently surrendering the stock and receiving his note back. The court held M became a stockholder, and not a mere optional subscriber, by giving a receipt for the stock "purchased by me" and a receipt for a dividend on one hundred shares of stock "owned by me".

³⁶In *Ross v. Bank of Gold Hill*, 20 Nev. 191, 19 Pac. 243 (1880) the bank received money, in part payment of shares subscribed to, as part of its capital and the subscribers did not object to this representation to third persons. The court held them to be stockholders, although one subscriber claimed he had the option to forfeit further payments and thus evade liability and another subscriber contended that the money paid was a loan to one of the officers of the bank.

³⁷In *Stern v. Mayer*, 166 Minn. 346, 207 N.W. 737 (1926) the court considered the following factors as indicia of an executory contract for the sale and purchase of stock rather than a subscription to stock: long-time payment terms, advance payments were to be forfeited if the applicant defaulted in payments, right to interest on payments made, the payments were not present additions to the capital stock of the corporation, and finally, the agreement was labeled "Application for Stock" instead of "Subscription for Stock."

made by the person as the exclusive remedy of the corporation should the person fail to pay any future installment as due."³⁸

It is interesting to observe how the Pennsylvania courts have recognized these elements as indicative of the intent of the parties; and how their ultimate decision, as to whether the agreement between corporation and subscriber fell within either one of the above categories, has coincided with their finding that these particular relationships were present or absent. The interesting part of this observation lies in the fact that the Pennsylvania courts are not content with so simple a solution—they have persisted in following the complicated set of rules set forth in *Bole v. Fulton*. Convenient as they may be as a guide for future litigation, a set of rules lacks the flexibility demanded by the complexness of this particular corporate problem. Applying the simple tests noted above, let us see how the Pennsylvania courts in the cases previously discussed could have reached the same conclusions.

In *Bole v. Fulton*³⁹ the court points out that no stock was ever issued in the name of the defendant and that his name did not appear on the stock books of the corporation, revealing an intent on the part of the corporation to deprive defendant of the rights of other shareholders concomitant with the presence of such elements. Within ten days after he subscribed, defendant notified the agent to whom he gave his subscription that he would not pay it—a clear intent on the part of the defendant not to assume the liabilities of membership in the corporation.

In *Bender v. Wiggins*⁴⁰ the subscriber had originally paid for only half of the shares he agreed to take and the corporation had "issued" only half the shares to him at that time. The court acknowledges that the intent of the parties does not appear from the agreement itself but from the parties' own construction of the agreement as evidenced by their course of dealing under it, and concludes that the right to payment by the corporation and the right of the subscriber to the shares are mutually dependent.

The plaintiff in *Schwartz v. Mfrs.' Casualty Insurance Co.*⁴¹ defaulted in payment of his subscriptions—after paying seven out of nine installments of one subscription and two out of nine installments of a second subscription. During the twenty-one years following the subscriptions, numerous share and cash dividends were declared by the company but none were paid to plaintiff, nor did plaintiff ever claim any dividends. The court concludes that these facts clearly indicate that plaintiff never became a shareholder. But the court reaches its de-

³⁸The stock-purchase certificates recently issued by the International Nickel Company contained this typical clause: "Failure to pay any installment within the time limits above fixed and as above set forth, shall operate as a forfeiture of all rights in respect of the subscription and the installments previously paid thereon. . . ." See Frey, *supra* note 1, at 758.

³⁹233 Pa. 609, 82 A. 947 (1912).

⁴⁰323 Pa. 182, 185 A. 730 (1936).

⁴¹335 Pa. 130, 6 A.(2d) 299 (1939).

cision only after reiterating at length the rules set forth in *Bole v. Fulton*.

In *Philadelphia and Gulf Steamship Co. v. Clark*⁴² the defendant had paid several installments on the shares and then defaulted although, as the court admits, he never repudiated nor attempted to rescind the agreement. The court speaks of the agreement as an executory contract which has been so far executed as to preclude the application of the already familiar rule in *Bole v. Fulton*. It is clear from the facts alone, however, that it was the defendant's intent to hold fast to his rights under the agreement, and the corporation by suing for the unpaid balance of the subscription indicated its desire to make him one of its members.

This discussion has sought to raise the following questions: Where a person has subscribed for shares in an already existing corporation, what is the legal relation between the person and the corporation on the date for performance of the contract—is he already a shareholder or is some further act required on the part of corporation or person to establish this relationship? Will not the intent of the parties be the ultimate test? Should we adopt a set of inflexible rules to determine this intent or do the facts of the particular case indicate more clearly the intent of the parties? To what extent are we aided in the determination of these problems by precise definitions of the terms involved?

PAUL J. ANDREWS

⁴²59 Pa. Super. 415 (1915).