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placed in a cul-de-sac generally base their decisions on reasoning similar to that in the *Hiatt* case—*i.e.*, that an abutting land owner has an easement in travel on the streets and highways in both directions, and there is damage to him different in kind and in degree from that suffered by the public generally.²¹ On the other hand, courts holding that no recovery can be had reason much as the court in *Wofford*—that a person has no right to traffic in front of his property, and that the damage to the abutting landowner is different only in degree from damage to the general public. It is suggested that none of these reasons is the real basis for any of the courts' decisions. The courts' decisions are in reality a result of a balancing of interest of the landowner, who has unquestionably been damaged, with that of society in having an efficient and safe means of transportation at the lowest possible cost. If the cases are viewed in this manner, the reason for the shift of the weight of authority is obvious. With the costs of building highways and other means of land transportation rising and with the shift in highway building to the limited-access road, the balance has swung to the side of the public interest.

DENNIS JAY WINNER

Investment Securities—Duty to Register Transfer

In *Kanton v. United States Plastics, Inc.*,¹ the plaintiff, a New York resident, was owner and holder of 10,920 shares of Class A stock of defendant, United States Plastics, Inc. ("Plastics"), a Florida corporation.² Plaintiff acquired the shares while employed by Plastics from one Scharps who, as president, "dominated and controlled" Plastics.³ On termination of his employment, plaintiff decided to sell the shares. The stock certificates carried a legend

²¹ Textual writers generally favor giving compensation in this situation. *E.g.*, 4 McQUILLAN, MUNICIPAL CORPORATIONS 358-59 (Moore, 2d ed. 1943).

¹ 248 F. Supp. 353 (D.N.J. 1965).

² Plaintiff actually paid \$27,500 for 10,000 Class B convertible shares, which he later converted on a share-for-share basis into an equal number of Class A shares. In addition, 920 shares were received through stock dividends in 1962 and 1964. *Id.* at 355.

³ *Id.* at 363. Scharps was held not to be an indispensable party to this suit, which concerns not Scharps' possible adverse claim to the shares, but solely the question of the duty of Plastics and the transfer agent to register transfer of the shares. *Id.* at 360.

reciting that the shares had been purchased for investment purposes and not with a view to distribution or resale.⁴ Plaintiff, however, secured from the Securities and Exchange Commission a "no-action letter" indicating that it was unlikely that the SEC would challenge sale of these shares as a violation of the Securities Act of 1933. On March 10, 1965, plaintiff submitted the stock certificates along with the no-action letter to Plastics' transfer agent, a New Jersey corporation and also a defendant. On March 24, 1965, the transfer agent, assertedly acting under Plastics' instructions, definitively refused to register transfer of the shares into the plaintiff's name and returned the certificates. On the same day plaintiff instituted a diversity suit seeking a mandatory injunction to compel the defendants to register transfer of the shares into plaintiff's name or, alternatively, damages measured as of March 24, 1965, the refusal date.⁶ The district court granted the injunction.

Initially, the court held that both defendants were properly parties to the New Jersey suit. Although the transfer agent, a New Jersey corporation, was no longer serving Plastics in that role, it was still amenable to suit for its alleged defaults while functioning as such. Plastics, as principal, was properly named since its activities in this case gave it sufficient minimum contacts with New Jersey to subject it to an in personam judgment. Avoiding any broad ruling that "the mere presence in . . . [New Jersey] of . . . [the transfer agent] without more, is sufficient to subject Plastics to personal jurisdiction,"⁷ the court pointed to four activities that laid a sufficient predicate for the assertion of jurisdiction over the Florida issuer: (1) the New Jersey transfer agent had long served Plastics in that capacity, (2) the refusal to register transfer, on Plastics' instructions, occurred in New Jersey, (3) Plastics had frequently communicated with its transfer agent in this matter, and (4) Plastics had agreed to indemnify the transfer agent for any

⁴ Actually, only one certificate carried the legend, *id.* at 356, but in view of the final disposition of the case, this fact is immaterial.

⁶ Since the court held, *id.* at 359, that "plaintiff's claim, realistically viewed, is not related to, and does not arise under, the Securities Acts," *i.e.*, the Securities Act of 1933, 48 Stat. 74, as amended, 15 U.S.C. §§ 77a-aa (1964), and the Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U.S.C. §§ 78a-hh (1964), jurisdiction rested only upon diversity and jurisdictional amount.

⁶ The requested damages were \$327,000, the alleged value of the shares on the refusal date, 248 F. Supp. at 356, but the court made no decision on this point since it granted an injunction, the primary relief sought.

⁷ *Id.* at 359.

loss entailed by its refusal to register transfer of these shares pursuant to *Plastics'* instructions.⁸ Considering the issuer's unusual degree of intervention into the otherwise routine work of its stock transfer agent—especially since the issuer's activities sought only to promote interests of its controlling shareholder—the court could properly find that the issuer's New Jersey contacts justified suing it there without offense to “traditional notions of fair play and substantial justice.”⁹

This holding is particularly significant in that it allows a shareholder seeking registration of transfer to obtain jurisdiction in at least two states when the issuer and transfer agent reside in different jurisdictions and when, as may often be the case, the shareholder wishes to join both issuer and transfer agent. In the present case, jurisdiction over the issuer was important, since the transfer agent's resignation made it impossible for it actually to register transfer (although not to pay damages if assessed in a proper case), but the issuer could be compelled to take the required action either by its own action or by instructions to its new transfer agent. In practice, the holding here means that in the frequent case where a issuer has or must maintain a New York City transfer agent,¹⁰ the shareholder may join both of them in a suit in federal court in the southern district of New York, at least if the issuer's activities are sufficiently substantial in relation to the problem as the court found them to be here. However, the court properly declined ruling on the difficult question whether maintenance of a transfer agent is alone sufficient to make the issuer amenable to suit in the transfer agent's jurisdiction.¹¹

⁸ *Id.* at 360.

⁹ *Id.* at 359.

¹⁰ For securities listed on the New York Stock Exchange it is customary for the issuer to maintain a transfer agent and a registrar in New York City. Additionally, it is common practice to maintain a “local” agent in the jurisdiction of incorporation. For example, Virginia Electric and Power Company, whose shares are listed on the New York Stock Exchange, has transfer agents in Richmond, New York City, and Boston.

¹¹ Relevant here is a common provision in corporation statutes that a foreign corporation is not deemed to transact business in a state merely because it maintains a stock transfer agent in the state, at least for purposes of determining any obligation to obtain from the Secretary of State a certificate of authority. See, *e.g.*, N.C. GEN. STAT. § 55-131(b)(4) (1965). A statute sometimes specifies that such an exemption “shall not be deemed to establish a standard for activities which may subject a foreign corporation to service of process . . .” *E.g.*, S.C. CODE ANN. § 12-23.1(c) (Supp. 1965).

Furthermore, the federal court made several significant determinations on the merits. Since suit was brought in New Jersey, where the Uniform Commercial Code is in effect, the court properly applied Code section 8-106,¹² which refers registration-of-transfer questions to the law of the issuer's incorporating state, in this case Florida. Finding no relevant law in Florida, where the Code had been enacted but had not taken effect at the time of decision,¹³ the court undertook "to prophesy . . . how the Florida courts would decide the issue if called upon to do so"¹⁴ and used both Code and pre-Code common-law rules to make this prediction. Thus, the Code is recognized as a significant source of general law, although as it becomes effective in most of the states, there will be fewer occasions to use it in this way, since it will be applied directly to problems.

The transfer agent had refused to register transfer of the shares on the ground that a stock certificate legend recited purchase for investment rather than for resale, although plaintiff submitted an SEC no-action letter along with the certificates. The court did not have to determine squarely the letter's legal impact. For one thing, as it stressed, federal criminal sanctions could not be invoked against the transfer agent for registering transfer,¹⁵ since the prohibitions of the federal securities acts relate only to the "sale"¹⁶ of securities, a term that is not defined to include registering transfer of a security after it has changed hands. Moreover, where the 1933 act has dealt with post-sale events, such as delivering a security after sale, it has specified them.¹⁷ Finally, as a policy matter, registering transfer does not usually involve the dangers that the securities acts seek to avert, for these dangers inhere in the actual sale rather than in the issuer's recognition of a transferee as record owner for purposes of, *e.g.*, notices of meetings, dividend payouts, and other phases of the established relationship between a corporation and its shareholders. A second reason why the court could avoid squarely determining the effect of the no-action letter is its fact-finding that

¹² UNIFORM COMMERCIAL CODE § 25-8-106 [hereinafter cited as UCC], N.C. GEN. STAT. § 25-8-106.

¹³ 248 F. Supp. at 361. The Code was apparently enacted after the court wrote its opinion.

¹⁴ *Ibid.*

¹⁵ *Id.* at 358-59.

¹⁶ 48 Stat. 74 (1933), as amended, 15 U.S.C. § 77b(3) (1964).

¹⁷ 48 Stat. 77 (1933), as amended, 15 U.S.C. § 77e(b)(2) (1964).

the real reason for refusing transfer was to accommodate the wishes of the seller, in this case Scharps.¹⁸ Presumably because of the increased value of the shares, the seller was seeking ways to rescind the sale and to accomplish this putative purpose had the issuer (which seller controlled) give instructions against registering transfer. Since this was obviously not an acceptable defense, the court's mandatory injunction implies at least this much: that a restriction on registering transfer of shares originally acquired for investment does not of itself suspend a duty under state law to register transfer into a purchaser's name, where an SEC no-action letter is furnished and no other tenable or good faith grounds to refuse registration are present. Such an implied holding accords to the SEC no-action letter the effect and weight normally assigned to it, without going so far as to make it conclusive on the courts.¹⁹ Nor would the Uniform Commercial Code seemingly dictate a contrary result. Code section 8-204²⁰ only states a negative rule that an admittedly lawful transfer restriction is ineffective unless conspicuously noted on the certificate; but it does not logically follow that every lawful restriction conspicuously noted must always be effective or enforced.²¹ Thus, for purposes of ascertaining a duty to register transfer (or a liability for refusal), the transfer itself would appear to be "rightful" within the meaning of Code section 8-401.²²

Finally, the court determined whether Scharps had stated an

¹⁸ 248 F. Supp. at 358.

¹⁹ See 3 LOSS, SECURITIES REGULATION 1844 n.533, 1896 n.15 (2d ed. 1961), indicating the extent to which the SEC honors no-action letters. Loss quotes a former SEC chairman as stating in print "there seems never to have been 'any case where the Commission has initiated any proceedings after a letter of this nature has been issued, provided that the letter requesting the "no-action" position has accurately presented all the facts.'" *Id.* at 1844 n.533. This does not conflict with the SEC's view, quoted in the instant case, that a no-action letter "is not binding in a court of law on the question of the liability of an issuer for permitting a sale of its securities without registration under the Securities Act of 1933, nor would such an opinion preclude an issuer from maintaining that a sale of its unregistered securities by a stockholder would be in violation of Section 5 of the Securities Act of 1933." 248 F. Supp. at 357.

²⁰ UCC § 8-204, N.C. GEN. STAT. § 25-8-204.

²¹ Stock transfer restrictions, including restrictions like the one in the present case, are analyzed in Folk, *Article Eight: Investment Securities*, 44 N.C.L. REV. 654, 680-82 (1966); a typical "investment" restriction legend appears at 681 n.131.

²² UCC § 8-401, N.C. GEN. STAT. § 25-8-401(1)(e). The Code imposes a duty to register transfer only if, among other things, "the transfer is in fact rightful. . . ." For further discussion, see Folk, *supra* note 21, at 706-09.

"adverse claim"²³ to the security, for if so, both under the Code and prior law, the transfer agent would be justified in delaying registration of transfer while it investigated the claim. The court ruled that an issuer's direction not to register transfer of particular shares alone is not sufficient notice of an "adverse claim" as to impose a Code duty of inquiry on the transfer agent.²⁴ Not only was the bare instruction not to register transfer an insufficient identification of the "adverse claim," but even if this were enough to create a duty of inquiry, the transfer agent failed to follow through on the Code-approved procedure for discharging that duty of inquiry.²⁵ Hence, under the Code neither the transfer agent nor Plastics was privileged in refusing to register transfer.

Alternatively, the court held, assuming the Code inapplicable, that both Plastics and its transfer agent had a common-law duty to register transfer. The precise ground and scope of this holding is unclear. First, the court noted the control exerted by Scharps over Plastics to further his personal interests in this transaction by inducing refusal to register transfer. This holding may be roughly stated as follows: that an issuer acts in bad faith and without reasonable grounds in refusing to register transfer (or inducing its transfer agent's refusal), if personal desires of a controlling shareholder prompt refusal, *i.e.*, where the issuer uses its strategic position to promote the interests of one as against another claimant.²⁶ Thus, the issuer must act without favoritism or discrimination in registering stock transfers. To this extent, such an obligation accords with modern corporate law concepts imposing duties of fairness on directors, officers, majority shareholders and others in a position to exert corporate powers. Although the court articulates these ideas under

²³ See UCC § 8-301(1), N.C. GEN. STAT. § 25-8-301(1), for a definition of this term.

²⁴ 248 F. Supp. at 360, 362.

²⁵ See UCC § 8-403, N.C. GEN. STAT. § 25-8-403, on the duty of inquiry and methods of discharging that duty. This is discussed in detail in Folk, *supra* note 21, at 699-702.

²⁶ A crucial affidavit in the case

concludes with the statement that Plastics, not being able to make a determination with respect to the conflicting claims to the stock, refused to allow a transfer to be made of the certificates in question.

This statement . . . on its face, presupposes an adverse claimant dealing at arms length with the corporation of which he is a stockholder. But this Court cannot shut its eyes to the relationship existing between the adverse claimant and his corporation, and the latter's conduct by reason thereof.

248 F. Supp. at 363.

common law, they would appear equally to apply under the Code via its requirement that issuers and transfer agents must always act in good faith.²⁷

ERNEST L. FOLK, III*

Military Law—Sixth Amendment Right to Counsel Applied to Special Court-Martial

Petitioner in *Application of Stapley*,¹ a private first class in the regular Army, was tried for and convicted of four violations² of the Uniform Code of Military Justice by special court-martial convened at Fort Douglas, Utah. He was sentenced to be confined at hard labor for three months, to forfeit fifty-five dollars of his pay per month for six months and to be reduced in rank to private. At the outset petitioner requested that he be represented by a qualified military lawyer. His request was denied, and he was told that to retain individual civilian counsel would cost about 150 dollars. Unable to pay that amount, he proceeded to trial represented by a captain in the Veterinary Corps and a second lieutenant, "neither . . . [of whom] had any experience before or with any court-martial or in advising persons charged with offenses."³ Acting on their advice, petitioner entered into a pretrial agreement⁴ with the convening authority, pleaded guilty to all charges, made no request for enlisted members on the court, did not object at the trial to the denial of

²⁷ Under the Code, the transfer agent has a duty of good faith running to the holder or owner of securities. N.C. GEN. STAT. § 25-8-406(1)(b). "Good faith" means honesty in fact in the conduct or transaction concerned." N.C. GEN. STAT. § 25-1-201(19). On good faith, see Folk, *supra* note 21, at 708.

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¹ 246 F. Supp. 316 (D. Utah 1965).

² UNIFORM CODE OF MILITARY JUSTICE arts. 86 (unauthorized absence), 90 (willful disobedience of a superior commissioned officer), 117 (provoking speech or gestures), 123a (making, drawing or uttering check, draft or order without sufficient funds), 10 U.S.C. §§ 886, 890, 917, 923a (1964) [hereinafter cited as UCMJ].

³ 246 F. Supp. at 319.

⁴ A pretrial agreement is an administrative procedure, or "negotiated plea," whereby the accused agrees to enter a plea of guilty to all charges in return for a guarantee that any sentence in excess of a stipulated maximum (here two months confinement and two months forfeiture of pay) will be disapproved.