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A NEW DEAL FOR FIDUCIARIES' STOCK TRANSFERS

*Alfred F. Conard**

FOR nearly one hundred years, executors and administrators have been struggling with the excessive documentation¹ which corporations demand as a condition of recording stock transfers.² For almost as long, legislatures have been passing laws in the hope—generally vain—of alleviating the burden.³

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¹Typical documentation for a transfer of stock on behalf of a decedent's estate includes: (1) the certificate, assignment, and signature guarantee (as in a non-fiduciary transfer); (2) a court clerk's certificate of appointment of the fiduciary; (3) a certified copy of the will, if any; (4) a court order authorizing sale or distribution, where the law of the state in which the fiduciary was appointed requires the fiduciary to obtain such orders; (5) a waiver of inheritance tax from one or more states having contacts with the transfer. This article is concerned only with items 3 and 4.

For an explanation of why the documentation is required by transfer officials, and why lawyers regard it as excessive, see Christy, "Responsibilities in the Transfer of Stock," 53 MICH. L. REV. 701 (1955); Conard, "Simplifying Security Transfers," 30 ROCKY MT. L. REV. 1 (1957); Dewey, "The Transfer Agent's Dilemma: Conflicting Claims to Shares of Stock," 52 HARV. L. REV. 553 (1939); Reports of Committee on Simplification of Security Transfers by Fiduciaries, 96 TRUSTS & ESTATES 861 (1957); 95 id. 904 (1956); 94 id. 835 (1955); 91 id. 765 (1952); Scott, "Participation in a Breach of Trust," 34 HARV. L. REV. 454 at 465-467 (1921); SCOTT, TRUSTS, 2d ed., §325 (1956).

²The rule that corporations are liable for failure to police stock transfers by fiduciaries was first announced in 1848. *Lowry v. Commercial & Farmer's Bank*, (C.C. Md. 1848) 15 Fed. Cas. 1040. Earlier English and American decisions were *contra*: *Hartga v. Bank of England*, 3 Ves. Jr. 55, 10 Eng. Rep. 891 (1796); *Bank of Virginia v. Craig*, 6 Leigh (33 Va.) 399 (1835); *Hutchins v. State Bank*, 12 Metc. (53 Mass.) 421 (1847). Although cases reveal that some corporations were still transferring without investigation in the 1850's [*Wooten v. Wilmington & W. R. Co.*, 128 N.C. 119, 38 S.E. 298 (1901) and *Baker v. Atlantic Coast Line R. Co.*, 173 N.C. 365, 92 S.E. 170 (1917)], they disclose a fiduciary's suit against a professional transfer agent which refused to transfer without proof of rightfulness as early as 1864 [*Bayard v. Farmers' and Mechanics' Bank of Philadelphia*, 52 Pa. St. 232 (1866)].

³The following acts are the principal acts which were apparently designed to alleviate the risks of the security issuer; their effects will be discussed later:

1874 (*Pennsylvania*): Act of May 23, 1874, P.L. 222, §1; Pa. Stat. Ann. (Purdon, 1954) tit. 20, §3151 [said to have been a direct reaction to the decision in *Bayard v. Farmers' & Mechanics' Bank*, note 2 *supra*, and to have been superseded by the Uniform Fiduciaries Act in 1923. See *First Nat. Bank v. Pittsburgh F. W. & C. Ry. Co.*, (E.D. Pa. 1939) 31 F. Supp. 381 at 385].

1897 (*Delaware*): 19 Del. Laws, c. 246, §3; Del. Code Ann. (1953) tit. 12, §1572.

In 1957, at least three states (and possibly four) opened a door through which estate representatives can emerge from their long bondage.⁴ For the first time, identical acts were passed in different states, and interstate recognition of simplification measures began.⁵ For the first time acts were passed which get to the root of the transfer agent's problem.⁶

The Acts That Failed

It is not enough to pass a well-intended law. That has been done before, with little or no gain.

Uniform Fiduciaries Act. The most conspicuous failure among

1918 (*Massachusetts*): Mass. Gen. Acts 1918, c. 68, §3; Mass. Laws Ann. (1955) c. 203, §21.

1919 (*Illinois*): Ill. Laws 1919, p. 312; Ill. Rev. Stat. (Smith-Hurd, 1929) c. 32, §29, repealed on adoption of Uniform Fiduciaries Act, 1931.

1922: Uniform Fiduciaries Act, 9-B U.L.A. 10, adopted by 22 states from 1923 through 1953.

1927 (*Ohio*): Ohio Laws 1927, p. 22, §8623-33; Ohio Rev. Code (Page, Supp. 1957) §1701.28. This law was supplemented by related acts in 1931 and 1941, and was radically amended and simplified in 1949.

1929 (*California*): Calif. Laws 1929, c. 711, p. 1268, §16; Cal. Corp. Code (Deering, 1953) §2411.

1947 (*Oklahoma*): Okla. Laws 1947, p. 123, §118; Okla. Stat. Ann. (1953) tit. 18, §1.118.

1948 (*Virginia*): Va. Acts 1948, p. 351; Va. Code (1950) §13-105.1, repealed, Va. Acts 1956, c. 428, §1.

1953 (*Pennsylvania*): Pa. Laws 1953, p. 148; Pa. Stat. Ann. (Purdon, 1954) tit. 12A §§8-401 to 8-404.

1953 (*Wisconsin*): Wis. Laws 1953, c. 399, §66; Wis. Stat. Ann. (West, 1957) §180.85.

1955 (*Connecticut*): Conn. Gen. Stat. (Supp. 1955) §2911d.

Other statutes bearing on fiduciary stock transfers are collected in REPORT OF THE NEW YORK LAW REVISION COMMISSION 183-190 (1937).

⁴ The three states, which adopted the Model Fiduciaries Securities Transfer Act, and the citations, are Connecticut [Conn. Pub. Acts 1957, No. 573], Delaware [Del. Laws 1957, S. B. No. 287] and Illinois [Ill. Rev. Stat. (1957) c. 32, §§439.50-439.57].

The fourth state is Massachusetts, which adopted a revised version of the Uniform Commercial Code: Mass. Acts & Resolves 1957, c. 765. Part 4 of art. 9 of the U.C.C. purports to simplify security transfers. Reasons for putting Massachusetts in the "possible" category will be given later in this article.

⁵ The Illinois and Delaware acts are identical (except for title, repealers, and other trimmings); the Connecticut act is substantially like them.

Although the Massachusetts act of 1957 bears the same name as a Pennsylvania act of 1952 (the Uniform Commercial Code), the Massachusetts act is very much changed, at least in the transfer simplification provisions (part 4, art. 9).

On September 3, 1957, Chicago transfer agents began making simplified transfers for Delaware corporations on the basis of the Delaware and Illinois acts; Wilmington transfer agents have since reciprocated, with respect to Illinois estates.

⁶ As later discussion will show in more detail, simplification acts passed before 1957 generally failed to protect the security issuer against the one or both of the hazards that —(a) the fiduciary lacked power or capacity to transfer, (b) the issuer had constructive notice, through some employee or agent, that the transfer was wrongful.

earlier attempts to solve the fiduciaries' stock transfer problem is section 3 of the Uniform Fiduciaries Act, hopefully promulgated by the Commissioners on Uniform State Laws in 1922,⁷ and subsequently adopted in 23 states.⁸ This section was apparently intended to facilitate transfers by relieving corporations of some of the risks of transferring fiduciaries' stock.⁹

The New York Law Revision Commission saw defects in the Fiduciaries Act provisions, and prepared a modified draft of section 3.¹⁰ This was submitted to the legislature with an exhaustive study and a recommendation for passage.¹¹ The law was expected to abolish the requirement of all documents other than proof of appointment of the fiduciary.¹²

The effects of the Uniform Fiduciaries Act on stock transfer

⁷ HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 109 (1922) (hereinafter cited HANDBOOK); 9-B UNIFORM LAWS ANNOTATED 17 (1957) (hereinafter cited U.L.A.).

⁸ The list includes Alabama, Arizona, Colorado, District of Columbia, Hawaii, Idaho, Illinois (repealed), Indiana, Louisiana, Maryland, Minnesota, Nevada, New Jersey, New Mexico, New York (§3 only), North Carolina, Pennsylvania, South Dakota, Tennessee, Utah, Washington (§3 only), Wisconsin, and Wyoming.

Of the adoptions listed above, Illinois' was repealed in 1957 incidentally to adoption of the Model Fiduciaries Securities Transfer Act (note 4 above). Washington and New York have §3 but no other sections of the act. Ohio, which is commonly listed among adopters of the U.F.A., is omitted above because it did not adopt §3.

The above list of adoptions is taken from 9-B U.L.A. 17 (1957), where citations to primary sources may be found, except for the two states which adopted only §3. For these, see N.Y. Gen. Bus. Law (McKinney, 1941) §§359i-359k; Wash. Rev. Code (1957) §§21.16.010, 21.16.020.

⁹ Exactly how much simplification the commissioners expected is not clear. Their broad objectives, applicable to all sections of the act, were stated as follows: "The general purpose of the Act is to facilitate the performance by fiduciaries of their obligations. . . . In order to prevent occasional breaches of trust, the courts have sometimes adopted rules which can easily be evaded by a dishonest fiduciary, but which seriously hamper honest fiduciaries in the performance of their obligations. The fact that the English courts have substantially adopted the principles here laid down, and that these principles have worked well in practice, would tend to dissipate any fear that their adoption in this country would result in inadequate protection to beneficiaries." HANDBOOK (1922) 337-338; 9-B U.L.A. 11.

A further reference to English practice is contained in the commissioners' note to §3. HANDBOOK (1922) 339-340; 9-B U.L.A. 17.

It is clear that under English law and practice the corporation does not inquire into the power or authority of the personal representative. See GOWER, MODERN COMPANY LAW (1954); GORE-BROWN, HANDBOOK ON JOINT STOCK COMPANIES, 41st ed. (1952).

¹⁰ Enacted as N.Y. Gen. Bus. Law §§359i-359k. The principal departure from the Uniform Fiduciaries Act made by the Law Revision Commission was an expansion of the statute to include transfers of securities from the name of a decedent. The Uniform Act applies only to securities which are already in the name of fiduciary (or, in some states, in the name of fiduciary's nominee), having been previously transferred out of the name of the decedent.

¹¹ N.Y. LAW REV. COMM. REP. 129-190 (1937).

¹² Id. at 135-136.

practice have been very slight.¹³ It is common knowledge that wills, court orders, and supporting affidavits are still required almost universally.¹⁴ Statistical proof of the UFA's failure resulted from a survey of practices of 93 transfer agents, completed by the New York Stock Transfer Association in 1953.¹⁵

The failure of the UFA was most marked in relation to individual executors and administrators. Take, for example, the requirement that an executor, appointed in a state requiring a court order to sell stock, must present a certified copy of his court order to the transfer agent. Where the UFA was *not* in effect in all relevant states, 93 out of 93 transfer agents required a copy. Where the UFA *was* in effect, 87 out of 93 required it.¹⁶ Or take, instead, the requirement of a certified copy of the will. Where the UFA was not in effect, 83 out of 93 transfer agents required it from an individual executor. Where the UFA was in effect, 79 out of 93 required it.¹⁷ In both instances, the UFA failed to affect the great bulk of transfers.

UFA consequences were only slightly more positive in relation to corporate fiduciaries—chiefly trust companies—acting as executors or administrators. Practice with regard to corporate fiduciaries is different for many reasons. Their expertise and financial responsibility incline transfer agents to be less demanding of them than of individual fiduciaries; trust companies commonly use a form of guarantee when requesting transfer, known as the "Standard Indemnity Agreement";¹⁸ they also commonly keep securities in the names of nominees, without disclosing the existence of a trust.¹⁹

¹³ For a monograph on the subject, see KLINGLER, *THE UNIFORM FIDUCIARIES ACT AS APPLIED TO CORPORATE SECURITY TRANSFERS IN NEW YORK STATE* (1956, Rutgers University Graduate School of Banking thesis).

¹⁴ See authorities collected in note 1 *supra*. Also David, "The Decedent's Securities and Their Transfer," 1 *PRACTICAL LAWYER* 50 (April 1955).

¹⁵ The results of the survey were circulated in mimeographed form to members and associates of the New York Stock Transfer Association on November 27, 1953. The report has no title, but will be referred to herein as "NYSTA Survey."

¹⁶ NYSTA Survey, QQ. II-1, II-2.

¹⁷ *Ibid.*

¹⁸ For a description of one trust company's employment of the standard indemnity agreement, see Mudge, "The Simplification of Corporate Fiduciary Transfers," 35 *TRUST BUL.* 20 (Feb. 1956).

¹⁹ For an explanation of nominee practice, see SCOTT, *TRUSTS*, 2d ed., §179.5 (1956); Williams, "Easing Problems of Stock Transfer," 95 *TRUSTS & ESTATES* 278 (1956); 73 *BANKING L.J.* 457 (1956); 35 *TRUST BUL.* 34 (April 1956); Rogers and Chinnis, "Stock Transfers under the Uniform Fiduciaries Act and Nominee Statutes," 7 *WASH. & LEE L. REV.* 150 (1950); *THE NOMINEE PROBLEM* (1955) (pamphlet issued by American Society of Corporate Secretaries, Inc.).

With these variations of practice in mind, it is interesting to study the extent to which transfer agents exempt corporate fiduciaries from production of documents. We will take, for an example, the certified copy of the will, and note how many of the agents required it in the presence or absence of Uniform Fiduciaries Act, §3 (UFA), and the Standard Indemnity Agreement (SIA), or both.²⁰

<i>Transfer from corporate executor to purchaser:</i>	Number requiring copy (out of number answering)	Percent
without UFA or SIA	81 out of 93	89%
with UFA but without SIA	70 out of 89	79%
with SIA but without UFA	59 out of 92	64%
<i>Transfer from corporate executor to nominee:</i>		
without UFA or SIA	75 out of 92	82%
with UFA but without SIA	66 out of 89	74%
with SIA but without UFA	59 out of 92	64%
with UFA and SIA	52 out of 89	58%

The results of these figures can be easily summarized. For individual executors and administrators, section 3 of the UFA has done practically nothing. For corporate executors and administrators, it has done a little. But it has done less than they were able to do by themselves by adopting a guarantee practice. Even combined with other aids, the UFA has not prevented a substantial majority of transfer agents from demanding full documentation.

Miscellaneous State Acts. Another handful of states have or formerly had statutes designed to lighten in some way the burden of the corporation in completing a transfer. One type of statute provides, in general, that a corporation is not bound to see to the proper execution of any trust to which the shares may be subject; California, Connecticut, Illinois, Massachusetts, Oklahoma, Pennsylvania, and Virginia have had such statutes.²¹

No one has published any detailed study of the practical effects of statutes of this type.²² Two of them—Pennsylvania's and Illinois'—were superseded many years ago by the Uniform Fiduci-

²⁰ Figures summarized from NYSTA Survey, QQ. II(1), II(2), II(3), IV(1), IV(2), IV(4), and IV(3), respectively.

²¹ Cited in note 3 *supra*.

²² For some relevant comments, see CHRISTY AND McLEAN, *TRANSFER OF STOCK*, 2d ed., 376-387 (1940).

aries Act.²³ Virginia's seems to have been repealed absent-mindedly in the course of adopting a new corporation act.²⁴ Two more—Oklahoma's and Connecticut's—are relatively new, dating from 1947 and 1955. In Massachusetts, I am told that the statute is given some effect, which will be discussed later. In the other states, the evidence indicates that the statutes have had little or no effect on the documentation of transfers.²⁵

Another type of statute, illustrated by Delaware,^{25a} provides that a security issuer is safe in relying on a court certificate that a particular transfer is proper. Since this type of statute merely substitutes one type of document for another, it is not a documentary simplification. Its value would seem to lie chiefly in those cases where the will or trust deed is ambiguous, and a court certificate avoids the problem of interpretation. There are still other types of acts, but their effects are not significant.²⁶

Acts That Have Succeeded in Part

Partial success was achieved by Ohio, which adopted an ingenious trilogy of acts designed to simplify transfers,²⁷ drawn up

²³ First Nat. Bank v. Pittsburgh F.W. & C. Ry. Co., (E.D. Pa. 1939) 31 F. Supp. 381; Mudge v. Mitchell Hutchins & Co., 322 Ill. App. 409, 54 N.E. (2d) 708 (1944). The Pennsylvania act was probably the best passed in the United States before 1957, because the security issuer was not charged with notice of adverse claims unless notified *in writing*. Its supersession by the Uniform Fiduciaries Act was a step backward.

²⁴ It was repealed by a mass repealer of the former corporation chapter. Va. Acts 1956, c. 428, §1.

²⁵ I have checked the transfer requirements as stated in the *Stock Transfer Guide* for all the trust companies of California and Connecticut which are listed by the same source as Associate Members of the New York Stock Transfer Association. Oklahoma has none. All indicate that they require a certified copy of the will, as well as a court order where required by local law, whenever they act as transfer agent. Paradoxically, one of them also lists what it requires in transferring stock in itself, and here omits the requirement of certified will copy (Bank of America National Trust and Savings Association, Stock Transfer Department, San Francisco). In further confirmation of the California situation, see Mudge, "The Simplification of Corporate Fiduciary Transfers," 35 TRUST BUL. 20 (Feb. 1956).

^{25a} Cited in note 3 *supra*.

²⁶ See CHRISTY AND MCLEAN, *TRANSFER OF STOCK*, 2d ed., 376-387 (1940).

²⁷ Ohio Rev. Code (Page, 1954) §§1339.02, 2109.29; *id.* (Supp. 1957) §1701.28. Two sections of the legislation involve executors and administrators. Section 1701.28, originating in 1927, is a portion of the corporation code which provides that a corporation is not liable for various types of infirmity in fiduciary transfers, spelled out in great detail. It was greatly expanded by amendment in 1949.

Section 2109.29, originating in 1931, is a section of the probate code providing that a corporation need not take notice of the requirements imposed by that code upon fiduciaries.

The third section (1339.02) is related to lack of legal capacity of registered owners such as minors and incompetents; corporations are not liable for transfers made in ignorance of the incapacity. It originated in 1941, and is a part of the "Fiduciary Law."

and promoted by trust officer Henry Pirtle of the Cleveland Trust Company.²⁸ Pirtle persuaded his fellow townsmen, so that all the professional transfer agents of Cleveland now subscribe to rules of simplified transfer for intrastate cases.²⁹ But transfer agents in Toledo, Columbus, and Cincinnati remain unconvinced to this day.³⁰ So Ohio enjoys simplified transfers in one of four financial centers, and endures unsimplified transfers in the other three.

A similar history is recorded in Pennsylvania which in 1952 adopted the Uniform Commercial Code. Article 8 of the code deals with security transfers, and part IV of article 8 is intended to reduce documentation.³¹ In response to the code, some Philadelphia transfer agents have generally eliminated documentation on intrastate transfers,³² but Pittsburgh agents have made no change in their standard practices.³³

Wisconsin in 1953 adopted a simplification act patterned on the language of the Pennsylvania Commercial Code, but excluding all the other multifarious subjects with which the code deals.³⁴ Its provisions differ from the code's transfer provisions chiefly in that they cover only stock (not registered bonds), and are permissive rather than mandatory in form. Apparently the small amount of transfer business done in Wisconsin has been effectively simplified as a result of this act.³⁵ However, no recognition has

²⁸ Pirtle wrote the following articles in explanation of the laws which he had promoted: "Modification in Ohio of Doctrine that a Corporation is Trustee for its Shareholders," 20 OHIO OP. 464 (1941); "Further Remarks Concerning the Transfer of Corporate Securities in Ohio," 21 OHIO OP. 272 (1941); "New Ohio Securities Transfer Statute and Conflict of Laws," 22 OHIO OP. 539 (1942).

²⁹ Rules of Cleveland Stock Transfer Association, CCH STOCK TRANSFER GUIDE, p. 1159. See also under "Transfer Agents' Requirements" for Central National Bank of Cleveland, Cleveland Trust Company, National City Bank of Cleveland, and The Union Commerce Bank, CCH STOCK TRANSFER GUIDE, p. 1101ff.

³⁰ Questionnaires sent to various professional transfer agents in these cities were not returned. The conclusion stated is based on a telephone conversation with a Toledo bank official who did not wish to be quoted, and on hearsay from various sources. Counsel for one large Cincinnati corporation—not a professional transfer agent—stated in writing their unwillingness to rely on the Ohio legislation.

³¹ Pa. Stat. Ann. (Purdon, 1954) tit. 12A, §§8-401 to 8-404.

³² Interview and observation by the author at Girard Trust Company, Philadelphia, May 1955; correspondence with Mr. Elliott B. Thomas, member of American Law Institute committee on U.C.C., art. 9, of Philadelphia. However, a letter dated February 25, 1958, from another Philadelphia lawyer tells of a large Philadelphia trust company which does not make simplified transfers.

³³ Letter of June 12, 1957 to the author, from a vice-president of a major Pittsburgh transfer agent.

³⁴ Wis. Stat. Ann. (West, 1957) §180.85.

³⁵ Letters to the author from Charles Bunn, Madison, and R. J. Schimmel, Milwaukee.

been given to it in other states, and Illinois transfer agents have specifically ruled it insufficient for them to rely upon.³⁶

Massachusetts has a simplification act adopted in 1918 which was probably the prototype of section 3 of the Uniform Fiduciaries Act. It exonerates a security issuer from responsibility for the execution of any trust, but does not apply to "knowingly participating in a breach of trust."³⁷ This seems to have led some Boston transfer agents to dispense with copies of wills and trust deeds in almost all cases.³⁸ Apparently they still require copies of court orders wherever these are required by the state of fiduciary administration.³⁹ But the statute seems unlikely to get out-of-state recognition from New York transfer agents, who refuse to rely on similar provisions in their version of the Uniform Fiduciaries Act.⁴⁰ The Massachusetts act has not been repealed, and

No figures on volume of stock transfers by states are published, but one may compare numbers of associate members of the New York Stock Transfer Association, of which Wisconsin lists none, Minnesota 3 (in St. Paul and Minneapolis), and Michigan 9 (in Detroit, Dearborn, Grand Rapids and Muskegon).

³⁶ See note 48 *infra*.

³⁷ Mass. Gen. Acts, 1918, c. 68, §3; Mass. Laws Ann. (1955) c. 203, §21.

³⁸ A vice-president of a Boston trust company writes (Jan. 10, 1958):

"Over the years Transfer Agents have relied more and more on this statute, and our practice in recent years has not required copies of trust instruments, wills, etc. from Trustees, Executors, Administrators, Guardians, etc., even if the transfers were made to the individual fiduciaries. . . . Incidentally, we apply the rules stated above on all fiduciaries appointed in any state if the transfer is effected here and the corporation is incorporated in the Commonwealth.

"We also follow this procedure if the transfer is effected here and the corporation is incorporated in the states which have adopted the Uniform Stock Transfer Act. . . ." A similar report was received from another bank.

The frequent dispensing with certified copies of wills in Boston is confirmed by the summary of "transfer agents' requirements" in the *Stock Transfer Guide*, where this item is omitted from the requirement lists of First National of Boston, and Old Colony (of Boston). The requirement is still listed by Boston Safe Deposit, National Shawmut, New England Trust, and Second Bank-State. Since the letter quoted above came from one of the latter banks, simplification has evidently progressed farther than the *Stock Transfer Guide* discloses.

³⁹ All the Boston agents, including those who omit will copies from their *Stock Transfer Guide* lists, list "court order as required by state of probate," or words to the same effect. The distinction between will copies and court orders corresponds to a distinction in legal theory between a fiduciary's "breach of trust" and "excess of powers." Since the Massachusetts statute of 1918 exonerates the security issuer only for "breaches of trust," Massachusetts transfer agents have no charter to dispense with proof of "power." See Christy, "Responsibilities in the Transfer of Stock," 53 MICH. L. REV. 701 at 704-705 (1955); CHRISTY AND MCLEAN, *THE TRANSFER OF STOCK*, 2d ed., §223 (1940).

The Model Act expressly exonerates for excesses of power as well as for breaches of trust. See especially §3(a), which provides that the corporation "may assume without inquiry that the assignment . . . is within his authority and capacity, and is not in breach of his fiduciary duties. . . ."

⁴⁰ The advantages of the Massachusetts act over the New York and Uniform

will continue to complement the Uniform Commercial Code, when the latter becomes effective on October 1, 1958.

Although acts similar to Massachusetts' are in effect in California, Connecticut, and Oklahoma, I have no evidence that they have had beneficial effects, and some evidence to the contrary.⁴¹

On another front, some 40 states have attacked the transfer problem by passing "nominee acts," which authorize fiduciaries to put trust securities into the names of mere title holders instead of in the names of the fiduciaries as such. These acts, and their effects, are the subject of a separate study in this issue of the *Review*.⁴² Here, I will say only that the acts leave many categories of transfers wholly unsimplified, and that in the categories which are simplified, the acts substitute a lesser evil for a greater, rather than eliminating both.

Why Prior Simplification Acts Have Failed

Whether prior simplification acts substantially changed the law is not clear, but it is unimportant. What is important is that the acts failed substantially to change the practices of the major transfer agents.⁴³ If we are concerned with the expense, the delay, and the annoyance of documenting transfers, transfer officials are the ultimate tribunal for our purposes.

Transfer officials' decisions result from a balancing of many considerations, and perhaps a little inertia and friction in the balancing mechanism. Against simplification stand these factors: (1) the risk of liability for improper transfers; (2) the expense of operating a transfer system which has different rules for transfers from different systems, and of frequently changing the systems as

Fiduciaries' Acts seem to be limited to (1) the omission in Massachusetts of liability based on "knowledge of such facts that the action in registering the transfer amounts to bad faith," and (2) the inclusion in Massachusetts of a provision that public record of a document does not constitute actual knowledge to the security issuer. On the whole, I am inclined to believe that the differences in attitudes of Boston and New York trust officers are more significant than the differences between the statutes with which they have to deal. The very similar law adopted by Connecticut in 1955 was described by its sponsors at some times as based on the Massachusetts act, and at other times as based on the Uniform Fiduciaries Act.

⁴¹ See note 25 *supra*.

⁴² See comment, p. 963 *infra*.

⁴³ I use the term "transfer agents" to designate the officials who make decisions about transfer policy, whether employed by security issuers or by the trust companies who act as professional transfer agents. Although trust companies may refer basic questions of policy to the issuing corporations, I am informed that they generally decide for themselves.

laws change; and (3) the embarrassment of being involved in an improper transfer, even if no legal responsibility attaches.

In favor of simplification stand these factors: (1) the danger of liability for unreasonable refusal to transfer, or for delay; (2) the desire to escape the ill-will which frequently arises from documentary demands; (3) possible economies of operation under a simplified system; and (4) the danger of liability through notice acquired by demanding documents.

Liability for Improper Transfers. The dominant factor in transfer officials' calculations is surely the fear of liability for improper transfers. Commentators on the earlier Uniform Acts (the Fiduciaries Act of 1921, and the Pennsylvania Commercial Code of 1952) apparently believed that they had reverted to the English rule, and thus eliminated the basis of transfer agents' fears.⁴⁴ Whether or not the rule adopted is the English rule,⁴⁵ it leaves the security issuer exposed on a broad front. The Uniform Fiduciaries Act in the draft first presented to the conference expressly exposed the company to liability "where registration of the transfer is made with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary." As if this were not threat enough, a last minute addition was added, "or with knowledge of such facts that the action in registering the transfer amounts to bad faith."⁴⁶

Security issuers are never individuals; most of them are corporations with thousands of employees, and their transfer agents are other corporations with hundreds of employees. The danger of vicarious knowledge, through some employee's possession of

⁴⁴ See notes 9 and 12 *supra*, and accompanying text; SCOTT, TRUSTS, 2d ed., §325 (1956); *Mudge v. Mitchell Hutchins Co.*, 322 Ill. App. 409, 54 N.E. (2d) 708 (1944); *Stark v. National City Bank*, 278 N.Y. 388, 16 N.E. (2d) 376 (1938). The latter case declares at p. 401: "In those jurisdictions of this country which have adopted the Uniform Fiduciaries Act, the measure of responsibility, at least in cases which come within the provisions of that act, is restricted as in England."

⁴⁵ According to one view of the English law, the issuing company is not permitted to take notice of equitable interests, even if it wishes to. See *In re Perkins*, 24 Q.B. 613 (1890); but compare *Ireland v. Hart*, [1902] 1 Ch. 522; GORE-BROWN, HANDBOOK ON JOINT STOCK COMPANIES, 41st ed., 76 (1952); RANKING AND SPICER, COMPANY LAW, 10th ed., 126 (1955).

The secure feature in English law is the refusal to impute to a security issuer knowledge that is possessed even by its officers, if not actually known to the official who carries out the transfer. A tremendously significant case is *Simpson v. Molson's Bank*, [1895] A.C. 270, in which knowledge of impropriety of a transfer was not charged to the bank, although one of the guilty executors was president of the bank, and his counsel as executor was also bank counsel.

⁴⁶ HANDBOOK, 340 (1922); 9-B U.L.A. 17 (1951).

information about the transfer,⁴⁷ is enough to make transfer agents demand documentation.⁴⁸

Pennsylvania's Commercial Code carries a similar threat. The exculpatory provisions are applicable only when the issuer has "no knowledge of the unrightfulness of the transfer," and no "notice of another claim to an interest in the security."⁴⁹

The Wisconsin simplification act attempts to mitigate the dangers of vicarious knowledge by confining it to knowledge held, or which should be held, by the very individual acting in the transfer.⁵⁰ Although this may appear adequate to some readers,

⁴⁷ The worst examples of vicarious knowledge have arisen in cases involving notes or checks, which are well known to bank counsel. In *Grace v. Corn Exchange Bank & Trust Co.*, 287 N.Y. 94, 38 N.E. (2d) 449 (1941), a bank was charged with notice of embezzlement from a trust account because of checks repeatedly drawn on it and deposited in the trustee's personal account. Although the court did not think a single deposit would charge the bank with notice, it thought the series should have put the bank on guard. "Each such transfer was notice that the depositor, heavily indebted to the bank, was acting in a manner that is 'unwise and hazardous.' A requirement that a clerk, receiving such notice, should report it would not unduly hamper the transaction of the business of the bank." P. 106.

For two other cases of vicarious knowledge of a bank in dealing with negotiable instruments, see *O'Connor v. Cent. Nat. Bank & Trust Co.*, 306 Ill. App. 414, 28 N.E. (2d) 755 (1940); *Glendo State Bank v. Abbott*, 30 Wyo. 98, 216 P. 700 (1923).

⁴⁸ KLINGLER, *THE UNIFORM FIDUCIARIES ACT AS APPLIED TO CORPORATE SECURITY TRANSFERS IN NEW YORK STATE* 57-58 (1956) (Rutgers Univ. Grad. School of Banking thesis).

The Chicago SUGGESTED GUIDE FOR STOCK TRANSFER AGENTS UNDER ILLINOIS FIDUCIARIES SECURITIES TRANSFER ACT, August 26, 1957, states: "Other types of exoneration laws are in effect elsewhere (e.g., Ohio, Wisconsin) and the Uniform Commercial Code, as adopted in Pennsylvania and as introduced in Massachusetts, contains exoneration provisions. Most of these laws are unsatisfactory because they do not make clear the extent to which the corporation and its agents will be charged with breach of trust as a result of actual or presumed knowledge by a corporation employee or through a will or other document of which the corporation has 'constructive knowledge.' Views of counsel should be obtained as to whether such an exoneration law may be relied upon in any state of principal contact."

This document is signed by the Illinois State Bar Association Committee on Simplification of Security Transfers, and by the Stock Transfer Committee of the Chicago Corporate Fiduciaries Association.

⁴⁹ U.C.C. (1952) §§8-401, 8-403, 8-404. The 1952 version of the Uniform Commercial Code also contained other threats which resulted less from misguided policy decisions than from careless workmanship. For example, an issuer was protected only if a security were "fully indorsed" [§8-401 (1)], and indorsement was possible only by the registered owner [§8-308]; hence an executor or administrator could never "indorse" securities which stand in the decedent's name, and an issuer was never free from liability!

For other defects in the Pennsylvania Commercial Code, see Trumbull, "The Proposed Uniform Commercial Code and Investment Securities in Illinois," 51 N.W. UNIV. L. REV. 424 at 442-445 (1956); notes, 71 HARV. L. REV. 674 (1958); 103 UNIV. PA. L. REV. 209 (1954). For more sympathetic views of the Pennsylvania code, see Bunn, "Article 8—A Law for the Transfer of Investment Securities," 1952 WIS. L. REV. 339; Dehner, "Article 8—Investment Securities," 22 TENN. L. REV. 842 (1953); Walker, "Uniform Commercial Code Article 8—Investment Securities," 14 OHIO ST. L. J. 57 (1953).

⁵⁰ Wis. Stat. Ann. (West, 1957) §180.85(4) and (5)(c).

it has in fact been deemed inadequate by Chicago transfer agents,⁵¹ and they do not make simplified transfers of assignments which have significant Wisconsin contacts.

If in estimating these threats, transfer officials seem to view fly specks through a magnifying glass, they are doing only what history has taught them to do. In 1857, the Wilmington and Raleigh Railroad on an executor's request transferred stock to Joseph and John Baker without examining the will or any court order. If its lawyers had read the leading cases of England, Virginia, and Massachusetts then extant,⁵² they would have done no differently—unless they had also read a circuit court opinion of Chief Justice Taney,⁵³ and had weighted it more heavily than all the others. Sixty years later, Taney's view had become the law of the land, and the railroad was held liable to a remainderman.⁵⁴ The bequests to Joseph and John, it now appeared, were defeasible on death of the survivor without issue, which occurred in 1913. The same railroad made a similar mistake in 1869—still prior to the first appellate confirmation of Taney's doctrine—for which it paid the price in 1901.⁵⁵

Under these circumstances, a transfer agent cannot experiment for a year with a loose transfer policy, and determine next year what it cost; nor can it dismiss risks that have not yet matured into judicial holdings.

Expense of a Differentiating Transfer System. If 51 states, territories and districts should adopt an identical and effective simplification law, it would surely be simpler to eliminate documentation than to retain it. But so long as a majority of the states require documentation, it may appear simpler to require documentation on all transfers than to try to classify them.

My best evidence of this thinking is a letter from a Pittsburgh trust company official, whom I asked whether the company would be willing to dispense with documents other than the probate

⁵¹ The writer has been furnished confidential copies of opinions of counsel to two large Chicago transfer agents, advising them against relying on it.

⁵² *Hartga v. Bank of England*, 3 Ves. Jr. 55, 10 Eng. Rep. 891 (1796); *Bank of Virginia v. Craig*, 6 Leigh (33 Va.) 399 (1835); *Hutchins v. State Bank*, 12 Metc. (53 Mass.) 421 (1847).

⁵³ *Lowry v. Commercial Bank*, (C.C. Md. 1848) 15 Fed. Cas. 1040.

⁵⁴ *Baker v. Atlantic Coast Line R. Co.*, 173 N.C. 365, 92 S.E. 170 (1917). The Atlantic Coast Line was a remote successor by merger to the Wilmington & Raleigh.

⁵⁵ *Wooten v. Wilmington & Weldon R. Co.*, 128 N.C. 119, 38 S.E. 298 (1901). The Wilmington & Weldon was a successor by merger to the Wilmington & Raleigh, to be later succeeded by the Atlantic Coast Line.

certificate in cases involving a Pennsylvania estate and a Pennsylvania corporation, or an Ohio estate and Ohio corporation. He replied,

"From the practical, operational standpoint, bearing in mind that the majority of transfers are handled by clerical personnel, we follow the general practice of asking for documentation. However, counsel advises that we may properly make transfers in the two situations which you mention on production of a probate certificate, and we are willing to do so on request."⁵⁶

In Philadelphia, I am informed that those transfer agents who simplify at all do so only in cases where all contacts are Pennsylvanian.⁵⁷ They do not make simplified transfers in cases where all contacts are Ohioan.

To be sure, transfer agents already distinguish to some extent between the laws of various states. They require proof that court orders have been entered if the fiduciary operates in a state whose law demands court orders, but not if he operates in a state which makes no such demand; they require inheritance tax waivers only from the states which have inheritance taxes.⁵⁸ Hence one may doubt that the reason given by the Pittsburgh official is the only reason for his company's practice.⁵⁹ Still, one can easily appreciate the complications involved in adjusting a transfer practice to the variations in transfer laws of the state of incorporation, the state of transfer, and the state of fiduciary administration, in addition to the variations of law which must already be taken into consideration. The complications added might easily outweigh the

⁵⁶ The "two situations" referred to are (1) a transfer in Pennsylvania of a Pennsylvania fiduciary's stock in a Pennsylvania corporation, and (2) a transfer in Pennsylvania of an Ohio fiduciary's stock in an Ohio corporation.

⁵⁷ Conference of the author with E. Morris Bate, Jr., and other transfer officials of Girard Trust Company, Philadelphia, in May, 1955; letter of November 1, 1957, from Eliot B. Thomas, of Philadelphia bar, to author.

⁵⁸ See any number of lists of transfer requirements of various transfer agents in CCH STOCK GUIDE, p. 1101 ff., which include "If required by state of domicile or probate, a certified copy of order of court of competent jurisdiction directing sale or distribution," or words to this effect. This requirement is listed even by the Boston transfer agents who dispense with certified copies of wills.

⁵⁹ I have no doubt of the candor of the Pittsburgh explanation quoted in the text. However, even if counsel doubt the safety of making simplified transfers under Pennsylvania legislation, they might be wise to avoid announcing a policy of refusal. When sued for unreasonable refusal, their defense that they doubt the propriety of the particular transfer would be unconvincing in the presence of an announced policy of refusing all such transfers. This type of consideration probably impedes the obtaining of quotable statements on reasons for refusing to simplify security transfers.

savings which result from eliminating documentation in the few instances where state law permits.

Embarrassment. Do banks have non-economic scruples against adopting a system of transfers which might increase the number of wrongful transfers? In a recent article, the president of the New York Stock Transfer Association declared,

"Often the advocates of simplified stock transfers point to the Uniform Fiduciaries Act and similar statutes and, in effect, say the transfer agent should put on a blind bridle and ride rough-shod over possible rights of widows and children. *No bank wants to be associated with a breach of trust, whether or not it can be held liable. . . .*"⁶⁰

The prestige of a trust company could obviously be severely affected by its participation in a wrongful transfer of a large block of stock, in which some of its employees shared a degree of guilt. Although this type of factor is probably subordinate to considerations of legal liability, it is not necessarily negligible.

Liability for Refusal To Transfer. Against a very real fear of liability for completing wrongful stock transfers, the transfer agent feels a rather faint apprehension of being punished for unreasonable demands for documents. However burdensome the documentary demands may be, it will be cheaper for the executor to comply than to start a lawsuit.

Moreover, the courts have been very sympathetic toward the corporation's refusal to transfer because of doubt of fiduciary authority. The parade of cases exempting the corporation from liability on this ground is almost as impressive as the parade of those imposing liability for making transfers wrongfully.⁶¹

Furthermore, a transfer agent who likes to see documents can always start out by demanding them; most executors and administrators, although annoyed, will comply. If the fiduciary is inclined

⁶⁰ Williams, "Easing Problems of Stock Transfer," 73 BANKING L. J. 457 at 459 (1956); 35 TRUST BUL. 34 (Feb. 1956); 95 TRUSTS & ESTATES 278 (1956). Emphasis supplied.

⁶¹ In the following cases, the issuer was held not liable for refusal (temporary or perpetual) to transfer: Spangenberg v. Nesbitt, 22 Cal. App. 274, 134 P. 343 (1913); Bayard v. Farmers' & Mechanics' Bank of Philadelphia, 52 Pa. St. 232 (1866); Livezey v. Northern Pac. R., 157 Pa. St. 75, 27 A. 379 (1893); Hertz v. Record Pub. Co., (W.D. Pa. 1952) 105 F. Supp. 200; Spellissy v. Cook & Bernheimer Co., 58 App. Div. 283, 68 N.Y.S. 995 (1901); Harris v. Gen. Motors Corp., 263 App. Div. 261, 32 N.Y.S. (2d) 556.

Although there are plentiful cases of liability for refusal to transfer on demand of a registered owner in his own right [CHRISTY AND McLEAN, TRANSFER OF STOCK, 2d ed., §266 (1940)], I have yet to discover a case imposing a monetary liability for demanding further proof of the authority of a fiduciary.

to sue, the transfer agent will usually have an opportunity to make the transfer after all. Thus a transfer agent can minimize both risks by initially demanding documents of everyone, but withdrawing the demand on those who stand on their rights.⁶²

The drafters of the Pennsylvania Commercial Code apparently intended to change transfer agents' practices by instilling in them a healthy fear of liability for refusal to transfer. While the exoneration provision is subordinate in position, and vague in extent,⁶³ the opening gun announces that the company must register the transfer,⁶⁴ and the main barrage forbids the company to demand documents beyond those on an approved list.⁶⁵ It hardly matters that the two sections are inconsistent with each other;⁶⁶ both threaten the company which withholds transfer.

This approach testifies to a complete misunderstanding of the dynamics of share transfer. It leads quite logically to the situation which appears to prevail in Pittsburgh, where transfer agents initially demand full documentation, but will retreat if pressed.⁶⁷ Simplification then exists only for those who know their rights precisely, and are prepared to do battle for them.

The only judicial comment to date on the issuer's duty under the Pennsylvania Commercial Code indicates that judges are no more inclined to compel transfer under it than they were under prior law.⁶⁸

⁶² Cf. quotation above, cited to note 56.

⁶³ The code [Pa Stat. Ann. (Purdon, 1954) tit. 12A] does not define the situations in which the issuer is free of liability, except by indicating that they are the same ones in which the issuer *must* register transfers [§8-401 (2)]. The duty to register is conditioned on lack of knowledge and of duty to inquire [§8-401(1)(b)], and the duty to inquire is in turn conditioned on lack of notice [§8-403(1)]. In spite of the code's care in limiting "receipt" of notice [§1-201(27)], there is no such limitation on vicarious "notice" [see §1-201(25)], and "knowledge" is not defined at all. Consequently the door is wide open to imputation of knowledge and notice.

⁶⁴ Pa. Stat. Ann. (Purdon, 1954) tit. 12A, §8-401(1).

⁶⁵ Id., §8-402.

⁶⁶ Section 8-402(2) forbids the issuer to demand *more* evidence than certain listed documents, implying that these may be demanded. But §8-401(1) forbids requiring even these, since the duty to register exists if the certificate is "fully indorsed for transfer in conformity with the following section." The following section [8-402(1)] defines indorsement [by reference to "holder," §1-201(20)] in a way which clearly contemplates only signatures, not supporting evidence. This was one of the points made in proceedings of the New York Law Revision Commission's Committee on the Uniform Commercial Code, Art. 8. See minutes of May 19, 1955, items 60-61, and minutes of June 20, 1955, items 11-15; REPORT OF THE LAW REVISION COMMISSION TO THE LEGISLATURE, LEGIS. DOC. No. 65(A), p. 43 (1956).

⁶⁷ See quotation in text above, cited to note 56.

⁶⁸ In *Hertz v. Record Pub. Co.*, (W.D. Pa. 1952) 105 F. Supp. 200, the court referred to the Commercial Code as declaratory of existing law; the court dismissed a claim for

Economies of Operation. To transfer agents, a powerful appeal of simplification laws is their offering of an opportunity to reduce demands on time and personnel. This is an incessant demand, as all kinds of costs make their annual growth, and the physical volume of transfers to be registered increases. Machine operations have long since been installed by the leading transfer agents to calculate, address, and mail dividend checks; if they had not been, it is hard to imagine how many floors of clerks, and what protracted record periods would be necessary.

Chicago transfer agents have been pleasantly surprised at the increased ease of operation under the new statute. They had some reason to fear that the simplification statute would, in the first instances, effect more complication than simplification; it increased the necessities for classifying transfers from different states, and handling them differently. One company reports that sorting has proved quite simple, and that 25 to 35 percent of all transfers are capable of being handled without the documents formerly demanded. There is no prospect of dramatic cost cutting, but an effective brake on inexorable cost increases has been discovered.

This experience will appeal to all far-sighted transfer agents, who must realize that rising costs threaten the entire operation.⁶⁹

Avoiding Ill-Will of Fiduciaries and Their Counsel. Anyone who knows trust companies knows that they are very sensitive about their public relations and are prepared to spend both time and money to win good will, and avoid ill. Their problem, in stock transfer work, is to weigh the ill-will occasioned by a wrongful transfer against the ill-will engendered by demands for documents.

How the scale tips will vary with the extent to which protests against documentation are voiced and mobilized. I suspect that

wrongful refusal of transfer, hinting that it would do the same if the Commercial Code were applicable.

⁶⁹ Mr. Thomas H. Jolls, vice-president of the Northern Trust Company, Chicago, offers this observation: "I believe that there is an awakening consciousness that simplification is a progressive and necessary step in the widening of the ownership of corporate securities. Just in my own experience in this field of about twenty years we have simplified stock subscription; we have simplified the handling of fractions on stock dividends; we have changed many other procedures which 20 years ago were accepted as a matter of course but are now regarded as too cumbersome. Currently we and other banks are studying new methods of record-keeping, simplification of forms of stock certificates, etc. . . . Continued growth of the number of stockholders in this country exerts a constantly increasing pressure on corporations and their Transfer Agents to find short cuts in getting the job done." Memorandum to the author, dated Dec. 23, 1957.

the indignant voices of probate lawyers played their part in making Illinois the first state in which all transfer agents simplified their practice immediately after the act became effective, and in which a broad representation of interested agents participated in the drafting of the act itself. The Chicago transfer agents had been given notice that the state bar association intended to draft appropriate legislation to simplify transfers.⁷⁰ They could guess that if they did not participate in preparing legislation it would be prepared by someone else, and that if they did not conform to it they could expect a barrage of complaints from bar association leaders.⁷¹

No such prompt preparations to simplify practices followed adoption of simplification acts in Delaware or Connecticut;⁷² this

⁷⁰In October 1954, the American Telephone demanded a will copy, in addition to a court order, from an estate represented by a prominent Grundy County lawyer, David F. Root. Root responded with a long and spirited letter to Telephone counsel (Sidley, Austin, Burgess & Smith), in which he stated among other things: "I respectfully request you to cite me one bit of Illinois law to support your position. . . . The adoption of a policy such as you suggest is the type of shortsighted stupidity which brings down the wrath of the layman upon the lawyers and large corporations. . . ."

He sent a copy of his letter to the secretary of the state bar association, stating: "I respectfully request that this matter be considered by the Board of Governors as the policy sought to be recommended by Messrs. Sidley, Austin, Burgess & Smith is, as I have stated, not only stupid but is one which causes the expenditure of additional moneys to effect the transfer of stock and will reflect unfavorably on both members of the Bar and the corporations."

Copies of these letters (both dated October 14, 1954) were mimeographed and circulated among numerous Illinois bar association officers and transfer officials. On November 13, 1954, the Board of Governors of the Illinois State Bar Association passed a strongly worded resolution reciting the evils of documentary practice, and resolving, among other things,

"That the Illinois State Bar Association condemns the existence and continuance of the evil of such stock transfer situation as imposing an inequitable and unnecessary burden upon small Illinois estates.

"The President . . . is directed to refer this Resolution to the executive committee of its section on Probate and Trust Law with direction to draft proposed legislation designed to remedy such evil in Illinois to the extent that the same is feasible and report the same to the Board as soon as possible. . . ." 43 ILL. B. J. 163 (1954).

⁷¹Mr. Austin Fleming and Mr. Thomas H. Jolls of the Illinois committee have protested, on seeing this manuscript, against my emphasis on pressure from the probate bar. I am deeply conscious of the helpful attitude which they took toward this problem from their first contacts with it, and of their contribution in selling a positive attitude to other transfer agents. I persist in believing that the demands of probate lawyers were influential, partly because of the very passive attitude which I had previously met in the representatives of some trust companies and partly because of the absence of an energetic program for simplification in practice in states other than Illinois.

⁷²A letter from a trust department vice-president of Wilmington dated December 3, 1957, states:

"There are one or two large Delaware corporations who do their own transfer work. I have been in touch with one of them, and find they have not reached a firm conclusion as to practices which they are going to adopt under the new statute.

may be partly because trust companies there are not equally confronted with an organized demand for simplification.

The Danger of Demanding Documents. Before 1957, there was no danger (except in Pennsylvania) in demanding documents; the issuer was charged with notice of the contents of documents which he did not see as well as of those which he did.⁷³ There is little danger under the Model Act, which provides that if the issuer requires a document to prove the status of a fiduciary, it is not charged with the rest of the document's contents.⁷⁴ The sponsors of this act believe that if the danger of *not* demanding documents is removed, simplification will follow naturally.

From the beginning, the framers of the Uniform Commercial Code have taken a much dimmer view of transfer agents' disposition to simplify. In the Pennsylvania version, they were at pains to forbid demands for documents, and to render transfer agents liable for making unnecessary demands.⁷⁵

The sponsors of the code have now abandoned the prohibition of documentation and have substituted a new deterrent. If the transfer agent does elect to demand documents, he is forever charged with notice of their contents.⁷⁶ This ingenious provision mobilizes the fear that has motivated transfer agents to demand documents in the past; but its fire is now turned in the opposite direction.

Naturally, this provision is not popular with transfer agents; it will earn their opposition in the legislatures. They think the threat is an undue penalty for a single error in demanding undue documentation; it obliges them to make some kind of notation so that once having demanded documentation they must ever after demand it; sometimes the demand for documentation is

"In our bank, we are awaiting their plan of action, as we feel our procedure should be similar. . . ."

My inquiries to Connecticut transfer agents regarding recent changes in their transfer practice have not yet been answered.

However, the individual transfer agent of one of the large Delaware corporations informed the author under date of March 5, 1958, that it had dispensed with demands for will copies from Illinois, Connecticut, and Delaware fiduciaries since October 1957.

⁷³ *Lowry v. Commercial Bank*, (C.C. Md. 1848) 15 Fed. Cas. 1040; *Baker v. Atlantic Coast Line R. Co.*, 173 N.C. 365, 92 S.E. 170 (1917).

⁷⁴ Model Fiduciaries Securities Transfer Act, §3(c). The text of the act is reproduced at p. 885 *infra*.

⁷⁵ Pennsylvania Commercial Code, Pa. Stat. Ann. (Purdon, 1954) tit. 12A, §§8-401(1), 8-402(2).

⁷⁶ Massachusetts Commercial Code, Mass. Acts 1957, c. 765, §8-402(4).

unavoidable;⁷⁷ the danger may prove to be so great that they will go back to their old documentary ways.

Since the provision has obvious demerits, the question is whether transfer agents need this kind of an impulsion to induce them to simplify. The Commissioners of Uniform Laws, who have never been convinced that the Uniform Fiduciaries Act did not deserve success, naturally regard the transfer agents as a stubborn lot who must be coerced. Naturally, the transfer agents do not think of themselves that way.

Fortunately, the question can probably be answered by observation, before 1958 has run its course. Already, it is a matter of record that Illinois transfer agents have simplified their procedures, without the threat contained in the Uniform Commercial Code. If Delaware and Connecticut transfer agents follow suit, there will be no argument for continuing the notice provision of the Uniform Commercial Code.

Will the 1957 Simplification Acts Succeed?

Of the four states which passed simplification acts in 1957, two passed the Model Fiduciaries Securities Transfer Act⁷⁸ in complete form (Delaware and Illinois),⁷⁹ one passed it with changes (Connecticut),⁸⁰ and one passed a revised Uniform Commercial Code containing simplification provisions (Massachu-

⁷⁷ The principal situation cited here is where a trustee dies or retires, and another is appointed in his place by a procedure specified in the trust instrument. Since the issuer must have proof (even under the simplification acts) that the trustee rightfully holds his office, it must see the trust instrument. Under the Massachusetts code, it will then be charged with knowledge of all the provisions of the trust.

⁷⁸ Since the text of the act, released by the American Bar Association Committee on Simplification of Security Transfers in January 1957, is not yet widely available, it is reproduced at p. 885 *infra*. It was first published in Jolls, "Security Transfer Simplification," 96 TRUSTS & ESTATES 641 (1957).

The Model Fiduciaries Securities Transfer Act was developed as a result of continuing activity of the Committee on Simplification of Security Transfer by Fiduciaries, formed in 1951 within the Section of Real Estate, Probate, and Trust Law of the American Bar Association, and of the Committee on Simplification of Fiduciary Security Transfers of the Illinois State Bar Association. The author of the draft which won final adoption (with minor changes) was Francis T. Christy of New York, a member of the A.B.A. committee. The final draft of the act was issued by the committees in January 1957, simultaneously with its introduction in the Illinois legislature. Members of the A.B.A. committee at this time were Willard R. Brown (Miami), Charles Bunn (Madison), Donald J. Burdine (Los Angeles), Francis T. Christy (New York), Alfred F. Conard, Chairman (Ann Arbor), Joseph P. Cummings (New Rochelle), Robert B. Fizzell (Kansas City, Mo.), Austin Fleming (Chicago), Coll Gillies (Chicago), Rollin B. Mansfield (Chicago), Creighton S. Miller, former chairman (Chicago), Berto Rogers (New York), John J. Schatt (Harrisburg), Alphonse Santangelo (Norristown, Pa.), and Millard Vandervoort (Battle Creek).

⁷⁹ Del. Laws 1957, S.B. 287; Ill. Rev. Stat. (1957) c. 32, §§439.50 to 439.57.

⁸⁰ Conn. Pub. Acts 1957, No. 573.

setts).⁸¹ Whether these laws "succeed" will not depend on whether they please judges or law professors, but whether they please the transfer agents. I will discuss them in that light.

The Model Act. In Illinois, the Model Act has already succeeded. Every one of the professional transfer agents in Chicago is now making stock transfers for fiduciaries (within appropriate territorial limits) without the traditional documents, according to information given me.⁸² To judge whether this situation is likely to continue, and whether it will prevail in other states, calls for some analysis of the factors contributing to the Illinois situation.

Some of the factors are local. One of these is the indefatigable labors of Austin Fleming, chairman of the interested State Bar Association committee. His initiative and energy are the explanation for the remarkable fact that in the few weeks between the date of the governor's signature and the effective date of the act, the transfer agents had united on their new procedures and put them in effect immediately after Labor Day, 1957. Another local factor is the representative character of the committee which developed the act, including outstanding probate lawyers and lawyers associated with leading transfer agents of Chicago.⁸³ A third local factor is the militant sentiment in the Illinois bar,⁸⁴ and the support of bar association leaders.⁸⁵

⁸¹ Mass. Acts & Resolves 1957, c. 765.

⁸² Oral and written communications from Austin Fleming, a staff attorney of the Northern Trust Company (Chicago), and chairman of the Illinois State Bar Association Committee on Simplification of Security Transfers by Fiduciaries.

⁸³ Of the nine Chicago trust companies listed as associate members of the New York Stock Transfer Association (First, Continental, Northern, Harris, City, American, Chicago National, LaSalle, Chicago Title) the first three named had employees or officers who were members of the Illinois Bar Association committee. Relative volumes of stock transfer business are not published, but the order in which all are named above is the order of their total assets at the close of 1956, according to *Moody's Financial Manual*.

Other members of the committee were associated as counsel for major corporations which maintain their own transfer facilities in Chicago, including American Telephone and Commonwealth Edison.

The members of the committee were Merrit C. Bragdon, James E. Doherty, Austin Fleming, William M. James, Thomas H. Jolls, Creighton S. Miller, Henry L. Pitts, Edmond B. Stofft, James A. Velde, and Robert B. Wilcox.

Although several members of the committee have asked not to be identified as representatives of the companies named, I regard their affiliations as significant in the drafting of the Model Act and in its subsequent acceptance. By way of contrast, I am told that the Commercial Code was adopted in Philadelphia, Pennsylvania without any prior consultation with any of the local attorneys familiar with the routine of stock transfers.

⁸⁴ See note 70 *supra*.

⁸⁵ The Model Act moved so smoothly through Illinois that it was never necessary

But other factors, which are not local, appear to have predominated even on the Illinois scene. Most important of these is the technical merit of the Model Act. It repudiates flatly the Taney-born theory that a corporation is a trustee for the owners of beneficial interest in its shares.⁸⁶ It substitutes what may be called a "curtain" scheme;⁸⁷ equitable interests in shares are behind the "curtain" of registered ownership, hidden from the corporation's eyes. The curtain can be opened only by a *written* notice of adverse claim, delivered to the corporation before the transfer is made. This is essentially the system which prevails in England,⁸⁸ and gives great satisfaction there, although the technical bases of it are quite different.⁸⁹ The act is brief, and raises no ghosts of other dreaded liabilities.

Another non-local factor is the authorship of the act. Francis Christy, the principal draftsman, is the author of the treatise which is on every transfer officer's desk.⁹⁰ The dubious trans-

to call on visible support from high brass. However, it was probably helpful that Thomas S. Edmonds, who had promoted formation of the American Bar Association's committee on simplification in 1951, and the Illinois State Bar Association's committee in 1954, was president of the Illinois association in 1955-56. The 1956-57 president, J. Gladwyn Thomas, was also in full sympathy.

⁸⁶ See §§2 and 3, p. 885 *infra*. For the Taney-born theory, see *Lowry v. Commercial Bank*, (C.C. Md. 1848) 15 Fed. Cas. 1040, and comments on it by Christy, "Responsibilities in the Transfer of Stock," 53 MICH. L. REV. 701 (1955), and by Conard, "Simplifying Stock Transfers," 30 ROCKY MT. L. REV. 1 (1957).

⁸⁷ "Curtain" is the name applied to the system of relieving purchasers of responsibility for equities and future interests in titles to real property, introduced by various English Real Property Law reform acts, which place "naked equitable interests decently behind legal curtains." The English pattern of stock transfer was cited as a model of freedom from equities, although the name "curtain" does not seem to have been used in connection with stock transfers. For references to the "curtain" idea, and to the modeling of reformed real property transfers on English stock transfers, see the following: FOURTH REPORT OF ACQUISITION AND VALUATION OF LAND COMMITTEE ON TRANSFER OF LAND IN ENGLAND AND WALES 11, 43 (1919) ("curtain provisions"), 33 (analogy to stock transfer); WOLSTENHOLME AND CHERRY, CONVEYANCING STATUTES, 12th ed., clxxvi, 209 (1930) (analogy to stock transfer); UNDERHILL, A CONCISE EXPLANATION OF LORD BIRKENHEAD'S ACT 78, 91 (1922) (curtain clauses, with literary credit to Shakespeare); MEGARRY, LAW OF REAL PROPERTY, 2d ed., 572 (1955) (analogy to share transfer).

⁸⁸ GORE-BROWN, HANDBOOK ON JOINT STOCK COMPANIES, 41st ed., 252-253 (1952). The English practice requires the adverse claimant to serve a "notice in lieu of distringas," followed by a court order within eight days. A "distringas" is a preliminary seizure writ, comparable to an attachment.

⁸⁹ Instead of a law to rebut any implication of notice, the English have a law forbidding the registration of title in any way except absolute ownership, so that no notice of trusts can very well arise. GORE-BROWN, HANDBOOK ON JOINT STOCK COMPANIES, 41st ed., 253-254 (1952); GOWER, MODERN COMPANY LAW 389 (1954).

⁹⁰ CHRISTY AND MCLEAN, THE TRANSFER OF STOCK, 2d ed. (1940). This book has been called the "transfer agent's Bible." Mudge, "The Simplification of Corporate Fiduciary Transfers," 35 TRUST BUL. 20 (Feb. 1956).

fer officer, wondering whether to pass a simplified transfer, receives reassurance from the adviser who normally confirms his doubts.

Although transfer agents in other states cannot have the sense of proprietorship which Illinois transfer agents feel in the Model Act, they will have the advantage of a successful experiment to observe. I have yet to discover a transfer agent who is anything but pleased with the Model Act; the approbation of this group seems assured.⁹¹

Hence, it seems likely that most transfer agents in Delaware and Connecticut will do as Illinois transfer agents have done, although they have not done it as quickly. Human nature (including that of bankers and lawyers) being what it is, there will probably be some abundantly cautious agents who will insist on the old documentation until legal or moral pressure is put on them. Bar associations—state and national—will have a role to play in obtaining 100 percent conformity.⁹²

In Connecticut, the problem is slightly complicated by a deletion which the legislature made in the official form of the Model Act. It deleted section 5, which declares that "a corporation making a transfer under this Act incurs no liability to any person." At first glance, the deletion suggests that corporations are to be liable as heretofore. Further examination shows that the remaining sections negative liability, and the no-liability clause was presumably deemed surplusage. Passage of the act would have been futile if the legislature intended liability to continue unaffected. I have been orally informed that the committee in charge struck the no-liability clause as surplusage, but that there is no written evidence of legislative purpose. Chicago

⁹¹ This observation is based on personal meetings with several officers of Chicago and New York transfer agents, and of the New York Stock Transfer Association. Their attitude toward the Model Act contrasts with their attitude toward the Uniform Commercial Code, to which they have frequently expressed their private opposition. Although the agents and the association have never put themselves on record as opposed to the code, prominent persons associated with the transfer agents testified against the code in the New York Law Revision Commission hearings. See 2 N.Y. LAW REV. COMM. REP. 905 (1954) (Gaines & Hutson, attorneys for American Telephone), 929 (Haberkern, Chase National), 953 (Bancroft, Bank of New York).

⁹² A most important feature of the Illinois experience was the sponsoring committee's organization of meetings to explain to transfer agents and to probate lawyers what could be accomplished, and what could not, under the new act. Similar meetings were held in Philadelphia in 1953 following adoption of the Commercial Code, and may account in part for the difference between the code's relative success in the two ends of the state. There were no such meetings, I am told, in Pittsburgh.

transfer agents' counsel seem to have decided that the Connecticut act, despite its deletions, has the same effect as the Illinois act.⁹³

Will transfer agents in the other simplification states—Massachusetts, Ohio, Pennsylvania, and Wisconsin—accept the Model Act as reliable, so far as it applies to transfers in those states? No opinion adverse to its effectiveness has yet been heard. Yet its prospects in those states are not good. Simplification is spotty, at best, in Ohio and Pennsylvania.⁹⁴ Probably most of the transfer work in Wisconsin is local, so that there will be little occasion to set up procedures applicable to transfers having Illinois or Delaware contacts. In all three states, the transfer agents will be conscious that their Illinois colleagues refuse to rely on these states' simplification acts, and negative reciprocity is likely to point to non-recognition of the Model Act.

For recognition of the Model Act in Massachusetts, there is more hope. Some Massachusetts agents for Massachusetts companies already dispense with certified copies of wills.⁹⁵ The questions are (1) will these agents now dispense with certified copies when acting for Connecticut, Delaware, and Illinois companies, and (2) will they dispense with court orders from Illinois fiduciaries (Delaware and Connecticut laws do not require court orders). Since Boston transfer agents appear to have been among the nation's most progressive prior to the 1957 legislation, they seem likely to give the Model Act at least as much effect as the cautious Chicago transfer agents have given it. If so, both the above questions would be answered in the affirmative.

The principal cloud is reciprocity. It now seems doubtful that Chicago transfer agents will recognize Massachusetts legislation as "safe,"⁹⁶ and Boston bankers may be tempted to retaliate. This probability emphasizes the importance of efforts now going on to simplify the simplification movement.⁹⁷

Massachusetts' Revised Commercial Code. The Uniform Commercial Code, as revised and adopted in Massachusetts in 1957,

⁹³ SUGGESTED GUIDE FOR STOCK TRANSFER AGENTS, UNDER ILLINOIS FIDUCIARIES SECURITIES TRANSFER ACT, August 26, 1957.

⁹⁴ See notes 30, 32 and 33 *supra* and accompanying text.

⁹⁵ See note 38 *supra* and accompanying text.

⁹⁶ The Chicago SUGGESTED GUIDE FOR TRANSFER AGENTS (note 93 above), expressly declares the Massachusetts Commercial Code inadequate. Reasons are discussed in the next section of this article.

⁹⁷ See note 163 *infra* and accompanying text.

does not become effective until October 1, 1958.⁹⁸ Continuing in effect with it will be the act of 1918, relieving security issuers of liability for breach of trust.⁹⁹

As to wholly intra-state transfers, we can expect complete simplification. In fact, we already have it at some transfer offices,¹⁰⁰ and I write "some" only because I have been unable to get detailed statements from all sources. Although the act of 1918 does not contain any provisions to dispense with court orders, this is irrelevant to intrastate transfers because Massachusetts executors and administrators can sell or distribute without court orders.¹⁰¹

The hard question is how far transfer agents in other states will go in simplifying transfers for Massachusetts corporations, or Massachusetts fiduciaries. We may well start our inquiry with Pennsylvania, which also has a lawbook labelled "Uniform Commercial Code."¹⁰²

In Pennsylvania, we start with the fact that Pittsburgh agents have generally not simplified at all.¹⁰³ They are not likely to start relying on Massachusetts' act until they first rely on their own.

In Philadelphia, intrastate transfers have been simplified. But there has been no simplification involving Massachusetts corporations or fiduciaries, or Ohio corporations or fiduciaries, even though some agents in both of those states have simplified intrastate transactions. The prior Massachusetts act and the Ohio acts seem to be at least as well drawn as the Pennsylvania act.¹⁰⁴ I conclude that Pennsylvania agents have simplified where they thought they could be forced to (under the mandatory clause of the Commercial Code) and in no other instance.¹⁰⁵ It seems a safe bet that the Pennsylvania courts will not force their agents to rely on foreign law, at least where the effectiveness of that law is de-

⁹⁸ Mass. Acts & Resolves 1957, c. 765.

⁹⁹ Note 37 *supra*.

¹⁰⁰ Note 38 *supra*.

¹⁰¹ CCH STOCK TRANSFER GUIDE, p. 25,003.

¹⁰² Pa. Stat. Ann. (Purdon, 1954) tit. 12A.

¹⁰³ Note 33 *supra*.

¹⁰⁴ The Massachusetts law exposes the transfer agent to liability "for participating with actual knowledge of a breach of trust." The Ohio law exposes the transfer agent "for participating in bad faith with a fiduciary in a breach of any duty of the latter." The Pennsylvania code exposes the transfer agent who acts "with notice of another claim." See note 49 *supra*.

¹⁰⁵ As previously noted, the Pennsylvania code expressly forbids the transfer agent to demand more than certain minimum documents, and threatens him with liability if he refuses to transfer on the terms outlined in the code. §§8-401, 8-402.

nied elsewhere. So long as Chicago agents deny the effectiveness of Massachusetts law,¹⁰⁶ Pennsylvania agents will probably do likewise.

If, however, Pennsylvania's Uniform Commercial Code should be made uniform with that of Massachusetts, the picture would change in two ways. Pennsylvania agents could no longer argue to Pennsylvania courts that it is too much for them to determine the effect of Massachusetts law. Second, and more important, the Pennsylvania transfer agents might have such increased confidence in their own law that they would willingly give it maximum, rather than minimum, effect.

In Illinois, where the transfer agents have already evidenced intention to give their act a maximum effect, the preconditions are more favorable to giving recognition to the new Massachusetts legislation. However, Illinois agents have apparently decided not to give effect to prior legislation of Ohio, Pennsylvania, and Wisconsin, or to the Massachusetts Commercial Code, chiefly because of the exceptions for "actual knowledge" or "notice."¹⁰⁷

The Massachusetts Commercial Code narrows the exception, but does not limit it to *written adverse claims*, as in the Model Act. The new Massachusetts exception will operate (1) when the issuer has "received notification" in time to act on it (including oral notification), and (2) when the issuer has demanded documentary evidence, and the documents contain information adverse to the transfer.¹⁰⁸

Consequently, Illinois transfer agents apparently will not accept the Massachusetts Commercial Code as furnishing sufficient protection. The risks under the Commercial Code are obviously wider than under the Model Act. How much more liability is involved per million transfers, the Illinois agents do not purport to know. They conceive of themselves as risk avoiders, not risk distributors. If the risk can be reduced by practicable measures, they intend to reduce it, not take it.

The prospects of the Commercial Code cannot be candidly reviewed without acknowledging also the existence of a spirit of general distrust toward the code. When it was put forth in an official draft in 1952, bankers and lawyers characteristically doubted that anything so comprehensive needed to be done at all, or

¹⁰⁶ See note 48 *supra*.

¹⁰⁷ *Ibid*.

¹⁰⁸ Mass. Comm. Code §8-403(1).

that it could be done well even if needed.^{108a} When they took the trouble to study the code and suggest changes, they were told that the code was final, and needed no improvement. Subsequent revisions have confirmed the doubters' attitudes, rather than reassuring them. When they are asked to re-examine the work, they are inclined to say, "Must we spend another four years proving to you that it can't be done?"

Another source of hostility is a by-product of the bigness of the code. There is *some* provision in it to offend everyone, so nearly everyone is opposed to its enactment until his change is made. There are some provisions which are quite offensive to transfer agents.¹⁰⁹ Opposition to adoption of the code in one's

^{108a} See remarks of Samuel L. Rosenberry, 2 N.Y. LAW REV. COMM. REP. 144, 188 (1954).

¹⁰⁹ Many transfer agents object to the code's affirmative statement of the issuer's duties to transfer on proper demand [§8-401(1)], to pay damages for wrongful refusal [§8-401(2)], and to replace a security which has been wrongfully transferred [§8-402(2)]. Although liabilities of this sort exist under current law, the issuer's opportunities to defend on the ground of "reasonable" doubt or delay are probably constricted by the precision of the code.

The transfer officials have a much more legitimate objection, in my opinion, to an innovation in the Massachusetts code which deprives them of recourse against a person who has innocently presented a certificate with a forged indorsement, and received in return a new certificate. Prior decisions concurred that the presenter of a security warrants the genuineness of indorsements, and is liable to the issuer when the latter discovers his error: *Boston & Albany R. Co. v. Richardson*, 135 Mass. 473 (1883); *Hambleton & Co. v. Central Ohio R. Co.*, 44 Md. 551 (1876); *Lake Superior Corp. v. Rebre*, 65 Pa. Super. 379 (1917).

Although the issuer ordinarily has no way of verifying indorsers' signatures, the code deprives it of any right to reclaim the new certificate, and leaves it to depend entirely on the signature guaranty (if any). Since this guaranty has frequently been made gratuitously by a country banker a thousand miles away, it is a vastly less satisfactory remedy than to go against the presenter (who may still be a shareholder), or against the broker who handled the transaction.

I have heard suggestions that the issuer might protect itself by requiring the presenter of a certificate to guarantee prior indorsements, but any such demand is apparently forbidden by §8-401(1).

The unwelcome abolition of the common law presenter's warranties has a curious history. The 1952 code was silent on the subject, but it introduced the novel proposition that the bona fide purchaser of a certificate with forged indorsement washes away his liability to the owner by exchanging the forged certificate for a new one in the purchaser's own name (§8-311). Someone must have noticed the disharmony between this proposition and the common law; instead of abandoning the innovation, someone added a sentence to Comment 2 stating that such a bona fide purchaser is *not* liable to the issuer (1953 Code, §8-311, Comment 2, last sentence).

The New York Law Revision Commission's committee pointed out that this was legislation by comment [Analysis of §§8-311(b) through 8-319, prepared for Professor Fricke by Edward Greenbaum, Nov. 2, 1954, p. 6].

The committee also received arguments from counsel for American Telephone and Telegraph Company that the presenter's warranties should be expressly preserved (Report of Meeting of Committee on U.C.C. Articles, Dec. 6-7, 1954, items 99, 117-119).

The U.C.C. Editorial Board responded by adding a new section, §8-407, which

own state is easily translated into opposition to recognition of the code's effectiveness in another state.

Having looked carefully at reactions to the Massachusetts Code on the part of transfer agents in Pennsylvania and Illinois, we have little to add about the other states. Ohio agents will have the same general set of motivations as Pennsylvanian's. Connecticut and Delaware agents are likely to go no farther than Illinois agents go. Wisconsin agents' business is probably so local that there will be little occasion to formulate policies applicable to interstate transfers.

Conflicts and Contacts

For the interstate corporation, the simplification of stock transfers may depend on the laws of many states. A corporation which has made a mistaken transfer may be sued in any of the states and territories in which it does business. It may even be sued in foreign countries. Should it defer the simplification of its stock transfers until all these states and countries have adopted simplification acts?

Fortunately, no one seems to think so. Among people who worry about the law governing stock transfers, only three contacts of any fiduciary transfer are receiving serious consideration.¹¹⁰ These are the state of incorporation, the state of registration of transfer, and the state of fiduciary administration.

State of Incorporation. The only one of these contacts which has any substantial support in American case law and legal theory is the state of incorporation. The only cases known to me which

expressly stated the common-law presenter's warranties (Supplement No. 1 to 1953 Commercial Code, 1955).

The Law Revision Commission's Committee rejected this patch, chiefly on the ground of disharmony with §8-311 (Report of Meeting of Committee on U.C.C. Article 8, May 19, 1955, items 12-16). The Editorial Board surrendered, and added a clause to section 8-306(1), expressly excluding liability of an innocent presenter [U.C.C. of 1957, §8-306(1)]. So far as I can determine, no one ever examined carefully the merits of the innovation in §8-311 which started all the trouble.

¹¹⁰ Based on oral conversations with groups of transfer attorneys of Chicago and New York, and on the SUGGESTED GUIDE FOR STOCK TRANSFER AGENTS UNDER ILLINOIS FIDUCIARIES SECURITIES TRANSFER ACT, August 26, 1957.

One other contact—the state in which the certificate was delivered for sale—is considered by Christy and McLean, but rejected after examination. [TRANSFER OF STOCK, 2d ed., §232 (1940)]. Another—the "Commercial domicile"—is suggested by Rabel, in 2 CONFLICT OF LAWS—A COMPARATIVE STUDY 42-45 (1947); this will be considered at a later point.

give serious consideration to the question so hold.¹¹¹ The *Restatement of Conflicts* is flatly in accord.¹¹²

This well established doctrine probably grew out of the theory that a corporation is an artificial creation of the state in which it was formed, and necessarily lives, moves and has its legal being in the atmosphere of that state.¹¹³ The doctrine may be supported today on the more practical ground that the rights of the various far-flung shareholders should be equal, and they can be equal only if their rights are determined under the same system of law. It would be extremely confusing to everyone if the rights of the shareholders were to change like the climate as the corporation's activities migrate from state to state. The only satisfactory choice of a state whose law is to be applied is the state of incorporation.¹¹⁴

State of Transfer on Books of Corporation. Although no corporation has yet been held liable to its shareholders in defiance of the law of the state of incorporation, transfer officials do not confine their attention to past holdings. They worry about future ones. They may well do so, for the history of stock transfer law contains clear cases of liability for conduct which conformed to apparent legal standards when it was done.¹¹⁵

Granting that the law may break from its present mooring at the state of incorporation, what are the chances of its drifting to the state where the stock is transferred on the books, that is, where the old certificate is exchanged for a new one? An unsophisticated view of the situation leads directly this way because improper registration of transfer wrongs the former owner, and wrongs are

111 *Hiller v. American Tel & Tel. Co.*, 324 Mass. 24, 84 N.E. (2d) 548 (1949); *Seymour v. Nat. Biscuit Co.*, (3d Cir. 1939) 107 F. (2d) 58. See also, more generally, *Disconto-Gesellschaft v. U.S. Steel Corp.*, 267 U.S. 22 (1925).

112 CONFLICT OF LAWS RESTATEMENT, §§53, 182 (1934). See also Wilcox, "The New Illinois Fiduciary Transfer Simplification Act," 45 ILL. B. J. 740 (1957); Pirtle, "The New Ohio Securities Transfer Statute and Conflict of Laws," 22 OHIO OP. 539 (1942). Cf. Coleman, "Corporate Dividends and the Conflict of Laws," 63 HARV. L. REV. 433 (1950); Baker, "Conflict of Laws in the Administration of Intangibles," 19 MO. L. REV. 1 (1954).

113 Marshall, C.J., in *Trustees of Dartmouth College v. Woodward*, 4 Wheat. (17 U.S.) 518 at 636 (1819). Cf. *Canada Southern R. Co. v. Gebhard*, 109 U.S. 527 (1883).

114 Justice Holmes, ruling that Nebraska must apply to a fraternal insurance policy the law of the state of incorporation, said: "The act of becoming a member is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicile, membership looks to and must be governed by the law of the State granting the incorporation. We need not consider what other States may refuse to do, but we deem it established that they cannot attach to membership rights against the Company that are refused by the law of domicile. It does not matter that the member joined in another State." *Modern Woodmen v. Mixer*, 267 U.S. 544 at 551 (1925).

115 See notes 52-55 supra and accompanying text.

governed by the law of the place where they are committed.¹¹⁶ To escape from this easy conclusion, one must point out that the shareholder's rights arise only from the corporation's charter, and this is subject to the law of the state of incorporation.¹¹⁷ There is always the possibility that the judge will take the unsophisticated view and decline to follow the more sophisticated way out.

At least two lines of doctrine exist which may incline a judge to apply law of the state of transfer on the books, even though he fully grasps the state-of-incorporation theory. One is the view that states in which corporate activities are carried on have an interest which makes their legislation prevail over that of the state of transfer.¹¹⁸ For instance, the state in which dividends are declared and distributed may punish the directors according to its own law;¹¹⁹ or a state in which an allegedly assessable member of a foreign corporation resides may apply its own law to decide whether he became a member.¹²⁰

Another line of doctrine is that shareholders' rights are so far "embodied in the certificate" that they become subject to the law of the place where the certificate is. This idea was enunciated in the famous dictum of Holmes, "the question who is the owner of the paper depends on the place where the paper is."¹²¹ And so he held that the English government's seizure of a certificate for a share in a New Jersey corporation divested the rights of the shareholder, even though there was not a word of New Jersey law which recognized transfer in this manner. On the same theory, a Maine court ruled ineffective a transfer of stock which violated Maine law, although it might have been good by the laws of the states whose corporations issued the shares.¹²²

Both these lines of doctrine, and their accompanying cases,

¹¹⁶ CONFLICT OF LAWS RESTATEMENT §§377-378 (1934).

¹¹⁷ See authorities cited in notes 111-114 *supra*.

¹¹⁸ Compare the language of Circuit Judge Holmes in *Wirt Franklin Petroleum Corp. v. Gruen*, (5th Cir. 1944) 139 F. (2d) 659 at 660, where he said, "Indeed, where a domicile in fact is shown to exist, corporate convenience is subverted by litigation where the corporation actually is, rather than where its fictitious citizenship exists. . . . The trend of modern decisions is to administer justice in accordance with the realities disclosed by the facts; no legal fiction, however revered in antiquity, should be given effect when it is clearly antagonistic to the facts, to common sense, and to natural justice." The issue before the court concerned jurisdiction of courts, not choice of governing law.

¹¹⁹ *German-American Coffee Co. v. Diehl*, 216 N.Y. 57, 109 N.E. 875 (1915).

¹²⁰ *Pink v. AAA Highway Express*, 314 U.S. 201 (1941).

¹²¹ *Disconto-Gesellschaft v. U.S. Steel Corp.*, 267 U.S. 22 at 28 (1925).

¹²² *Strout v. Burgess*, 144 Me. 263, 68 A. (2d) 241 (1949).

can be distinguished easily enough.¹²³ But a doctrine which can be limited can also be extended. The transfer agents' insistence on a simplification law at the place of registration of transfer is based, I suppose, on fear that the doctrines will be extended.¹²⁴

State of Fiduciary Administration. Least of all support exists for applying to a corporation's stock transfers the law of the state in which the executor or administrator entitled to the stock was appointed. No general principle points in this direction, and there are neither holdings nor dicta to this effect.¹²⁵

Still, many transfer agents demand statutory protection from the state of fiduciary administration. Before we condemn them let us imagine the strongest kind of case for applying that law.

A judge appoints an executor. The executor makes wrongful transfers, and defaults; his surety is insolvent. A substituted ad-

¹²³ Aside from other distinctions, the Diehl and Pink cases deal with a corporate member's *liability* under the law of the state in which the member acted. Neither, therefore, can possibly constitute a holding upon the liability of the corporation. Both cases are the subjects of extensive commentary. On the German-American case, see Coleman, "Corporate Dividends and the Conflict of Laws," 63 HARV. L. REV. 433 (1950); on the Pink case, see note, 42 COL. L. REV. 689 (1942).

The Disconto and Strout cases both rest on the view that the corporation has by its own domestic law "embodied the share in the certificate." This reasoning would not apply under the Model Act, which expressly reserves to the state of incorporation governance of the shareholder's rights against the corporation. Model Fiduciaries Securities Transfer Act, §6, p. 885 *infra*.

Section 8-106 of the Uniform Commercial Code (1957), which was not present in former editions, provides: "The validity of a security and the rights and duties of the issuer with respect to registration of transfer are governed by the law (including the conflict of laws rules) of the jurisdiction of organization of the issuer."

¹²⁴ An editorial note in 48 YALE L. J. 92 (1938) argues that the law of the place of transfer registration should be applied, apparently because most transfers take place in New York, and New York has (the editor avers) an effective exoneration act. This Yalish argument apparently loses any force which it had when we discover that the New York exoneration act is not effective. The editor did not seem to contend that there was any case support for his argument.

Henry Pirtle, the Ohio simplifier, contended that the issuer could be *exonerated* either by the law of the place of incorporation, or by the law of the place of registration of transfer, regardless of the law of the other place. Citing cases, he reasoned that courts will not hold anyone liable for acts which were lawful where they were performed; and that even acts which are unlawful where performed can be excused by a release given elsewhere. See Pirtle, "The New Ohio Securities Transfer Statute and Conflict of Laws," 22 OHIO OP. 539 (1942).

¹²⁵ Christy [TRANSFER OF STOCK, 2d ed., 120 (1940)] reports with obvious reserve: "It has been held that the power of a fiduciary to transfer stock is governed by the laws of the jurisdiction where he is appointed, and not by the laws of the jurisdiction in which the corporation is domiciled"; but the decision cited enunciates the more modest proposition that if the transfer of stock is valid by the law of fiduciary administration, it will be recognized by the state of incorporation. *Ross v. Southwestern R. Co.*, 53 Ga. 514 at 532 (1874). This statement by no means implies that other states will regard as void all transfers which are void by the law of fiduciary administration.

ministrator takes his place, and sues the corporation which recorded the wrongful transfers. The impulse to aid the defrauded widow and heirs is strong, and so is the court's desire to repair the damage done.

If we look far enough, we may find some analogy for applying even the law of the state of fiduciary administration, which is usually the residence of the deceased stockholder and his beneficiaries. One may cite *Cardillo v. Liberty Mutual Insurance Company*,¹²⁶ where District of Columbia compensation law was applied in preference to that of Virginia, where the accident occurred. The Supreme Court declared, "A prime purpose of the Act is to provide residents of the District of Columbia with a practical and expeditious remedy for their industrial accidents. . . . The District's legitimate interest in providing adequate workmen's compensation measures for its residents does not turn on the fortuitous circumstance of the place of their work or injury."¹²⁷

The transfer official's fear that the law of the state of fiduciary administration will be applied is particularly acute with respect to a group of states whose statutes provide that if an executor sells stocks without a court order or confirmation, the sale "shall be void," or that "no title shall pass thereby to the purchaser."¹²⁸

If the company makes a transfer which has not been approved by a court, and then is sued in a state which has such a law, it has a hard argument to make. If the sale was truly "void," the company is surely liable. To escape, the company must persuade the court that the statute is inapplicable between shareholder and company, or that it is extraterritorial and invalid as to transfers in foreign corporations. Either argument goes against the words of the statute, and against the probable sympathies of the judge.

¹²⁶ 330 U.S. 469 (1947).

¹²⁷ *Id.* at 476.

¹²⁸ In the following citations, STG means CCH STOCK TRANSFER GUIDE: *Alaska*: Alaska Comp. Laws Ann. (1949) §61-14-1, STG p. 55,004; *Arizona*: Ariz. Rev. Stat. Ann. (1956) §14-599, STG p. 8303; *California*: Cal. Prob. Code (Deering, 1944) §755, STG p. 9004; *Florida*: Fla. Stat. (1941) §733.23, STG p. 14,004; *Idaho*: Idaho Code (1948) §15-702, STG p. 16,002; *Maryland*: Md. Code Ann. (1951) c. 93, §306, STG pp. 24,001-24,002; *Mississippi*: Miss. Code (1942) §620, STG p. 28,003; *Missouri*: Mo. Stat Ann (1956) §473.487, STG p. 29,002; *Montana*: Mont. Rev. Code (1947) §91.2803, STG p. 30,002; *Oklahoma*: Okla. Stat. Ann. (1937) tit. 58 §382, STG p. 40,003; *South Carolina*: S.C. Code (1952) §19-5-15, STG p. 44,003; *South Dakota*: S.D. Code (Supp. 1952) §35.1506, STG p. 45,003; *Texas*: Tex. Civ. Stat. (Vernon, 1956) Tex. Prob. Code §339, STG p. 47,002; *Wyoming*: Wyo. Comp. Stat. (1945) §6-1702, STG p. 54,002.

A sad commentary on the competency of judges is implicit in the fear that they may apply the law of the state of fiduciary administration. Nevertheless, most transfer agents who simplify at all demand statutory protection in the fiduciary's state.

Registered Bonds in the Conflict of Laws. All the 1957 simplification acts apply to registered bonds, as well as to stocks.¹²⁹ But the conflict of laws rules for bonds are quite different. Bonds are typically regarded as debts of the corporation, not as memberships in it.¹³⁰ There is no modern rule that a corporation's debts are governed by the state of incorporation; on the contrary, they are governed by the place of contracting, or by the place of performance.¹³¹ Both of these places present practical difficulties. If the place of contracting governs, one must decide whether the debt is contracted where the bonds are delivered to the underwriter, or by the underwriter to the investors. If the place of performance governs, there may be alternative places of payment (e.g., Wilmington, New York) and additional places where the duty to register ownership may be performed (e.g., Boston, Chicago).

The 1957 simplification acts have unanimously rejected all these confusing points of reference. The governing law is to be the place of incorporation.¹³²

This is all very well if the company happens to be sued in a state which has adopted the law. But what of the Delaware corporation which has issued bonds in New York, payable there, but whose bonds have been wrongfully transferred by a transfer agent in Chicago, and which is sued in North Carolina by the defrauded heir of a North Carolina estate?

If the North Carolina judge reads his cases with care, I think he should apply the law of Illinois. The question is not the

¹²⁹ Massachusetts Commercial Code (Mass.) §8-102(1)(a). Model Fiduciaries Securities Transfer Act (Conn., Del., Ill.) §1(f), reproduced at p. 885 *infra*. The Pennsylvania Commercial Code [§8-102(1)(2)] is to the same effect.

¹³⁰ For a case in which the traditional distinctions between bonds and stock were employed to decide a tax question, see *John Kelley Co. v. Commissioner*, 326 U.S. 521 (1946).

¹³¹ CONFLICT OF LAWS RESTATEMENT §§311-376 (1934).

¹³² Mass. Commercial Code §8-106; Model Act (Del., Ill.) §6; Model Act (Conn.) §5. The Pennsylvania Commercial Code purports to govern any transaction made or agreed to be made within the state, and to any security which has (ever?) been issued or transferred within the state. Pa. Commercial Code §1-105(4). This Napoleonic decree forcibly recalls Lord Ellenborough's famous query, "Can the Island of Tobago pass a law to bind the whole world?" *Buchanan v. Rucker*, 9 East 192 at 194, 103 Eng. Rep. 546 (1808).

validity of the bond (on which New York law might govern) but neglect to use care in transferring the bond. If the neglect is regarded as a tort, it took place in Illinois and is ruled by Illinois law.¹³³

The neglect may also be regarded as a breach of contract—one of the obligations implied by a promise to pay a named and registered bondholder. Whether any such obligation has been broken is determined by the law of the place where it was to be performed, which is Illinois. If the contract contains various obligations, each obligation is to be separately judged by its own place of performance.¹³⁴ American bond cases concerning defaults in payment of interest or principal concur in this rule.¹³⁵

However, the bond in question may have been transferrable alternatively in New York or Chicago; the place of performance is alternative. In this situation, such authority as exists concurs that by requesting registration of transfer at Chicago the holder has subjected his claim to Illinois law.¹³⁶

Following this analysis, we would conclude that an issuer is safe if the simplification law is in effect in the state of transfer on the books and (because the statutes so require) in the state of incorporation.

Unfortunately, the rules of conflicts in relation to contracts are much more fluid than those applicable to shareholders' rights,¹³⁷ and there are plenty of places for a judge to jump the track that we have laid out. Perhaps he prefers the rule that a contract is governed in its entirety by the law of the place of contracting, because this is the presumable intention of the parties.¹³⁸ Perhaps he thinks that all duties are governed by the

¹³³ CONFLICT OF LAWS RESTATEMENT §378 (1934); *Alabama Great Southern R. Co. v. Carroll*, 97 Ala. 126, 11 S. 803 (1892).

¹³⁴ CONFLICT OF LAWS RESTATEMENT §358 (1934). Cf. *id.*, §353; *Louis-Dreyfus v. Paterson Steamships, Ltd.*, (2d Cir. 1930) 43 F. (2d) 824.

¹³⁵ *Central Hanover Bank & Trust Co. v. Siemens*, (2d Cir. 1936) 84 F. (2d) 993, cert. den. 299 U.S. 585 (1936); *Thompson v. Lakewood City Development Co.*, 105 Misc. 680, 174 N.Y.S. 825 (1919).

¹³⁶ *Pan-Am. Securities Corp. v. Krupp A. G.*, 164 Misc. 445, 6 N.Y.S. (2d) 993 (1938), affd. 256 App. Div. 955, 10 N.Y.S. (2d) 205 (1939). Cf. CONFLICT OF LAWS RESTATEMENT §356 (1934).

¹³⁷ CHEATHAM, GOODRICH, GRISWOLD, AND REESE, *CASES ON CONFLICT OF LAWS*, 4th ed., 533 (1957): "The subject, Contracts, is the most confused one in conflict of laws." Similar observations have been made by an Englishman and a German. Morris, "The Eclipse of the *Lex Loci Solutionis*—A Fallacy Exposed," 6 VAND. L. REV. 505 (1953); 2 RABEL, *CONFLICT OF LAWS—A COMPARATIVE STUDY* 274, 451 (1947).

¹³⁸ See Morris and Cheshire, "Proper Law of a Contract in the Conflict of Laws," 56 L. Q. REV. 320 (1940); Nussbaum, "Conflict Theories of Contracts: Cases Versus

place of the *principal* performance which is payment;¹³⁹ if so, the "place of performance" becomes the place where payment was demanded.¹⁴⁰ Or he may conclude that he is applying a standard of care which has never been defined and which must therefore be judged by the law of the forum.¹⁴¹

This state of affairs may give a transfer official all kinds of worries. If he takes them seriously enough, he will refuse to simplify until appropriate statutes have been passed in all the states in which he could conceivably be sued. Happily, I have as yet discovered no examples of so extreme an attitude.

The saving grace is that the issuer is probably under no duty under any state's law to inquire into the propriety of *bond* transfers. The doctrine that the issuer of stock has such an obligation has never yet been extended to the issuers of bonds. In its present state of disrepute it is unlikely to be. But even a judge who regards with favor the Taney doctrine¹⁴² would be unlikely to extend the same protection to bondholders. A corporation may be regarded as a trustee for its shareholders much more plausibly than as a trustee for its creditors. In the *Lowry* case, Justice Taney derived the corporation's duty in part from the fact that it *required* all stock to be transferred on the books; the decision to register bonds is commonly optional with the holder.

Putting together the improbability of being held at all, and the uncertainty of what law governs, transfer agents are likely to apply to registered bonds the same procedures which they apply to stocks.

Choice of Law in Foreign Countries. Issuers and transfer agents have given no evidence yet of being concerned with law of countries other than the United States. But many American companies do business abroad and have foreign investors; so the subject may be worth a moment's consideration.

If any country outside the United States applies its own law to the situation, it is a safe guess that the security issuer will not be held liable. As is well known, English courts have repeatedly

Restatement," 51 YALE L. J. 893 at 915-918 (1942); and see the works of Morris and Rabel cited in note 137 *supra*.

¹³⁹ See *Badger Machinery Co. v. United States Bank*, 166 Wis. 18, 163 N.W. 188 (1917), where the effect of negotiating a bond in New Mexico was governed by the law of Wisconsin, where the bond was payable.

¹⁴⁰ By analogy to *Pan-Am Securities*, note 136 *supra*, where the bondholder's election to demand payment in Holland instead of in Germany made Dutch law applicable.

¹⁴¹ CONFLICT OF LAWS RESTATEMENT §380 (1934).

¹⁴² See note 2 *supra*.

repelled the suggestion that a security issuer must look out for the protection of equitable interests in the securities.¹⁴³ This view would presumably be followed in other nations of the Commonwealth, where Justice Taney's reputation would add little to the intrinsic attractions of *Lowry v. Commercial Bank*.¹⁴⁴

In countries with other legal systems, we have no such direct evidence of what views courts would take. It seems inherently doubtful that any such duty would be imposed. Its whole basis is the concept of participation by a third party in a breach of trust—a secondary development of Anglo-American trust law.¹⁴⁵ But the trust itself is a stranger to lands which lack the Anglo-Saxon legal tradition;¹⁴⁶ liability for negligent participation in a breach of this unrecognized institution seems most unlikely. In the related institution of *fiducia*, a third party who buys from an erring fiduciary incurs no liability.¹⁴⁷

It is also unlikely that foreign countries will apply their own law to the suit of a purported shareholder against the corporation. For the doctrine is universally recognized that the relations of shareholder and corporation are to be determined by law which is personal to the corporation.¹⁴⁸

But here we encounter an interesting difference. While American judges consider the corporation's domicile to be the state which granted its charter, European countries generally refer to the location of the general executive offices.¹⁴⁹ So a European court, passing judgment on the suit of a shareholder against Ford Motor Company, would not in the first instance refer to the law of Delaware, but of Michigan. However, on discovery that Michigan would in turn refer the question to Delaware law, the law of Delaware would ultimately be applied, by the process known as *renvoi*.¹⁵⁰

¹⁴³ *Hartga v. Bank of England*, 3 Ves. Jr. 55, 10 Eng. Rep. 891 (1796); *Simpson v. Molson's Bank*, [1895] A.C. 270; Gower, "Some Contrasts Between British and American Corporation Law," 69 HARV. L. REV. 1369 (1956).

¹⁴⁴ Note 2 *supra*.

¹⁴⁵ Scott, "Participation in a Breach of Trust," 34 HARV. L. REV. 454 at 465-467 (1921).

¹⁴⁶ Bolgar, "Why No Trusts in the Civil Law?" 2 AM. J. COMP. L. 204 (1953); Hefti, "Trusts and Their Treatment in the Civil Law," 5 AM. J. COMP. L. 553 (1956).

¹⁴⁷ Hefti, "Trusts and Their Treatment in the Civil Law," 5 AM. J. COMP. L. 553 at 559 (1956).

¹⁴⁸ 2 RABEL, *CONFLICT OF LAWS—A COMPARATIVE STUDY* 74 (1947).

¹⁴⁹ *Id.* at 31. Rabel uses the term "central office," which I have paraphrased as "general executive offices," on the supposition that the latter has more meaning to American readers.

¹⁵⁰ *Id.* at 50.

A different result would follow if the general executive offices of a Delaware corporation were in Venezuela. A German court would apply the law of Venezuela in the first instance, and also in the last instance, because Venezuela apparently agrees with Germany that the law of the general executive offices governs internal corporate problems.¹⁵¹ However, there would still be little danger for the corporation, since it is fundamentally unlikely that Venezuela would consider that the corporation has any obligation whatever to the owners of unrecorded interests in corporate stocks.

With respect to corporate bonds, it seems just as improbable as in the case of stocks that any foreign court would apply its own law to the controversy; or that, if it did, it would impose liability on the security issuer. European choice of law with respect to debt claims does differ somewhat from American choice of law; it has a much greater disposition to apply the law which the parties themselves intended, if they have made their intention known.¹⁵² Hence, any provision in the bond that it should be governed by the law of state of incorporation would probably be honored.

When the parties have not signified their choice of law, European authorities are nearly as divided as Americans between the place of contracting and the place of performance.¹⁵³ Since the place of contracting will be some American state, which presumably applies the law of the place of performance, we are again brought back to the place where the duty to transfer was rightfully or wrongfully performed.¹⁵⁴ So the ultimate law applied would probably be the same as if the case had started in an American court.

I have spoken of European law, because a little is known of it. On technical questions of this sort, I suppose that judges in other parts of the world—such as Latin America and Asia, are likely to defer to European solutions if known to them.

In summary, a contemplation of the law of foreign countries adds nothing to the danger of simplifying share transfers. Insofar as foreign courts decide differently than American courts would, their decisions are likely to favor the security issuers.

What the Security Issuers Think About Conflicts. According

¹⁵¹ Ibid.

¹⁵² Id. at 368.

¹⁵³ Id. at 463.

¹⁵⁴ Id. at 480.

to the proportions of timidity and caution that enter into their temperaments, security issuers have a wide variety of choice as to the conflicts requirements of a simplification program. The issuer who has faith in the law as it is written should be satisfied with a simplification law in only one contact of the transaction—the place of incorporation (for a stock). If he is a shade more cautious, he will demand two safe contacts—the state of incorporation and of transfer. If he regards law as no more certain than politics, he will demand three contacts, adding to the above the place of fiduciary administration. And if he suffers from a fear neurosis, he will refuse to simplify until proper laws are adopted in all the jurisdictions where he might conceivably be sued.

For the transfer of bonds, even the boldest issuer will presumably require in the first instance a safe contact both for the place of transfer (because this is indicated by the normal choice of law rule) and for the place of incorporation (because this is the choice designated by the simplification statutes). In the next stage of timidity, he will demand protection also at the place of issue; and, if superabundantly cautious, the place of fiduciary administration. Finally, the neurasthenic will demand protection in every state where suit may be brought.

Most Chicago transfer agents are now working on a three-contact approach. They will simplify transfers if the state of incorporation and the state of fiduciary administration, as well as the state of registration, have adopted the Model Fiduciaries Securities Act. States with other simplification acts are treated like those which have no simplification acts at all.¹⁵⁵

Some of the Chicago agents have established a two-contact approach for small security holdings; they are satisfied to find the Model Act in the state of incorporation and in the state of registration (which for them is always Illinois), without requiring it also in the state of fiduciary administration.¹⁵⁶

One large Chicago corporation is said to have gone even farther, and to be permitting its out-of-state transfer agents to dispense with documentation, regardless of the state of fiduciary

¹⁵⁵ This is the practice "advised" in the SUGGESTED GUIDE FOR STOCK TRANSFER AGENTS UNDER ILLINOIS FIDUCIARIES SECURITIES TRANSFER ACT, jointly issued under date of August 26, 1957, by the Illinois Bar Association Committee on Simplification of Fiduciary Security Transfers, and the Chicago Corporate Fiduciaries Association Stock Transfer Committee.

¹⁵⁶ The companies consider this policy as highly experimental, and may discontinue it at any time in order to let time show what the effects have been.

administration. This company's conflict-of-laws hazard is minimized by the fact that it does no business (and presumably cannot be sued) outside Illinois.¹⁵⁷

The three-contact approach is the one in actual use, I am told, in Philadelphia and Wisconsin. Simplified transfers are made when all three contacts are within the state. In neither of these states has any recognition yet been given to recognition of the other as a safe contact for a simplified transfer.

It is evident that the law of *other* states is a major factor in discouraging the simplification of security transfers. Although such fears are not groundless, they need not be placed on a par with fears of the law of the state of incorporation. If corporations have no faith whatever in courts, they should stop doing business altogether. Since they consent to make some transfers, trusting that the courts will not find the facts completely wrong, they might also make transfers in reliance on the law of the state of incorporation, trusting courts not to apply the law of the place of transfer. At least, they could disregard the law of the place of fiduciary administration, which could be applied only in open defiance of all known precedents.

The issuer of securities, in establishing its transfer policies, needs to make a combined consideration of conflict-of-laws rules and substantive law rules. To facilitate this type of analysis, I have prepared a table which suggests possible considerations bearing on simplified transfers of the securities of executors and administrators.

SAFE CONTACTS FOR SIMPLIFIED STOCK TRANSFERS	
on the order of executors and administrators	
<i>Safe Contacts as States of Incorporation</i>	
<i>Satisfactory to highly cautious issuer:</i>	
States which have adopted Model Act:	
	Connecticut
	Delaware
	Illinois
<i>Satisfactory to reasonably cautious issuer:</i>	
States which have adopted other simplification acts:	
	Massachusetts
	Ohio
	Wisconsin
	Pennsylvania

¹⁵⁷ The company involved has refused to confirm this practice in writing, and does not wish to be identified in connection with it, but does not deny the statement.

Satisfactory only to a highly experimental issuer:

All others

Safe Contacts as States of Transfer on the Books:

Satisfactory to highly cautious issuer:

States in which issuer cannot be sued.

States which have adopted Model Act:

Connecticut

Delaware

Illinois

Satisfactory to reasonably cautious issuer:

States which have adopted other simplification acts:

Massachusetts

Ohio

Wisconsin

Pennsylvania

Satisfactory to reasonably bold issuer:

Any other state (on supposition that law of state of transfer is irrelevant).

Safe Contacts as State of Fiduciary Administration

Satisfactory to highly cautious issuer:

States in which issuer cannot be sued.

States which have adopted Model Act:

Connecticut

Delaware

Illinois

States which adopted other simplification acts:

Massachusetts

Ohio

Wisconsin

Pennsylvania

States in which executor or administrator has power of sale without court order or direction in will:

Connecticut*

Delaware*

Massachusetts*

Pennsylvania*

Wisconsin*

Hawaii

Iowa

Maine

Minnesota

Nebraska

New Hampshire

New Jersey

New Mexico

New York

North Dakota

Rhode Island

Tennessee

Utah

Vermont

Virginia

West Virginia

*already included in prior list.

Satisfactory to reasonably cautious issuer:

States in which court order is required for sale, but
lack of it does not nullify sale:

Illinois*	Alaska
Ohio*	Arkansas
	Colorado
	District of Columbia
*included on prior list	Georgia
	Indiana
	Kansas
	Kentucky
	Louisiana
	Nevada
	North Carolina
	Oregon
	Washington

Satisfactory to reasonably bold issuer:

States in which lack of court order or confirmation
renders executor's or administrator's sale "void":

Alabama	Missouri
Arizona	Montana
California	Oklahoma
Florida	South Carolina
Idaho	South Dakota
Maryland	Texas
Mississippi	Wyoming

The Future of Simplification

The seven scattered states which now have simplification acts will probably find additional companions in 1958 and 1959.¹⁵⁸ The four enactments of 1957 testify to a gathering momentum.

However, the executors and administrators who have been gasping for legislation may soon be gasping for a less bewildering variety of styles. At present, there are seven states with six variations of simplification laws distributed among them. It is already certain that transfer officials in some states distrust the simplification acts of others; some even distrust their own acts. In only two states—Delaware and Illinois—is it clear that the transfer officials intend to recognize the effectiveness of the laws of any other state.

¹⁵⁸ As I write, the Model Fiduciaries Securities Transfer Act has been introduced in the 1958 sessions of the legislatures of New York, New Jersey and Michigan.

The extant competitors in the legislative race are presently two—the Uniform Commercial Code (1957 version) and the Model Fiduciaries' Securities Transfer Act. They are about to be joined by a third, the Uniform Act To Simplify Security Transfers.¹⁵⁹

The Uniform Commercial Code's excuse for existing is quite different from that of the other two. It is a comprehensive codification of the law governing commercial transactions. Simplification is one of four parts in one of eight articles. In order to obtain simplification by this route (assuming it to be an effective route), the legislature must accept a complete revision of its law of sales, negotiable instruments, bank collections, letters of credit, bills of lading, warehouse receipts, chattel mortgages, conditional sales, and incidental topics.

The Model Act, by contrast, exists exclusively for the purposes of simplifying transfers. It has been injected into a scene already occupied by the Commercial Code because of evidence that the code's adoption would be successfully opposed in the states which are most important to stock transfer,¹⁶⁰ and that transfer agents would refuse to simplify transfers under it even if it were adopted.¹⁶¹

The Uniform Act, now in draft, has the same basic objectives as the Model Act. The commissioners' reasons for launching another act with the same objectives are apparently mingled. On the simplest plane, they wish to help in a good cause, but demand a certain conformity to the style of other uniform laws. In addition, their editorial committee has various technical and terminological differences with the sponsors of the Model Act. Finally, some of the commissioners are so deeply committed to the Uniform Commercial Code that they want every other uniform act to subscribe to its Alice-in-Wonderland vocabulary.¹⁶²

¹⁵⁹ 1956 HANDBOOK, 285.

¹⁶⁰ The act was rejected by the New York Law Revision Commission in 1955, and by the Indiana legislature in 1957. Because of known opposition, it has not been introduced in Illinois.

¹⁶¹ See prior discussion as to effects of the code in Pennsylvania. I was orally informed by a group of transfer officials in July 1957 that when the Uniform Commercial Code was under consideration in New York in 1954, they had decided that its adoption would make no change in their transfer practices.

¹⁶² Whether you are in Wonderland depends, of course, on which door you came in by. If you came in as a person who handles securities (as investor, broker, corporate secretary, or transfer agent), you think of securities as involving (1) a document labelled "assignment," which says "I hereby sell assign and transfer," (2) a handing over of certificates to a buyer, called "delivery," (3) a process of cancelling the old certificate,

Fortunately, the last motivation seems to be on the wane; meetings of some of the sponsors of the Model Act and of the Uniform Act held in October 1957 and January 1958 at the New York Stock Exchange seemed to bring the two groups closer to agreement on a common draft.¹⁶³ If these groups succeed in unifying their efforts, it is most probable that a large majority of states will adopt the joint product within a few years. Reciprocal recognition between states would follow, so that nationwide or nearly nation-wide simplification of transfers would be a reality by 1965. There will remain the states which adopt the Uniform Commercial Code, to which reciprocity recognition may be denied by the Model-Uniform Act states. But it is likely that the Commercial Code will eventually achieve recognition from transfer agents. If its 1957 form proves unacceptable, further changes can and must be made in it.

It therefore seems likely that within five to ten years fiduciaries across the nation will be transferring their stock and registered bonds without copies of wills and court orders, and without the lawyers' interpretations and supporting affidavits that are sometimes made necessary by the terms of the wills and orders. But this will not come to pass by the mere efflux of time. It will

issuing a new one, and entering a new name on a stock ledger, all of which is called "transfer" and done by a "transfer agent," (4) the countersigning of the new certificate, and recording of serial numbers as a control on the transfer agent, done by a "registrar."

When you read any of the forms of the Uniform Commercial Code, you find that step 1 is called "indorsement" even though it is not written on the back of the instrument (which you always thought was the meaning of "indorsement"); you find that step 2 effects a "transfer" although a transfer agent has nothing to do with it; you find that step 3 is called "registration," although a registrar has nothing to do with it; and you find no word left for what a "registrar" does.

However, if you approach from a different angle, the wording of the code may seem quite reasonable, because there is no use being technical about where you "indorse," and the Uniform Stock Transfer Act initiated the present use of "transfer" and "registration" some forty years ago. The Wonderland is among the investment people who keep using their words with nineteenth century meanings.

¹⁶³ This meeting consisted of the five members of the Special Committee on Uniform Simplification of Security Transfers Act, of the National Conference of Commissioners of Uniform State Laws, and 13 members of an "advisory committee," drawn from the American Bar Association committee, the Stock Exchange, the American Law Institute, the New York Stock Transfer Association, the Corporate Transfer Agents Association, and the American Society of Corporate Secretaries. The persons present at the October meeting were Robert Braucher (Cambridge), Alfred A. Buerger (Buffalo), Willard B. Luther (Boston), Karl N. Llewellyn (Chicago), Walter D. Malcolm (Boston), Francis T. Christy (New York), Alfred F. Conard (Ann Arbor), Austin Fleming (Chicago), John R. Haire (New York), Carlos L. Israel (New York), T. Stanley O'Brien (New York), Daniel Partridge, III (Washington), Samuel L. Rosenberry (New York), Eliot B. Thomas (Philadelphia), George E. Wasko (New York), Joseph E. Williams (New York).

require an agreement among sponsoring groups on the legislation to be sponsored; it will require adoption by more than 40 legislatures; it will require alert responsiveness of corporation officials to the possibilities of the new laws.

The result will be a minor victory in the endless struggle which we of the legal and financial professions must wage to avoid strangling ourselves with red tape.

Model Fiduciaries' Securities Transfer Act

Be it enacted, etc. . . . [insert appropriate enacting language for the particular state.]

Section 1. Definitions.

In this Act, unless the context requires otherwise:

(a) "Assignment" includes any written stock power, bill of sale, deed, declaration of trust or other instrument of transfer.

(b) "Beneficial interest" includes the interest of a decedent's legatee, distributee, heir or creditor, of a beneficiary under a trust, of a ward of a beneficial owner of a security registered in the name of a nominee, or of a minor owner of a security registered in the name of a custodian, or any similar interest.

(c) "Corporation" means a corporation (private, public or municipal), association or trust organized or created under the laws of this State and issuing a security subject to this Act, and includes the transfer agents and registrars of any of its securities.

(d) "Fiduciary" includes an executor, administrator, trustee, guardian, committee, conservator, curator, tutor, custodian or nominee.

(e) "Person" includes a firm or corporation.

(f) "Security" includes any share of stock, bond, debenture, note or other security of a corporation which is registered as to ownership on the books of the corporation.

(g) "Transfer" means a change on the books of a corporation in the registered ownership of a security.

Section 2. Assignment to a fiduciary.

A corporation making a transfer of a security upon assignment by the registered owner to a person described as a fiduciary in the assignment or known by the corporation to be a fiduciary is not bound to inquire into the existence, extent, or correct description of the fiduciary relationship, and thereafter, until the corporation receives written notice to the contrary, it may assume without inquiry that the registered owner continues to be the fiduciary.

Section 3. Assignment by a fiduciary.

A corporation making a transfer of a security upon assignment by a fiduciary

(a) may assume without inquiry that the assignment, even though to the fiduciary himself or to his nominee, is within his authority and capacity and is not in breach of his fiduciary duties,

(b) may assume without inquiry that the fiduciary has complied with the laws of the state having jurisdiction of the fiduciary relationship, including any laws requiring the fiduciary to obtain court approval of the transfer, and

(c) is not charged with notice of and is not bound to obtain or examine any court record or any recorded or unrecorded document relating to the fiduciary relationship or the assignment, even though the record or document is in its possession, except that, if the security is not registered in the name of the fiduciary, the corporation shall obtain a copy of a document showing his appointment and, if court appointed, certified by the clerk of the appointing court within sixty days before the date of transfer, but the corporation is charged with notice of only that part of the document which provides for the appointment.

Section 4. Adverse claims.

If a person having or asserting a claim of beneficial interest adverse to the transfer of a security from a fiduciary delivers written notice of the claim to the corporation before the transfer, the corporation shall promptly notify the claimant by registered mail of the presentation of the security for transfer. The corporation shall withhold the transfer for fifteen days after sending the notice and shall then make the transfer unless it is restrained by a court order.

Section 5. Non-liability of corporation.

A corporation making a transfer of a security under this Act incurs no liability to any person.

Section 6. Application.

This Act applies to every claim of beneficial interest in a security issued by a corporation organized under the laws of this State regardless of the place of delivery or transfer, regardless of the location or domicile of the person asserting the claim, and regardless of the location of the certificate or other instrument representing the security or of the assignment.

Section 7. Tax obligations.

This Act shall not be construed to affect any obligation of a corporation with respect to estate, inheritance, succession or other taxes imposed by the laws of this state.

Section 8. Repeal.

The following acts or parts of acts are repealed: [List acts or parts of acts of the enacting state which conflict with, or overlap, the model fiduciaries' securities transfer act. In particular, list section 3 of the Uniform Fiduciaries Act, if in effect in the state. It is *not* necessary to refer to or repeal any part of the Uniform Stock Transfer Act.]

Section 9. This Act may be cited as the "[Insert name of state] Fiduciaries' Securities Transfer Act."

Section 10. Effective date.

This Act shall take effect on