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## CORPORATIONS-LIABILITY OF TRANSFER AGENT FOR WRONGFUL REFUSAL TO TRANSFER SHARES

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CORPORATIONS—LIABILITY OF TRANSFER AGENT FOR WRONGFUL REFUSAL TO TRANSFER SHARES—Plaintiff, stockholder in a mining company, sued a transfer agent of the company in conversion for its refusal to transfer plaintiff's stock into block shares. The lower court found for plaintiff. On appeal, *held*, reversed. There is no direct liability of a transfer agent to the stockholder for wrongful nonfeasance in delaying or refusing to transfer stock. *Mears v. Crocker First Nat. Bank of San Francisco*, (Cal. App. 1950) 218 P. (2d) 91.

Transfers of stock were formerly entered in the corporate books by stockholders themselves, but, as the holders became more numerous and widely scattered, it was inconvenient to appear in person; agents were then authorized to transfer the stock under a blank power of attorney. The agents are almost always in the employ of the corporation, since the complexity of present-day stock dealings has made it necessary to delegate the duty of perfecting these transfers to specialized transfer agents.<sup>1</sup> It would seem, however, that the transfer agent could be treated as the agent of the transferring stockholder as well as agent of the corporation so as to make the agent liable to the stockholder in the usual principal-agent relationship.<sup>2</sup> The courts do not accept this theory<sup>3</sup>—

<sup>1</sup> Behrends and Elliott, "Responsibilities and Liabilities of the Transfer Agent and Registrar," 4 So. CAL. L. REV. 203 (1931).

<sup>2</sup> This is possible even though an agent is generally subject to a duty not to act during the period of his agency for persons whose interests conflict with those of the principal. But in many cases circumstances indicate an understanding that the agent may act for principals whose interests do conflict. 2 AGENCY RESTATEMENT §394 (1933). However, it can be said in cases of wrongful refusal to transfer stock that there is no acceptance of the agency by the transfer agent.

<sup>3</sup> A stock transfer agent is the agent of the corporation by which it is employed, and not the agent of the stockholders. *Nicholson v. Morgan*, 119 Misc. 309, 196 N.Y.S. 147 (1922).

any liability of the transfer agent to third persons has evolved by reference to the liability of the corporation to the transferring stockholder or his transferee. Today, under the terms of transfer as they generally appear on the stock certificate, all the corporation is called upon to do is open its transfer books to the registered holder or his attorney and permit registration of the transfer. But at an early date the courts developed the theory that a corporation acts as custodian of its shares and, in making a transfer on its books, acts in a fiduciary capacity.<sup>4</sup> Since the corporation must protect the interests of the owners of its stock, it has the duty, when a transfer of shares is demanded, to ascertain whether or not a transfer is duly authorized, and to make only those transfers which are authorized.<sup>5</sup> For a failure to perform this obligation the corporation is subject<sup>6</sup> either to a bill in equity<sup>7</sup> or mandamus<sup>8</sup> to compel transfer, or an action at law for damages under the theory that refusal to transfer is conversion of the stock.<sup>9</sup> Refusal to transfer stock is protected only if the corporation acts in good faith and presents an adequate reason.<sup>10</sup> A transfer agent is subject to the same standards; but is it subject to the same liabilities as the corporation?<sup>11</sup> There are few decisions in this field because there is little reason to seek judgment against the agent if the corporation is solvent; if the corporation is insolvent there is again little reason to pursue the agent, for its improper action with respect to worth-

<sup>4</sup> *Lowry v. Commercial & Farmers' Bank*, 15 Fed. Cas. 1041, Case No. 8581, Taney 310 (1848); See *CHRISTY & McCLEAN, THE TRANSFER OF STOCK*, 2d ed., §2 (1940).

<sup>5</sup> *Nagel v. Ham, Yearsley & Ryrie*, 88 Wash. 99, 152 P. 520 (1915); 27 *CORN. L.Q.* 101 (1941).

<sup>6</sup> Damages for refusal to transfer may be sought either by the assignee of the stock or the assignor. *CHRISTY & McCLEAN, THE TRANSFER OF STOCK*, 2d ed., §268 (1940). But *Lewis v. Bidwell Elec. Co.*, 141 Ill. App. 33 (1908), states that an action of conversion for refusal to transfer can be maintained only by the assignee.

<sup>7</sup> *Thaddeus Kosciuszko Soc. v. Polish Home Assn.*, (Mo. App. 1949) 218 S.W. (2d) 811; *Lacoe v. Wolfe*, 133 Cal. App. 159, 23 P. (2d) 831 (1933); *Rudolph v. Andrew Murphy & Son*, 121 Neb. 612, 237 N.W. 659 (1931).

<sup>8</sup> *Age Pub. Co. v. Becker*, 110 Col. 319, 134 P. (2d) 205 (1943); *Jackson Opera House Co. v. Cox*, 188 Miss. 237, 192 S. 293 (1939); *Catherwood v. Guarantee Trust & Safe Deposit Co.*, 252 Pa. 466, 97 A. 703 (1916).

<sup>9</sup> *Young v. Cockman*, 182 Md. 246, 34 A. (2d) 428 (1943); *Sharon v. Kansas City Granite & Monument Co.*, (Mo. App. 1939) 125 S.W. (2d) 959; *Aronson v. Bank of America Nat. Trust & Savings Assn.*, 9 Cal. (2d) 640, 72 P. (2d) 548 (1937); *Virginia Public Service Co. v. Steindler*, 166 Va. 686, 187 S.E. 353 (1936). That conversion does not lie, *Robertson v. L. Nicholes Co.*, 141 Misc. 660, 253 N.Y.S. 76 (1931). That the right of the holder of the certificate to bring conversion is doubtful, but the holder may sue in *assumpsit* or bring an action on the case, *Barrett v. King*, 181 Mass 476, 63 N.E. 934 (1902).

<sup>10</sup> *Tobias v. Wolverine Mining Co.*, 52 Idaho 576, 17 P. (2d) 338 (1932); *Mundt v. Commercial Nat. Bank of Ogden*, 35 Utah 90, 99 P. 454 (1909). See 27 *CORN. L.Q.* 101 (1941); *Dewey*, "The Transfer Agent's Dilemma: Conflicting Claims to Shares of Stock," 52 *HARV. L. REV.* 553 (1939).

<sup>11</sup> The transfer agent is liable to his principal, the corporation if it does not exercise ordinary and reasonable care and diligence in the performance of its duties. *CHRISTY & McCLEAN, THE TRANSFER OF STOCK*, 2d ed., §281 (1940).

less stock will not lead to substantial damages.<sup>12</sup> The third person could possibly sue the agent either on a tort or on a contract theory. The principal case<sup>13</sup> follows the general rule concerning an agent's liability to third persons: the agent is liable for misfeasance and malfeasance but not for nonfeasance.<sup>14</sup> But the courts do not clearly distinguish nonfeasance from misfeasance, some courts holding that failure of an agent to perform a duty that his principal owes through him to a third person is misfeasance.<sup>15</sup> It would seem that tort liability should be imposed any time an undue risk of injury to others is present, whether nonfeasance or misfeasance is involved.<sup>16</sup> It can also be argued that the stockholder is the donee beneficiary of a third-party beneficiary contract. The modern tendency is to give a donee beneficiary an enforceable right, but in order to maintain an action he must show that the contract was made to benefit him or the class to which he belongs.<sup>17</sup> The court in the principal case decides that there is no intent that a benefit flow to stockholders, and it is probably true that the intent of the corporation in making such a contract is primarily to have a highly trained agent handling the responsibilities and liabilities of transferring stock. But there is probably some intent to benefit stockholders, and it is not too difficult to impose upon the specialized transfer agent somewhat greater responsibilities to third persons than are imposed upon the usual agent.<sup>18</sup> Surely the public is likely to look to the transfer agent rather than the corporation for protection against improper transfer of stock certificates.

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<sup>12</sup> Behrends and Elliott, "Responsibilities and Liabilities of the Transfer Agent and Registrar," 4 So. CAL. L. REV. 203 (1931).

<sup>13</sup> The principal case at 96 held Cal. Civ. Code (1949) §2343 inapplicable. Sec. 2343 provides that an agent is responsible to third persons as a principal for his acts in the course of his agency when his acts are wrongful in their nature.

<sup>14</sup> Hulse v. Consolidated Quicksilver Mining Corp., 65 Idaho 768, 154 P. (2d) 149 (1944); Lewis v. Hargadine-McKittrick Dry Goods Co., 305 Mo. 396, 274 S.W. 1041 (1924); Palmer v. O'Bannon Corp., 253 Mass. 8, 149 N.E. 112 (1925); Orvis v. Howe, 183 App. Div. 1, 170 N.Y.S. 264 (1918); Dunham v. City Trust Co. of New York, 115 App. Div. 584, 101 N.Y.S. 87 (1906). See 12 FLETCHER, CYC. CORP. §5525 (1932); 2 AGENCY RESTATEMENT §352 (1933); 1 MECHEM, AGENCY §1464 (1914).

<sup>15</sup> Bell v. Josselyn, 3 Gray (69 Mass.) 309 (1855); 1 MECHEM, AGENCY §§1466-1473 (1914).

<sup>16</sup> It has been held that a transfer agent may be liable for a "malicious" refusal to transfer, which is supposedly misfeasance instead of nonfeasance. This in reality seems to be a recognition that the transfer agent as an individual owes a duty to stockholders. Fowler v. National City Bank of Rome, 49 Ga. App. 159, 176 S.E. 113 (1934); Orvis v. Howe, *supra* note 14.

<sup>17</sup> 2 WILLISTON, CONTRACTS §§356, 357 (1936).

<sup>18</sup> But see Lacey v. Wolfe, *supra* note 7.