

BOSTON COLLEGE INDUSTRIAL AND COMMERCIAL LAW REVIEW

VOLUME V

SPRING, 1964

NUMBER 3

THE TRANSFER OF SHARES IN A COMMERCIAL CORPORATION—A COMPARATIVE STUDY

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I

United States private investments in Europe have been increasing steadily since the end of the Second World War.¹ Many of these invest-

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Acknowledgement

The writer wishes to acknowledge a grant from Howard University which enabled him to do some of the research on English, French and German materials.

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TABLE I
Value of American-Owned Foreign Assets
(all figures in \$ millions)

Europe	1943	1946†	1962††
Private Investment	4,418.3	2,743	14,460
Long Term			
Direct	2,047.0	1,041	8,843
Securities	814.1	719	2,728

† The reduced 1943 figures reflect losses in Eastern Europe.

†† These figures also reflect increased market values over 1943.

Sources: Balance of Payment Statistical Supplement (1963); Survey of Current Business (August 1963); Census of American-Owned Assets in Foreign Countries, May 1943 (1947).

TABLE II
Value of American-Owned Foreign Securities
(all figures in \$ millions)

	Private Corporate Obligations	Stocks, Common & Preferred		Total	
	1943	1943	1950	1943	1950
Europe	55.1	533.7	722.2	814.1	1600.5
France	2.5	29.8	92.7	40.8	206.8
Germany	14.5	68.9	132.8	125.4	182.9
U.K.	17.9	219.2	325.1	312.4	822.3

Sources: Census of American-Owned Assets in Foreign Countries, May 1943 (1947); Census of Private Foreign Investments in U.S. (1950).

ments have been made in Britain,² France³ and Germany.⁴ The creation of the European Common Market⁵ opened up a new field to American capital, and, subsequently, the creation of the European Free Trade Association⁶ added to the countries wooing American investors. Although the primary need of Europe was for capital to acquire much-needed raw materials, United States know-how and machinery was also in great demand. One of the questions confronting American capitalists was whether to gain control of existing facilities, or to open up new enterprises within the countries concerned.

In many instances the attempt to control existing enterprises resulted in unpleasant political repercussions,⁷ and various protective legislative devices were adopted.⁸ In addition, exchange control regulations hampered the free flow of capital and restricted the removal of

TABLE III
Transactions in Foreign Stock*
(all figures in \$ millions)

	1959	1960	1961	1962	1963 Jan.-Nov.
Europe	-174.4	-75.2	-24.9	-143.7	-24.2
France	-41.5	-42.1	-31.2	-39.5	-25.4
Germany	-20.4	-17.7	-36.6	-13.7	+4.7
U.K.	-19.9	-42.1	-63.4	+4.9	+19.6

* — means buying by U.S. investors exceeded selling by the indicated amount.

+ means selling by U.S. investors exceeded buying by the indicated amount.

This table reflects: (a) Buying stimulated by European Common Market; (b) Selling stimulated by decline of market after May 1962 and (c) Selling stimulated by anticipation of the Interest Equalization Tax, *infra* note 10.

Source: Treasury Bulletin (Jan. 1964).

² Since no specific figures are available on portfolio investments, the above Tables are referred to. Note also Dunning, *American Investment in British Manufacturing Industry* (1958).

³ *Ibid.*

⁴ *Ibid.*

⁵ Treaty Establishing the European Economic Community; 298 U.N.T.S. No. 4300 (1958).

⁶ Convention Establishing the European Free Trade Association, Stockholm, Nov. 20, 1959, Cmnd. 906 (London).

⁷ Note the repercussions in France when it was discovered that the majority of the share capital of the Simca Car Company had come into the hands of American investors; see also the absorption of an English subsidiary by Ford Motor Company, causing debate in Parliament.

⁸ Though English law makes no special provisions for a corporation created by foreign nations, this is the approach in France. Where it is intended to establish a corporation in France without the physical presence of the incorporators, *Avis* [Notice] No. 669 (Jan. 1959) requires that the *Service des Changes* [Exchange Control Branch] of the Ministry of Finance, Directorate of External Finance, grant an authorisation to the foreign incorporators. Where the incorporators are present in France, they must first obtain a *carte de séjour* (Residence Permit) and must then apply for a *carte de commerçant* (Trading Permit). See Article I of the Law of November 12, 1938, as supplemented by the Law of October 8, 1949 and the Decree of November 26, 1949. See further Nicholson, *The Significance of Treaties to the Establishment of Companies in 2 American Enterprise in the European Common Market—A Legal Profile*, Ch. IX (1962).

profits. But with improvements in the balance of trade and the realisation that restrictions made it more difficult to attract American capital, many of these temporary restrictions were lifted.⁹ The flow of United States capital abroad has been steady and has now begun to play a considerable part in the nation's economy, even to the extent of causing some concern here.¹⁰ This became an especial problem when private investors began to invest abroad to the detriment of the domestic market.¹¹

This paper will investigate investments in corporate shares and the transferability of such shares. An investor seeking to participate in the capitalisation of corporate structures has to consider not only the possible return on his capital in the form of dividends but also the question of liquidating his investment should a suitable market develop. We will therefore consider the transferability of shares under English, French and German laws and compare these laws with recent developments in the United States, particularly those under Article 8 of the Uniform Commercial Code.¹²

In the Anglo-American legal system, the corporate share represents

⁹ Generally no difficulty was placed in the path of foreign investors wishing to remove their profits; e.g., France: Avis No. 482 (Dec. 5, 1950). As to capital realisations, note the distinction made in France for capital invested before 1949, which must be paid into special "capital accounts" and can be repatriated only indirectly by following the provisions of Avis No. 573 (July 11, 1954). For a full discussion of Exchange Control Regulations in France from 1939-1960, see Jeantet, 1 American Enterprise in the European Common Market—A Legal Profile, Ch. IV (1962). For Germany, where no restrictions exist, see Runderlass Auszenwirtschaft Nr. 35/59 (April 29, 1959). This circular applies to both investment in and creation of corporate structures and also to both the removal of profits and capital realisations. For England, see Mann, The Legal Aspect of Money (2d ed. 1954), containing an analysis of the Exchange Control Act, 1947, 10 & 11 Geo. 6, c. 14. See also the Control of Borrowing Order, 1958 S.I. 1958, No. 1208. See further Doing Business with France, U.S. Dep't of Com. (1958); Summary of French Company Law and Taxation, Bureau d'Etudes Fiscales (1963); Friedmann & Pugh, Legal Aspects of Foreign Investment (1959).

¹⁰ See the provisions of the Interest Equalization Tax Bill, H.R. 8000 (March 9, 1964), at present under consideration by the Senate, intended to stop the "present drain" of American dollars overseas.

¹¹ "In 1962, U.S. residents purchased \$1.0 billion of new foreign securities offered in this country." American Bankers Ass'n, Statement on Balance of Payment 15 (1963). See also Europe's Securities Lure U.S. Investors, 35 Investor's Reader, No. 8, p.1 (October 12, 1960), dealing with the resultant development of the American Depositary Receipt (A.D.R.) discussed infra. Of note here is that A.D.R. enables American investors to both participate in the European Market and retain the fluidity of their investments, while still complying with the foreign exchange control regulations. The actual foreign securities are held by the issuers of the A.D.R. as authorised depositories in the country concerned. Only the A.D.R., an American security relating to foreign investments (see UCC §§ 8-102(a)(iii)-(iv), 8-320), is traded in this country.

¹² The Uniform Commercial Code has now been enacted in thirty legal systems within the United States. More than 75% of the population of the United States is within Code states. Of further note is that, although the Code and the Uniform Act for the Simplification of Fiduciary Security Transfers do not conflict, the Code enlarges the provisions of the Act, yet most States have retained the Act on their statute books; *ex abundanti cautela?*

a right of participation not only in the distribution of profits, if any, but also in the management and control of corporate activities through the exercise of voting rights in general meetings.¹³ Even though active participation in management and control has become somewhat minor in importance because of the revolution to professional managers, both legislation and the articles of association of most corporations require that a close contact be maintained between the corporate management and the shareholder.¹⁴ In France and Germany the inter-relationship of management and shareholders is much less apparent. This is illustrated in France by the shift of control from the *assemblée générale* to the *président du conseil d'administration*, which has been interrupted only slightly by the introduction of the *comité d'entreprise*, which introduces the element of labour into the managerial council.¹⁵ In Germany the policy of depositing bearer shares with banks has added to this problem.¹⁶ Banks, by virtue of their vast shareholding resulting therefrom, have been able to be represented on the Board of Corporations, and have thereby established control by securing nominees favourable to their policy. It is therefore possible to conclude that in France and in Germany, the investor's duty is ended with his contribution to the capital, with a possible, but not a necessary, concomitant right to participate in the profits realised from the pooling of capital resources.¹⁷ This depersonalisation of the shareholder-corporation relationship has its base in the greater freedom to transfer rights once they are embodied in a document.¹⁸ Nonetheless, it must be remembered that

¹³ See e.g., Gower, *Modern Company Law* (2d ed. 1957); Ballantine, *Corporations* (Rev. ed. 1946); Berle & Means, *The Modern Corporation and Private Property* (1932).

¹⁴ See Berle & Means, *op. cit. supra* note 13. Also Caplin, *Proxies, Annual Meetings and Corporate Democracy: The Lawyer's Role*, 37 *Va. L. Rev.* 653 (1951).

¹⁵ Church; *Business Associations Under the French Law*, Part 4 (1960); as to the *comité d'entreprise*, see Ordinance of February 22, 1945; Act of May 11, 1946; Act of August 12, 1950. A steady evolution of the reduction of the importance of the stockholders' meeting can be traced since 1940. Note especially the Act of November 16, 1940, as modified by the Act of March 4, 1943. That Act, though intended to impose more responsibility on the board of directors, resulted in concentrating power in the hands of the *président du conseil d'administration*. For the German equivalent to the *comité d'entreprise*, see *Betriebsverfassungsgesetz* of October 11, 1952 and the *Gesetz ueber die Mitbestimmung der Arbeitnehmer in den Aufsichtsraeten und Vorstaenden der Unternehmen des Bergbau und der Eisen und Stahl erzeugenden Industrie*, May 21, 1951 and the *Law* of July 15, 1957.

¹⁶ See Hueck, *Gesellschaftsrecht* (8th ed. 1958); Wuerdinger, *Aktien Recht* (1959).

¹⁷ See Wuerdinger, *op. cit. supra* note 16, § *Mitgliedschaft und Aktie II*, Content of Membership 2(a); see also *Aktiengesetz*, Jan. 30, 1937, § 52 Abs. 1 and § 212. See also § 60.

¹⁸ Germany: *Aktiengesetz*, Jan. 30, 1937, § 10 indicates that shares are either bearer or order papers.

France: *Commercial Code*, art. 35 relates to bearer shares—*action au porteur* while Article 36 deals with nominal shares—*action nominative*. As is indicated by Wuerdinger, *op. cit. supra* note 16, "The incorporation of membership into the share certificate has as its purpose the promotion of negotiability." The effect is that the right thus becomes incorporated into the certificate and is transferable with it.

membership rights are not dependent upon the existence of a share certificate, which is but evidence of membership in the corporation.

One further point to be noted is the absence of the no-par value share in English, French and German laws. Both German and French law require that shares not only have a par value, but also provide that par value be not less than a minimum amount.¹⁹ Although, this is closely linked with the requirement of a minimum capital, the futility of linking par value with maintenance of capital has been clearly demonstrated by Professor Gower,²⁰ commenting on the need for reform in England:

Until recently there has been no public demand for the introduction of no-par shares in England, the untutored people who have been misled into supposing that a £1 share is cheap if it can be bought on the market for 1s. and expensive if it costs 30s. have not been sufficiently organised or influential to produce audible outcry. In the last few years, however, companies have found that a fixed nominal capital leads to ignorant criticism of the extent of their profits, which appear excessive in comparison with that capital, although fair enough in comparison with the true capital employed.²¹

Although there have been recommendations to introduce no-par value shares,²² the English Parliament has not yet taken any steps to amend the law²³ so as to allow the issue of such shares.²⁴

The reason advanced for the need to have a par value requirement in German and in French law is that a corporation must have its full capital subscribed before it can commence business.²⁵ It is also argued

¹⁹ France: The par value is a least 100 new francs per share. To form a corporation (*société anonyme*) there must be at least seven stockholders. The value here is in the new heavy franc. The Decree of August 4, 1949, article 28, required that the value of the shares shall be not less than 10,000 "light" francs. Prior to that the Act of July 24, 1867 (this is the basic law applicable to French corporations) article 1 required only 1000 francs.

Germany: Aktiengesetz (AktG.) § 6 Abs. 2. The minimum capitalisation is 100,000 D.M. unless permission for a lower figure has been obtained from the Minister of Justice or the Minister of Economics. Although AktG. § 6 Abs. 2 refers to a specified amount of capital, § 169 allows "authorised capital" which may be called up within five years of formation. Money received from shares sold above par are placed into a capital reserve fund; § 130. The minimum par value is 100 D.M. under the DeutschMarkbilanzgesetz.

²⁰ Op. cit. supra note 13.

²¹ Id. at 115-16.

²² See Cohen Report (Cmnd. 6659/1945) ¶ 18. This is the Report which preceded the Companies Act, 1948, 11 & 12 Geo. 6, c. 38. See also the favourable report of the Departmental Committee under Mr. Montague Gedge, Q.C. (Cmnd. 9112/1954).

²³ Companies Act, 1948, 11 & 12 Geo. 6, c. 38, §§ 2(4)(a), 21(2).

²⁴ For a full discussion of the problems involved see Baxter & Gower, Shares of No Par Value, Incorporated Accountants Practice Note Series, No. 29 (1954).

²⁵ The capital is the safeguard of creditors according to French and German law, and thus must be preserved. But French law does not require that the capital be fully

that the main duty of the corporation is to maintain its full capital so as to enable creditors to rely upon this capital when dealing with the corporation.²⁶ It is submitted, however, that the existence of the French *action de jouissance*, resulting from the amortisation of the share, destroys this argument.

Whichever form the transfer of shares may take, be it negotiation, assignment or some special form of transfer, it is most likely that a contract will underlie the change in ownership.²⁷ In view of the fact that we are dealing here with foreign shares, there will arise questions of the choice of law in relation to such transfer. Thus, let us assume that the shares of a foreign corporation are available for purchase. Three questions arise for consideration; what law governs (1) the validity of the shares, proper issue, etc., (2) the rights and duties of an issuer with respect to the registration or acknowledgement of the transfer and (3) the contract to transfer between the parties.

Considering the last question first, what law governs the validity of the contract to transfer?²⁸ The Uniform Commercial Code makes a clear departure from existing commercial law in tackling the problem of the choice of law rule. The Code confers upon the parties a freedom of choice of law, provided that the law chosen has some reasonable contact with the transaction. "Failing such agreement this Act applies to transactions bearing an appropriate relation to this state."²⁹ In this respect the Code comes very close to the approach advocated by Professor Cheshire³⁰ in England, that the law governing a contract shall be the "proper law" of the contract,³¹ i.e., that law which is at the center of gravity to the contract.³² Although originally rigid rules such as the *lex loci contractus* or *lex loci solutionis*, have been applied by continen-

paid up at once, since only *actions d'apport* (contribution shares) must be paid up in full before the stock company comes into existence. Only one quarter of the cash shares (*actions de numéraire*) need be paid up when the company comes into existence; all must be paid up by the end of five years. Act of July 24, 1867, Arts. 1, 3 and 24. In German law the corporation acquires *Rechtsfähigkeit* (capacity) by entry into the *Handelsregister*. Before such entry is possible all shares must have been subscribed. See further Baumbach & Hueck: AktG. § 52.

²⁶ The repurchase of French shares, i.e., amortisation, can be made from capital or from profits or reserves. If out of profits or reserve, no difficulty exists since the capital is kept intact. What is the status of such repurchased shares? See Escarra, *Droit Commercial* (1952). They can be resold but should not be kept too long. Where the repurchase is out of capital, there is a reduction of capital and, unless special procedures are followed, the repurchase is void.

²⁷ It is unlikely that in a commercial transaction a gift would be involved. Thus that form of transfer is not considered in relation to the choice of law problem.

²⁸ See Dicey, *Conflict of Laws* (7th ed. 1958); Cheshire, *Private International Law* (5th ed. 1957); Ehrenzweig, *Conflict of Laws*, ch. 6 (1962).

²⁹ UCC § 1-105 (1).

³⁰ Op. cit. supra note 28.

³¹ Id. at 213-30.

³² Graveson, *The Proper Law of Commercial Contracts as Developed in the English Legal System*, *Lectures on the Conflict of Laws and International Contracts* (1949).

tal-European courts, freedom to choose the applicable law was subsequently recognized.³³ This led to the application of the *lex validitatis*,³⁴ so that "whenever the court's choice is between the assumption of an invalidating and a validating rule, it will assume the latter."³⁵ This choice of law question may be further confused by the doctrine of the "Vorfrage,"³⁶ i.e., should an incidental question be governed by the same conflict of laws rule as that applicable to the main issue?³⁷

In the problem we are considering, it can be argued that the main or principal question is the transfer of shares, and that the contract to transfer is merely incidental to this issue. The controversy is between the choice of law rule applicable to the contract and that applicable to the transfer of shares. Martin Wolff³⁸ advocates that the law governing the main issue be applied to the incidental question (the "Vorfrage") in the interest of harmony between the decisions of the forum and those of other foreign courts whose systems of law may be involved.³⁹ On the other hand, Leo Raape⁴⁰ considers that this would be buying international harmony at the price of internal dissonance.⁴¹ Authority exists in favour of both views.⁴² It is submitted that the answer lies somewhere between the two positions, resulting in the application of that rule which will effectuate the intention of the parties.⁴³

³³ Meijers, *L'histoire des principes fondamentaux du DIP à partir du moyen âge*, 49 *Recueil des Cours* 547 (1934); Savigny, *The Conflict of Laws* (2d ed. rev., Guthrie's translation 1880); Rabel, 2 *The Conflict of Laws, A Comparative Study* (2d ed. 1960).

³⁴ For a discussion of this concept see Ehrenzweig, *op. cit. supra* note 28, at 464-90.

³⁵ *Id.* at 465.

³⁶ Melchior, *Die Grundlängen des Deutschen Internationalen Privatrechts* (1932); Wolff, *Private International Law* (2d ed. 1950); Robertson, *Characterization in the Conflict of Laws* (1940).

³⁷ Melchior, *op. cit. supra* note 36, cites the following example of a situation giving rise to this problem: In an action concerning the marital relationship between a man and a woman the existence of the marriage between them is in issue—without the marriage there can be no such relationship. This issue is thus part of the *principal question* (*Hauptfrage*). Should the issue be the relationship of a child to the father, the existence of the marriage of the parents is no longer the principal question, but is a *preliminary* or *incidental question* (*Vorfrage*).

³⁸ *Op. cit. supra* note 36, at 208.

³⁹ Exceptions to this approach are admitted by Robertson, *op. cit. supra* note 36, "in the interest of justice." See also Wengler, *Die Vorfrage im Kollisionsrecht*, 8 *Zausl. P.R.* 148 (1934).

⁴⁰ Raape, *Les Rapports Juridiques Entre Parents et Enfants*, 4 *Recueil des Cours* 401 (1934); see also Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch* (9th ed. Raape 1931).

⁴¹ Cf. Cheshire, *op. cit. supra* note 28, and Breslauer, *Private International Law of Succession* (1938); Gotlieb, *The Incidental Question in Anglo-American Conflict of Laws*, 33 *Can. Bar Rev.* 523 (1955).

⁴² Stumberg, *Commercial Paper and the Conflict of Laws*, 6 *Vand. L. Rev.* 489 (1953); compare *Direction der Disconto-Gesellschaft v. United States Steel Corp.*, 267 U.S. 22 (1925) and *Berg v. Oriental Consol. Mining Co.*, 70 N.Y.S.2d 19 (Sup. Ct. 1947) with *Morson v. Second Nat'l Bank*, 306 Mass. 588, 29 N.E.2d 19 (1940).

⁴³ Guttman, *Whither Legitimacy: An Investigation of the Choice Rules to Determine the Status of Legitimacy*, 15 *Rutgers L. Rev.* 764 (1960). Ehrenzweig, *op. cit. supra*

The Uniform Commercial Code provides a rather simple solution to one situation in which the problems created by the *Vorfrage* may arise. In connection with the duties of an authenticating trustee, transfer agent or registrar, the question is raised whether the liability of these agents is governed by the law indicated by the conflicts rule applicable to the transaction, or whether their liability should be governed by the *lex actus*, i.e. the substantive law provisions of the Code. An argument has been advanced^{43a} that since Section 8-406 imposes upon these agents "the same rights and privileges as the issuer", their obligations are governed by the law determinative of the obligations of the issuer. Section 8-406 does not contain a choice of law rule. It provides that the duties of an authenticating trustee, transfer agent or registrar are those imposed upon the issuer.^{43b} In this way the search for a choice of law rule is obviated and the question of a *Vorfrage* does not arise. The court will have to determine, not the law applicable to the duties of such agents, but the nature of the duty on the issuer and then demand a like performance from the agent.^{43c}

Considering the first question, Section 8-106 of the Uniform Commercial Code provides a conflicts rule applicable in the securities field. Thus, the validity of the security and the rights and duties of the issuer with relation to a transfer "are governed by the law (including the conflict of laws rules) of the jurisdiction of organization of the issuer."⁴⁴

There appears to be no doubt that the validity of the security will

note 28, at 418, submits that the *lex validitatis* would have to have applicability. The case of *Morson v. Second Nat'l Bank*, supra note 42, at 590, 29 N.E.2d at 20, seems to support this position. In that case, two Massachusetts domiciliary-residents were travelling in Italy, when one handed a sealed envelope to the other as a gift. The envelope contained shares in a Massachusetts corporation. When the donor died, the administrator attempted to invalidate the gift under the law of Italy, the place of transfer. The court applied Massachusetts law for "that which was done in Italy would have been sufficient, if it had been done in Massachusetts." I.e., the law of the issuer was allowed to govern the mode of transfer, the actual handing over being merely incidental to the transfer.

^{43a} *Welland Inv. Corp. v. First Nat'l Bank*, 81 N.J. Super. 180, 195 A.2d 210 (1963). See UCC Annots., section 8-406, infra p. 610.

^{43b} *Ibid.* The transfer agent had raised this argument in order to have the court apply the law of Delaware to its obligations as agents. Since the Code has not yet been enacted in Delaware, the agent argued that it was at most guilty of a mere nonfeasance for which it could not be sued under Delaware law.

^{43c} By adopting this approach, the Code prevents the defence that an agent, though liable for a misfeasance and a malfeasance, is not liable for a nonfeasance. *Heuser v. Reilly*, 128 N.J.L. 533, 27 A.2d 4 (Sup. Ct. 1942), aff'd 129 N.J.L. 388, 30 A.2d 27 (E. & A. 1943). This distinction in the law of agency is most irrational. It is difficult to see why a holder should have to prove malice before he can succeed in an action against the agent of an issuer. Also, when we look at the refusal to act from the point of view of the issuer, we find great difficulty to discern therein a "mere" nonfeasance as opposed to an active refusal. The distinction is thus not only irrational but also an artificial distinction.

⁴⁴ UCC § 8-106. For a recent case, see *Welland Inv. Corp. v. First Nat'l Bank*, supra note 43a.

have to be governed by the law of the organisation of the issuer. It is that law which gives legal status to the issuer and as such governs its ability to issue securities.⁴⁵ In this connection no different approach exists in the English, the German or the French laws.

When we come to regard the second question, *i.e.*, the rights and duties of an issuer with respect to the registration of the transfer, it once again becomes appropriate to refer to the law of incorporation. Two approaches can be discerned in the United States. The first considers the law of the place of transfer to be controlling,⁴⁶ while the second requires conformity with the law of the place of organisation.⁴⁷ Whichever approach may be adopted, it will be the law of the state of incorporation which will determine the choice of law rule applicable to the registration of transfers.⁴⁸ The Code achieves this effect by providing one choice of law applicable to all investment securities.⁴⁹ But although the *lex loci actus* governs the negotiation of securities,⁵⁰ the seller has to assist the buyer to obtain registration as a shareholder in accordance with the *law of incorporation of the issuer*.⁵¹

German law provides that as to a German commercial joint-stock corporation (Aktiengesellschaft), it is the articles of association which will govern the transferability of the shares and the general contents of the shareholders' rights. But in order to "legitimate"⁵² his rights to membership, the claimant will have to comply with German law.⁵³ Although the transfer of bearer shares is governed by the *lex loci actus*,⁵⁴ the transfer of nominal shares is always controlled by German

⁴⁵ Latty, Pseudo-Foreign Corporations, 65 Yale L.J. 137 (1955).

⁴⁶ Direction der Disconto Gesellschaft v. U.S. Steel Corp., *supra* note 42.

⁴⁷ Restatement, Conflict of Laws, § 184 (1934); Uniform Act for Simplification of Fiduciary Security Transfers, § 8; Seymore v. National Biscuit Co., 107 F.2d 58 (3d Cir. 1939); Morson v. Second Nat'l Bank, *supra* note 42.

⁴⁸ *Ibid.*

⁴⁹ Conard, A New Deal for Fiduciaries Stock Transfer, 56 Mich. L. Rev. 843, 869 (1958).

⁵⁰ UCC § 8-401.

⁵¹ UCC § 8-316.

⁵² As to nominal shares, AktG. § 62 Abs. 3 provides: "As regards the Aktiengesellschaft, only those who are entered on the register are shareholders." This fiction exists only in favour of the corporation. R.G. Bd. 86, S. 160. (A dispute exists as to this conclusion by the court.) Although an entry in the register is not necessary to acquire ownership, the entry will effect the "*Legitimierung*" of the shareholder, *i.e.*, it will establish his right as a shareholder vis-à-vis the corporation. The corporation will have to check the apparent regularity of indorsements and declaration of transfer, but need not check the genuineness of the signatures. The entry is not creative of legal rights, however, and cannot make an improperly entered person a shareholder. Error can be remedied (R.G. Bd. 123, S. 282) not by the corporation unilaterally, but only with the consent of the true shareholder. Until removed from the register, the person entered on it can exercise shareholders' rights. As to bearer shares, possession suffices to "legitimise" the possessor, B.G.B., § 793, provided the corporation cannot prove that the possessor is not entitled to the bearer share. See also AktG. § 66.

⁵³ AktG. § 62.

⁵⁴ R. G. Seuff. A. 88, S. 194.

law; so that even though a transfer by indorsement and delivery may not be recognised by the *lex loci actus*, it will be effective under German law.⁵⁵

In recognition of the need to comply with the law of the state of incorporation of the issuer, the Uniform Commercial Code provides that reference be made not only to the corporation law of that jurisdiction, but also to its "conflict of laws rule." This is a clear reference to the admission of a *renvoi*. A reference either back or forward to the law of the transaction would thus have to be accepted.⁵⁶ So far, the approach of the American courts has been to ignore the conflicts rules in the law to which their choice of law rules have referred them,⁵⁷ while in England the theory of the total *renvoi* has had a considerable vogue.⁵⁸ It submitted that a *renvoi* is here required so as to enable the *de cuius* to realize his expectations. Certain rights, such as rights in lands situate in the jurisdiction of a foreign legal system and rights of shareholders to participate in a corporation, will be protected only by a *renvoi*. Only by considering the totality of the foreign law will it be possible to determine the rights of the holder of a security. To enforce the rights of the holder it may be necessary to proceed ultimately against the assets of the issuer. Generally, they will be found in the place of organisation and governed by that law.⁵⁹ A full determination of these rights in the forum will prevent the unnecessary expenditure involved in an attempt to enforce rights not recognised by the foreign state.⁶⁰

II

The approach to share certificates as embodying a chose in action has not been carried by English law to its ultimate conclusion so as to make the certificate a negotiable instrument as under German law. Only share warrants, issued when shares are fully paid up⁶¹ and after exacting revenue requirements⁶² are satisfied, are deemed bearer securi-

⁵⁵ Wuerdinger, op. cit. supra note 16; see also E.G.B.G.B. § 30.

⁵⁶ For an interesting discussion of the problem involved see Ehrenzweig, op. cit. supra note 28, at 334 et seq.; Compare, Lorenzen, The Renvoi Doctrine, 27 Yale L.J. 509 (1918) with Cowan, Renvoi Does Not Involve a Logical Fallacy, 87 U. Pa. L. Rev. 34 (1938).

⁵⁷ In re Tallmadge, 109 Misc. 696, 181 N.Y. Supp. 336 (Surr. Ct. 1919); see however, In re Schneider's Estate, 198 Misc. 1017, 96 N.Y.S.2d 652, aff'd on rehearing, 100 N.Y.S.2d 371 (Surr. Ct. 1950). For the facts, see 298 N.Y. 532, 80 N.E.2d 667 (1948), where the court applied the "total" *renvoi* theory.

⁵⁸ In re Duke of Wellington [1947] Ch. 506, aff'd, [1948] Ch. 118 (C.A.); see also Cheshire, op. cit. supra note 28.

⁵⁹ Cf. Latty, op. cit. supra note 45.

⁶⁰ Restatement of the Law Second, Conflict of Laws (Tent. Draft No. 5 1959).

⁶¹ Companies Act, 1948, 11 & 12 Geo. 6, c. 38 §§ 83, 112. The articles of association must permit the issue of such share warrants. See also Rules of the London Stock Exchange, Appendix 34, § 197 (Schedule 8, Part 1) requiring the prompt issue of warrants and certification of transfer to obtain quotation on the Exchange.

⁶² The share warrants must be stamped three times the amount of transfer duty,

ties. Due to difficulties in communication between the corporation and the holders of such warrants, these share warrants were never very popular.⁶³ This unpopularity has been increased by the Exchange Control Act of 1947,⁶⁴ which added further restrictions to the issue of share warrants.⁶⁵ These restrictions were enacted to preserve the stability of the pound sterling. They not only have brought about the control of the issuance of share warrants, but they also require all bearer securities to be deposited in special deposit accounts.⁶⁶ Dividends, if any, are paid into these accounts.⁶⁷

On the continent of Europe, however, the bearer share has long been the primary form of corporate stock, provided: (1) that the articles of association (*Satzung*) allow them; (2) that the share is fully paid up; and (3) that it is not subject to any additional burden.⁶⁸ A bearer share is transferable by agreement and delivery.⁶⁹ It is usual for such shares to be deposited with banks for safekeeping since loss enables a finder to acquire and hold title to the certificate until the corporation brings an action to disprove his right to the share.⁷⁰ Deposit

i.e., 6%; Stamp Act, 1891, 54 & 55 Vict., c. 39, 1st Schedule, and Finance Act, 10 & 11 Geo. 6, c. 35 §§ 52 (1), (2).

⁶³ The Report of the Committee on Transfer of Shares, The Stock Exchange, London, England, ¶¶ 68, 69 (Dec. 1960) under the Chairmanship of Lord Ritchie indicates: Thirdly, Bearer is not acceptable to the average investor in this country, the main objection being the liability of the title document to loss or destruction. . . . (69) The interest of the United Kingdom investor is in our view of paramount importance and we do not consider that the time is ripe for asking him to accept Bearer security. However we believe there may be a case for the wider use of Bearer security especially for Government Stocks and for companies whose shares are dealt with extensively in foreign markets.

The suggestion of this committee is the creation of "as nearly as possible a hybrid of Bearer and Registered Share."

⁶⁴ 10 & 11 Geo. 6, c. 14.

⁶⁵ 10 & 11 Geo. 6, c. 14, §§ 10, 11. Thus, there must be Treasury permission to the issue of share warrants; it is only rarely granted.

⁶⁶ But only if situated in the United Kingdom or held on behalf of a United Kingdom resident. Exchange Control Act, 1947, 10 & 11 Geo. 6, c. 14, §§ 15, 16. Exchange Control (Authorised Depositories) (No. 2) Order, 1954 (S.I. 1636 of 1954) as amended.

⁶⁷ Ibid.

⁶⁸ Baumbach-Hueck, AktG. § 10; Note B.G.B. §§ 793 et seq. and Rehfeldt, Wertpapierrecht (8th ed. 1959). Note that a share in an *Aktiengesellschaft* subject to *Nebensleistungen* (additional duties) cannot be bearer. (AktG. § 50.) This type of corporation arose in the sugarbeet industry, the shareholders being under the obligation to supply beets to the factories. Also the interim-certificates (scrip), usually issued before the shares are fully paid up, must not be bearer, AktG. § 10 Abs. 3, or they will be void, AktG. § 10 Abs. 2 and 4. R.G., J.W. 1927, S. 1679. Criminal liability as well as the duty to compensate will exist. AktG. § 296 Abs. 1(3). Where the share can only be transferred subject to the consent of the corporation it cannot be bearer. AktG. §§ 61 Abs. 3; 88 Abs. 2; 50 Abs. 1. A bearer share cannot be so restricted. R.G., J.W. 1939, S. 296.

⁶⁹ See B.G.B., §§ 929 et seq. As to good faith, see B.G.B., § 935 and H.G.B., § 366. The regulations applicable to banks under H.G.B., § 367 limit acquisition in good faith.

⁷⁰ AktG. 66. Note that these provisions have nothing to do with the Wertpapierbereinigungsgesetz (Aug. 19, 1949), trying to trace war profits and theft of property by Nazis. See also the Aufgebotsverfahren under § 799 Abs. 2 and B.G.B., § 800.

with the bank confers tremendous power upon the bank since it then will be able to exercise all the rights of the shareholders.⁷¹ Thus, the power of banks in the corporate field is not to be underrated.⁷² It is evident not only in the exercise of voting strength resultant on the deposit, but it also is discernible in the approach of banks to corporations which in many instances are both its debtors because of loans and its creditors because of deposits. Close ties often result through the bank's representation on the board of directors of a corporation.⁷³ One of the difficulties of this close relationship became evident in Germany with the advent of the Nazis' rise to power. Nationalisation of the banks resulted in Nazi power over those corporations whose shares had been deposited with these banks.⁷⁴

The favourable position held by bearer shares in Europe is mainly due to the ease with which such shares can be transferred and, in times of stress, moved from country to country as realisable wealth. This became most evident during the emergencies of the refugee period created by the Germans in 1933. The resultant Nazi laws, requiring the deposit of Jewish-owned bearer shares in special accounts, sought to prevent the removal of these assets from the country so that they would be available for confiscation by the Nazis. Where such shares were not deposited, the German administrator of Jewish property obtained a declaration that the share was lost and, by court order, a replacement share was issued.⁷⁵ The replacement shares would be kept in these special accounts.⁷⁶

When the Red Armies entered Berlin they found a number of bearer shares in banks, and they could have controlled German economy through the use of the powers contained therein. In addition, claims based on expropriation were made by persons whom the Germans had forcibly relieved of the right to control their shares. As a result, a process of examining rights to shares was started by the

⁷¹ The rights in the share certificate are exercisable on production of a bearer share. (*Legitimierung*.) See AktG. § 114 indicating that banks do not have to produce proxies to vote these shares.

⁷² It is usual to deposit share certificates with banks. Banks also introduced "irregular deposits" as a result of which certificates were treated as fungibles, the depositor being entitled only to an equal number of share certificates, i.e., a contractual right against the bank. Compare UCC § 8-320. Depotgesetz § 15 (Feb. 4, 1937) required such agreement to be in writing. Note that most of the over-the-counter market is carried on by banks.

⁷³ See Schlesinger, *Comparative Law* 440 (2d ed. 1959).

⁷⁴ Though nationalisation occurred in 1931 when the serious bank crisis occurred in Germany, the Nazis were not slow in seizing this opportunity to gain control of the economy.

⁷⁵ AktG. § 66.

⁷⁶ See Decree of December 3, 1938 and the unfortunate result reached by the Swiss court in *Seligmann-Gans*, B.G.E. Bd. 66II, S. 37 (1940) which, coupled with AktG. § 66, enabled the Germans to make a compulsory confiscation of Jewish assets "contrary" to Swiss public policy.

West German Government under the *Wertpapierbereinigungsgesetz*.⁷⁷ All those who claimed shareholder rights were required to prove the mode of acquisition of their bearer shares. Where claims were established to the satisfaction of this law, new shares were issued. This slow work is still in process.⁷⁸

In France, the German occupation and the fear of its extension into what was known as Vichy-France, led to the large scale removal of wealth from that country. As a result, the Vichy-Government passed ordinances prohibiting the issue of bearer shares and demanding the deposit of existing bearer securities in specially authorised depositories,⁷⁹ *Caisse centrale de dépôts et de virements de titres* (C.C.D.V.T.). The holders were required to deposit their shares in member banks. These banks, in turn, deposited them with the C.C.D.V.T. where accounts were kept for each bank. Transfers were accomplished by means of account adjustments without physical delivery of the share certificates. The compulsory nature of this form of deposit account for bearer securities made the C.C.D.V.T. very unpopular,⁸⁰ and led to its abolition in 1949.⁸¹ The ease and speed with which transfers of shares were made possible by this central depository system led to the introduction of a voluntary organisation, *Société interprofessionnelle pour la compensation des valeurs mobilières* (*Sicovam*).⁸² The mechanical convenience of the earlier system was preserved without the feature of compulsion. It should be noted, however, that some element of compulsion still exists. A shareholder who leaves his bearer shares with an affiliated bank will have to give specific instructions that the shares are not to be sent to *Sicovam*. Where such a share has come into the hands of an affiliated bank or broker, clear title can be given to the transferee. Thus, where the bearer share has been stolen or lost, a notice is published in the *Bulletin des Oppositions*, hopefully in time for affiliated banks and brokers to be on notice not to negotiate such share.⁸³ Since a deposit with *Sicovam* would be a nego-

⁷⁷ August 19, 1949.

⁷⁸ There are no longer any restrictions on investments in Western Germany, *Run-derlasz Auszenwirtschaft* Nr. 35/59.

⁷⁹ Act of February 28, 1941; Act of June 18, 1941; Act of February 3, 1943. Authority to issue bearer securities was again granted in 1949. Decree No. 49-1105, Art. 2, Aug. 4, 1949.

⁸⁰ Being in Government controlled depositories, the revenue authorities were able to keep a check on the transactions of these bearer securities and, thus, to demand the payment of revenue duties. Note that the Act of July 24, 1867, as amended by Decree of November 29, 1939, prohibits a person from representing himself as a shareholder and to vote as such without holding a proxy. Blank proxies are deemed valid and are usually held by banks.

⁸¹ Act of July 5, 1949, Art. 26; Decree No. 49-1105 of August 5, 1949.

⁸² *Ibid.*

⁸³ Decree No. 49-1105, Art. 16.

tiation and the share would lose its identification and be treated as fungible, early notice is requisite.

In the United States, the bearer share has never found adherents. The political situation was never such as to require this means of facilitating the transfer of wealth. In addition, fear of loss of the certificate and the difficulties of communication between the corporation and shareholder militated against the adoption by corporations of this form of security. However, the possible treatment of such security is provided for by the Uniform Commercial Code in Article 8.⁸⁴ The history of European experimentation with bearer shares has shown that in times of political stress, when bearer shares were counted upon to play their part, the concomitant economic stress has led to restrictions destroying negotiability by mere delivery.

III

Although the bearer share is the usual form of stock participation in the French and German corporate structure, this form of share certificate is subject to certain restrictions. The articles of association (*Satzung*) must either permit the issue of bearer shares or, in France, not forbid *actions au porteur*.⁸⁵ Only where the share has been fully paid up can a corporation issue a certificate in this form.⁸⁶ Also, since bearer shares are freely transferable, they cannot be issued where some additional activities are demanded from the shareholder,⁸⁷ nor where the transfer of shares is subject to restrictions, such as the consent of the corporate governing body.⁸⁸ In all these circumstances, the identity of the shareholder will be of importance to the corporation. The corporation will keep a register of shareholders⁸⁹ in order to keep the control the circumstances require.⁹⁰

⁸⁴ UCC § 8-102.

⁸⁵ Germany: AktG. § 10; Baumbach-Hueck (11th ed. 1961). Note that where doubt exists, the share must be treated as a nominal (registered) share. AktG. § 17. France: see Church, *Business Associations Under French Law* (1960); Act of August 4, 1949, Art. 2.

⁸⁶ France: Act of July 24, 1867, Art. 3; Germany: AktG. § 10 Abs. 2.

⁸⁷ Note the German *Aktie mit Nebenspflichten*. (AktG. § 50.) This is possible provided (i) the Articles contain provisions for such duties; (ii) the transfer of shares is restricted in requiring the consent of extant members and (iii) the duty is disclosed on the share certificate. The duty is part of the shareholder's right transferred with the share. (R.G. Bd. 136 S. 313.)

⁸⁸ France: Although it is not possible to make the transfer subject to the consent of all shareholders [Cass. Aug. 10, 1887, 1 Dalloz 440 (1887), 1 Sirey 33 (1889)], it is possible to restrict the transfer so as to require the approval of the management or general meeting to the transferee. Cass. Oct. 29, 1902; 1904 J. des Soc. 391. Germany: AktG. §§ 61 Abs. 3; R.G. Bd. 132, S. 149; 88 Abs. 2; 50 Abs. 1. Consent can be given before or after the transfer. R.G. Bd. 132, S. 157. It is not possible to link the consent to that of a third party, R.G. in J.W., 1959, S. 296.

⁸⁹ France: Act of July 24, 1867, Art. 21; Germany: AktG. § 61.

⁹⁰ E.g., to make calls, to demand performance of additional acts, to consider the attributes of the proposed transferee, etc.

In German law this does not mean that the nominal share (*Namensaktie*) is not a negotiable instrument.⁹¹ It is an order paper requiring indorsement and delivery for negotiation.⁹² There is no need for the share certificate to indicate that it is an order paper, it is such by its very nature.⁹³ As such, the nominal share certificate is subject to the provisions of the German Negotiable Instruments Law (*Wechselrecht*).⁹⁴ Although the share is negotiable by indorsement and delivery, an informal transfer is also possible by means of a declaration of transfer (*Abtretungserklaerung*) and assignment (*Zession*). Little use is made of this form, however.⁹⁵

Although the articles of association cannot restrict the free alienation of bearer shares and cannot prevent the negotiation of nominal share certificates, nevertheless, the exercise of membership rights is dependent upon the transferee's name being entered into the register. Thus there will have to be a *Legitimation* to show that the share has been properly negotiated and that membership has been transferred. If the transfer of membership is dependent upon consent of the management⁹⁶ (*Vinkulierung*), the articles will have to be examined to determine whether management has an absolute discretion to refuse its consent or only a limited one.⁹⁷ An abuse of discretion is reversible. There is no need to enter a restriction on transfer on the share certificate,⁹⁸ as is the case under the Uniform Commercial Code.⁹⁹ The basis of shareholding being the articles of association, a transferee is deemed to have notice thereof. In all other respects the transfer of the share certificate also transfers membership rights, for these rights follow the ownership of the paper, into which they have become incorporated. A corporation will have to check whether a negotiation occurred, but it is under no obligation to check the validity of any signature.¹⁰⁰ Nor is

⁹¹ AktG. 61 Abs. 2. It is order paper and WechselGesetz §§ 12, 13 & 16 are applicable.

⁹² W.G. § 13, deals with indorsement and also indorsements in blank. R.G. Bd. 117, S. 72. The nominal share is thus an order paper and not a *Rektapapier*, i.e., payable only to X.

⁹³ See the analysis by Rehfeldt, Wertpapierrecht (8th ed. 1959), i.e., the share certificate need not state on its face that it is transferable by indorsement and delivery. It is *geborene* order paper. See also Hueck, Recht der Wertpapiere (7th ed. 1957).

⁹⁴ Supra note 92.

⁹⁵ B.G.B., §§ 413, 952; R.G. Bd. 86, S. 157.

⁹⁶ AktG. § 61 Abs. 3.

⁹⁷ Ibid. R.G. Bd. 132, S. 149; R.G. Bd. 132, S. 154. Where there has been a wrongful refusal to enter him, the transferee can demand such entry since he has become a member by acquiring the share certificate.

⁹⁸ It is effective even against a purchaser in good faith, being part of the contract between shareholder and corporation. The consent can be given by the board of directors, R.G. Bd. 72, S. 293, even though the articles designate some other group.

⁹⁹ UCC § 8-204.

¹⁰⁰ AktG. § 62; Baumbach-Hueck, op. cit. supra note 85.

there an obligation on the corporation to enter a person on the share register if his right to the share can be disproved.

Finally it must be noted here, that it is possible to obtain the advantages of a bearer share certificate by indorsing the nominal share certificate in blank. An indorsement in blank will enable the negotiation of the share certificate, although the holder will not be able to exercise membership rights until he obtains entry into the register. Until that time, the person whose name is on the register will remain liable to perform any acts required of members.¹⁰¹ This becomes of especial importance in connection with the *Nebensleistungsaktie*, a share which requires additional acts from its holder throughout the life of the corporation. This type of corporation has its origin in the sugar-beet industry and requires that members annually supply beets to the mill for processing.¹⁰²

Under the Uniform Commercial Code, the registered share is also considered a negotiable instrument,¹⁰³ transferable by indorsement and delivery.¹⁰⁴ A bona fide purchaser will take free from equities.¹⁰⁵ The question whether an indorsement is required to negotiate the share is determined by the form in which the share has been issued, since the Code here rejects the common law rule of "once a bearer instrument, always a bearer instrument."¹⁰⁶ An indorsement in blank, however, will have the effect of permitting the share to be negotiated by delivery until shareholder rights are sought to be exercised. Then entry into the register is needed and the corporation will issue a new registered share to the holder.¹⁰⁷ Where the transfer is not by negotiation, it will be possible to achieve the same result through the so-called shelter provision of Section 8-301(1).¹⁰⁸

An important distinction from German law is in the obligation of the corporation with respect to signatures. The Code grants no protection in the case of an unauthorised signature.¹⁰⁹ The application for

¹⁰¹ E.g., calls as well as demands for the *Nebensleistung* will have to be addressed to that person. AktG. § 62 Abs. 3.

¹⁰² Godin & Wilhelm, Aktiengesetz (2d ed. 1950); AktG. § 50.

¹⁰³ UCC § 8-105; see further Guttman, Investment Securities under the Uniform Commercial Code, 11 Buffalo L. Rev. 1 (1961).

¹⁰⁴ UCC § 8-307.

¹⁰⁵ UCC § 8-301(2). The UCC refers to these as "adverse claims" [UCC § 8-301(1)]. Thus, note the importance of the notice provisions in UCC §§ 8-103, 8-204 & 8-304.

¹⁰⁶ The Code requires that the instrument be originally issued to bearer before that rule is applicable. But note that an indorsement on a security in bearer form may give notice of an adverse claim (UCC §§ 8-310 & 8-304).

¹⁰⁷ UCC § 8-308(2). The Code here resolves a difficulty of interpretation which existed under the NIL in relation to NIL § 40 and NIL §§ 9(5), 34. Usually a registered share will be returned to the corporation which will issue a new certificate. Note the use of clearing houses, however, where the shares would be held in street names or indorsed in blank. UCC § 8-320.

¹⁰⁸ UCC § 8-301(1).

¹⁰⁹ UCC § 8-311 refers to unauthorised indorsements. For the effect of an unau-

membership will have to be accompanied by a suitable assurance that the signatures on the application to transfer the share are genuine, and that the person who signed had appropriate authority. There is no need to investigate the validity of the transfer and thus an indorsement guarantee cannot be demanded.¹¹⁰ What can be requested is an assurance that the signature is that of an appropriate person, having the proper incumbency, to sign the transfer.¹¹¹ What is such appropriate evidence of incumbency is indicated in the Code.¹¹²

With respect to signatures, the purchaser of the security is asked to produce a warranty that the signature is valid. If he be a purchaser for value without notice of adverse claims his warranty would merely indicate that he has no knowledge of any defect in the authority of signatories.¹¹³ The power of an owner to attack the validity of relevant signatures is, however, subject to some restrictions among which are estoppel, contributory negligence and ratification.¹¹⁴ The Code in allowing ratification avoids the difficulties which are caused by drawing a distinction between forgery and an unauthorized signature. It is no longer necessary to investigate the existence of fraudulent purposes. By protecting the bona fide purchaser, provided he has received a new, re-issued or reregistered security from a broker, or has himself sent his transfer to the corporation and in return received such security in good faith, the Code recognizes that the purchaser may not be aware of any restrictive indorsements that may have appeared thereon. The issuer would remain liable however¹¹⁵ and would have to protect himself by demanding a signature guarantee.¹¹⁶ He will also have a right against the unauthorised signatory.¹¹⁷

This approach would appear to make those provisions, which

thorised signature on issue, see UCC § 8-205. The term "unauthorised" is defined in UCC § 1-201(43) as being without "actual, implied or apparent authority and includes a forgery."

¹¹⁰ UCC § 8-312(2).

¹¹¹ UCC § 8-312(1) and 8-308.

¹¹² UCC § 8-402(3).

¹¹³ UCC § 8-306.

¹¹⁴ UCC § 8-405(1) sets out an instance of contributory negligence in requiring that an owner who has lost his security must notify the issuer within a reasonable time or he will be precluded from setting up his right under UCC § 8-311, where the issuer has registered a transfer prior to receiving such notice.

¹¹⁵ UCC §§ 8-311(b), 8-404. The owner, if he is not precluded by estoppel, contributory negligence or ratification, will be able to recover a similar security or, at least, damages (UCC § 8-104).

¹¹⁶ UCC § 8-312.

¹¹⁷ Hawkland, *Commercial Paper* 33 (1959) states: "[S]urely no social policy is violated in making a forger or unauthorised agent personally liable on the instrument. The liability of the forger may not be worth much, but that is no reason not to impose it. The liability of an unauthorised agent may be worth a great deal . . ." This was written in relation to UCC § 3-404(1) and no equivalent provision exists in Article 8, but the suggestion is a sound one. Note Official Comment 2 to UCC § 8-104.

require that restrictions be indorsed on the instrument, of little effect.¹¹⁸ The rule of notification by indorsement on the security is further cut back by the power granted in Section 8-107, under which a security is treated as a fungible. Thus, delivery can be completed by handing over any form of security be it bearer, registered in the name of the transferee or indorsed in blank, unless there is an agreement requiring a specific form.¹¹⁹ This links closely with the right of the buyer from a broker to be handed a "clean" security, *i.e.*, one free from all adverse claims.¹²⁰ But the protection of the issuer is further lost, as is that of any subsequent holder wishing to enter on this share a restriction indicating his adverse claim,¹²¹ by the use of the clearing house.¹²²

Free transferability is best achieved by having the security in bearer form or indorsed in blank or "street" name, thereby achieving the same result as if it were a bearer security.¹²³ Thus in many instances shares are kept in clearing houses through which the brokers transact their business. Only when the client desires to receive the actual share certificates would there be any actual physical transfer and then, of course, a share subject to adverse claims could be rejected.¹²⁴ The whole transaction is carried out on the books of the clearing house in the same manner as financial transactions may be carried out between banks,¹²⁵ *i.e.*, a balancing of accounts. The closest continental

¹¹⁸ Note here also the provisions of UCC § 8-320, as a result of this means of transacting transfers of shares, the actual certificate may never be seen and thus no notice of adverse claims be given to the purchaser.

¹¹⁹ In English law, a vendor who contracts to sell registered shares, cannot complete by delivering share warrants. *Iredell v. General Sec. Corp.* (1916) 33 T.L.R. 67 (C.A.).

¹²⁰ UCC § 8-313 which rejects the decision in *Isham v. Post*, 141 N.Y. 100, 35 N.E. 1084 (1894). In its amended form UCC § 8-313(3) protects the broker where he received the notice of adverse claims after he had taken delivery as holder for value. The purchaser may, however, demand a security free from all adverse claims, unless he be estopped from doing so. UCC § 1-103. The New York Stock Exchange objects to the right of the customer to demand such "clean" security. See further Israel's *How to Handle Transfers of Stock, Bonds and Other Investment Securities*, Bus. Law. 90, 99-101 (Nov. 1963).

¹²¹ UCC § 8-304 and see §§ 8-103, 8-204.

¹²² UCC § 8-320.

¹²³ Note the criticism of placing securities in street name. Report of the Committee on Transfer of Securities (Dec. 1960), The Stock Exchange, London, England, ¶ 43 [W]e consider that this system does not save labour but rather increases it. The duties of the company pass to the "names" who are called upon to perform the tasks of recording the transfer of shares, the distribution of dividends and capitalisation issues, applications for rights issues or other offers and other tasks which normally fall on the company. We believe this system would raise difficulties as to the legal relationship of the "name" to the owner of the shares. We also consider that there would be objections to this method from those who, for various reasons, dislike increasing the anonymity of shareholders.

¹²⁴ UCC § 8-313. Note further the American Depositary Receipt, where the basic foreign security is most likely not even in the United States, but in the foreign country in an authorised depository. In my submission, however, the A.D.R. is the security traded here and not the foreign one underlying it.

¹²⁵ Article 4 of the Code may become a guideline here.

equivalent is the *Sicovam* of France, which also treats negotiable, bearer securities as fungibles and provides for their transfer on the books kept by this institution. If the share certificate is never seen, little effect can be given to an indorsement. Generally clearing houses will not accept shares subject to adverse claims, for although they are entitled to return the shares to the broker if they are rejected by a purchaser,¹²⁶ this is not of much assistance where shares are treated as fungibles by the clearing house so that it is not possible to determine their origin.

Although the duty to register a transfer is stated in mandatory terms,¹²⁷ this duty is subject to the overriding obligation of good faith.¹²⁸ It must, however, not be forgotten that the purpose of the Uniform Commercial Code is to prevent the excessive documentation previously demanded by transfer agents and corporations.¹²⁹ Thus once the formal requirements of the transfer are satisfied, the transfer can be compelled.¹³⁰ In return the corporation is granted immunity from liability from anyone affected by such transfer.¹³¹

IV

Neither French nor English law appears to treat the nominal registered share as a negotiable instrument, though they do strive for that effect. French law permits some restrictions to be placed on the transfer of nominal shares,¹³² but it forbids an absolute prohibition on transfer.¹³³ Any restriction will be narrowly construed.¹³⁴ Ownership of the shares is based on a declaration of transfer, signed by the transferor or his agent,¹³⁵ entered in the register. The effect of a transfer, once properly constituted on the books of the corporation, is that the new holder has title to the share, if acquired in good faith. Such title

¹²⁶ See the New York Stock Exchange Rules 265-75, as well as those of the Washington-Baltimore and Philadelphia Stock Exchanges. Another problem exists where the broker obtained the security from another customer. Here, too, he would not have a chance of returning it. It is submitted that the new provisions in UCC § 8-113 are preferable to what used to be the law. A customer is not under the rule "know your client", as a broker is, nor is he in a position to see that he does not get a tainted security, something against which the broker can much better protect himself. Whether UCC § 8-313 will remain the rough spot for New York brokers in the light of UCC § 8-320 will have to be seen. To date, New York has not agreed to amend the emasculated provision of UCC § 8-313 enacted in that state.

¹²⁷ UCC § 8-401.

¹²⁸ UCC § 1-203. This becomes most important in relation to UCC § 8-402(4).

¹²⁹ That is, under the Taney doctrine, *Lowry v. Commercial & Farmers' Bank*, 15 Fed. Cas. 1040 (1848). See effect in *Conard, Simplifying Securities Transfers*, 30 Rocky Mt. L. Rev. 33, 34 (1957) as to resultant costs.

¹³⁰ UCC § 8-401, or at least damages can be recovered under UCC § 8-104. See further Guttman, *op. cit. supra* note 103, at 39.

¹³¹ UCC § 8-404.

¹³² Cass. Mar. 27, 1878; 1 Sirey 277 (1878).

¹³³ Cass. August 10, 1887; 1 Dalloz 440 (1887); 1 Sirey 33 (1889).

¹³⁴ Cass. January 2, 1924; 1925 J. des Soc. 83.

¹³⁵ Code de Commerce, Art. 36; Act of July 24, 1867, Art. 21.

cannot be attacked; not even by the true owner, who will have to move against the thief, forger or the corporation when he has been wrongfully deprived of the share.¹³⁶ In this connection the importance of the *Bulletin des Opposition* should be noted. Through it, brokers and others may be given notice of objections to any intended dealings with the shares.¹³⁷ Where proper notice has been given, it is not possible later to plead a "white heart, empty head" defence.¹³⁸ This conclusion is also reached by the Uniform Commercial Code, but it fails, however, to provide a uniform method of notification.¹³⁹

Where the transferor deals directly with the corporation and not through a stockbroker (*transfert réels*),¹⁴⁰ the demand to transfer must be in the form prescribed. This requires that the transferor have his signature verified unless he personally appears at the offices of the corporation.¹⁴¹ The receipt of an application to transfer must state that the shares have accompanied the application and must indicate when the securities will be available to the transferee.¹⁴² Notice of any opposition to the transfer must be given by the corporation to the applicant within ten days. Otherwise a provisional indorsement of non-opposition must be sent (*visa provisoire de non-opposition*).¹⁴³ The transfer may thus be completed within eleven days of the demand.¹⁴⁴

Where the transfer is made through stockbrokers, French law is unnecessarily complicated. In such a case, there must be two transfers, one from the selling stockbroker to the buying stockbroker and a further one to the buyer. One step can be avoided if the buying stockbroker promptly informs the corporation that he is merely a broker. In that case, he will not be entered on the books of the corporation and, thus, he will not be liable should the shares still be subject to any outstanding calls.¹⁴⁵ This circuitry can also be avoided where one stockbroker acts on behalf of both the seller and the buyer.¹⁴⁶ The greatest

¹³⁶ Cass. October 31, 1900; 1901 J. des Soc. 547.

¹³⁷ Decree No. 49-1105 of August 4, 1949, Art. 16.

¹³⁸ *Graham v. White-Phillips*, 296 U.S. 27 (1935).

¹³⁹ UCC § 8-405(1) merely requires notice but does not indicate the form it is to take. UCC § 1-201(26) would thus apply. UCC § 8-403(3)(a) requires notice in writing but does not require the matters set out in UCC § 8-403(1)(a).

¹⁴⁰ Decree of October 25, 1934.

¹⁴¹ Id. at Art. 7.

¹⁴² Decree of October 26, 1934, Art. 12.

¹⁴³ Id. at Art. 14; (Decree of October 25, 1934, Art. 8).

¹⁴⁴ Id. at Art. 12. Delay entitles the holder to damages.

¹⁴⁵ See Decree of October 25, 1934, Arts. 2-4; Decree of October 25, 1934, Arts. 2, 7. Note the analysis of the transfers under the UCC by Guttman, *Investment Securities under the U.C.C.*, 11 Buffalo L. Rev. 1, 16-17 (1961) and Israels, 1954(2) N.Y.L. Rev. Com. Rep. (UCC) 897.

¹⁴⁶ This would only take eight days. The transfer would be much quicker where the security can be converted into bearer security, for here the selling broker applies to have the security converted and then hands it over to the buying broker or buyer. It can then be reconverted into nominal security.

objection to these repeated transfers is the time lost before the transfer is completed. For if approval of the new member is required by the articles of association, it may take up to fifteen days even though only one stockbroker is involved.¹⁴⁷

It is also possible for nominal shares to be attached by creditors prior to a transfer. This is done by serving notice on the corporation forbidding it to pay either dividends or to amortise the share.¹⁴⁸ The court will then be asked to order the sale of the share. If the debtor refuses to deliver the share certificate, the creditor can obtain a court order requiring the corporation to strike the name of the shareholder and to deliver a new share, to be sold in execution of the attachment.¹⁴⁹ It is submitted that the method of transfer adopted in France indicates that the share certificate is not a negotiable instrument, but that to it are attached some rights similar to negotiability, provided the proper formalities for transfer have been followed.

Restrictions on transfer are well known to English corporation law. Thus all "Private Companies" must expressly restrict the transfer of shares so as to limit the shareholders to the number permitted.¹⁵⁰ Also, in the exempt private company, this restrictive power has to be incorporated into the articles of association so as to prevent other corporations from purchasing its stock, thereby causing it to lose the advantages exemption confers.¹⁵¹ In this respect, the English approach is different from the restrictions contained in the articles of a closely-held American corporation. Such closely-held corporations, how-

¹⁴⁷ Decree of October 25, 1934, Arts. 3-5; Decree of October 26, 1934, Arts. 3, 7, 8. Note that this time is still shorter than that elapsing in England, where a company has two months to notify its refusal to the transferee. Companies Act, 1948, 11 & 12 Geo. 6, c. 38, § 78. The Jenkins Committee, Cmnd. 1749/62, ¶ 476, proposes that the time be cut to five weeks. In the United States a much shorter time applies, usually four days.

¹⁴⁸ Amortisation here is affected out of company assets, excluding the capital. There must be specific authority in the articles permitting amortisation. Once amortised, the share certificate is changed to indicate this (*action de jouissance*), but the shareholder's rights are not affected thereby, with the exception that, on liquidation, he does not have a claim to the capital since he has already received his share of it.

¹⁴⁹ Church, *Business Associations Under French Law*, § 255 (1960).

¹⁵⁰ Companies Act, 1948, 11 & 12 Geo. 6, c. 38, § 28(1) sets out the three requirements for a company to be a private company: (a) membership must be limited to fifty persons excluding employees and ex-employees who became members while in the employment of the company; (b) restrictions on the transfer of shares must exist; and (c) no invitation must be made to the public to subscribe to shares or debentures.

¹⁵¹ It is, however, difficult to prevent a loss of exemption from the requirements of publishing financial statements and those prohibiting loans to directors, since exemption depends not on the provisions of the articles or memorandum, but on the de facto position of members, debenture holders and directors. As to the requirements to be fulfilled for a company to claim to be an exempt private company, see Companies Act, 1948, *supra* note 150, § 129 and Schedule 7. A provision similar to Table A, Part II, Article 6 may help. Note that the Jenkins Committee, *supra* note 147 recommended the abolition of the distinction between public, private and exempt private companies with some concession as to publication of accounts, etc., by companies whose shares are not quoted on the stock exchange.

ever, must give notice of the restriction on transfer by indorsement on the share certificate. Otherwise, a purchaser may be able to claim that he had properly acquired the share without notice of the restriction.¹⁵² In this connection a further restriction becomes important. Namely, shares, which have not been registered under the 1933 Securities Act, will have to carry due notice to this effect so as to prevent any transfer violative of this Act.¹⁵³ English law does not control the issue of shares in this manner, leaving instead the policing of the issues to the stock exchange and to the private industry involved in the dealing with shares. Some control, however, does exist,¹⁵⁴ though with the exception of the emergency legislation under the 1947 Exchange Control Act,¹⁵⁵ it has no effect on the transfer of shares already issued.

One of the first differences we can note between the English approach and that under the Uniform Commercial Code is the absence of any Statute of Frauds provision in English law applicable to the transfer of shares. English law allows an oral contract for the sale of shares, and will specifically enforce such oral contract, even though nothing has been paid thereunder.¹⁵⁶ The basis of the divergence of the English and the American approach to this matter is the unfortunate existence of decisions like *Greenwood v. Law*,¹⁵⁷ where Judge Van Sykel found that Lord Denman in *Humble v. Mitchell*,¹⁵⁸ had overlooked two decisions¹⁵⁹ applying the Statute of Frauds¹⁶⁰ to a contract for the sale of shares. A realisation that shares are choses in action and not goods¹⁶¹ would have released this type of commercial transaction from an unnecessary hindrance. Doubt remained in this country even at the beginning of the twentieth century and was resolved only by the extension of the Statute of Frauds provision in the Uniform Sales Act to choses in action.¹⁶² The Statute of Frauds, in so far as it had been

¹⁵² UCC § 8-204. Note that restrictions on transfer cannot be absolute. *Tracey v. Franklin*, 31 Del. Ch. 477, 67 A.2d 56 (1949). A right of first refusal to the corporation or other shareholders is generally permitted. *Baumuhl v. Goldstein* 95 N.J. Eq. 597, 124 Atl. 118 (1924). See further O'Neal, Restrictions on Transfer of Stock in Closely Held Corporations: Planning and Drafting, 65 Harv. L. Rev. 773 (1952).

¹⁵³ *Israels*, Stop-Transfer Procedures and the Securities Act of 1933—Addendum to Uniform Commercial Code—Article 8, 17 Rutgers L. Rev. 158 (1962).

¹⁵⁴ Note the Capital Issues Committee set up under the Borrowing (Control and Guarantees) Act, 1946, 9 & 10 Geo. 6, c. 58 and the Control of Borrowing Order, 1958, S.I. 1958, No. 1208, made thereunder, requiring Treasury consent to issues of more than £50,000 within any period of twelve months. Of further note is the Prevention of Fraud (Investment) Act, 1958, 6 & 7 Eliz. 2, c. 45.

¹⁵⁵ 10 & 11 Geo. 6, c. 14.

¹⁵⁶ *Cheale v. Kenward* (1858) 3 De G. & J. 27.

¹⁵⁷ 55 N.J.L. 168, 26 Atl. 134 (1893).

¹⁵⁸ 11 Ad. & El. 205, 113 Eng. Rep. 392 (1840).

¹⁵⁹ *Crull v. Dodson*, 2 Eq. Cas. Abr. 51, Sel. Cas. T. King 41, 22 Eng. Rep. 44, 25 Eng. Rep. 211 (1725) and *Mussell v. Cooke*, Prec. Ch. 533, 2 Eq. Cas. Abr. 49, 70, 22 Eng. Rep. 43, 62, 24 Eng. Rep. 239 (1720).

¹⁶⁰ 29 Car. 2, c. 3 (1677).

¹⁶¹ See *Humble v. Mitchell*, supra note 158.

¹⁶² Uniform Sales Act § 4.

retained as applicable to the sale of goods, has been rejected in England.¹⁶⁸ In this country, however, the Uniform Commercial Code continues this anachronism¹⁶⁴ and, unfortunately, still embodies its requirements in relation to shares, albeit in a somewhat ameliorated manner.¹⁶⁵

In order to transfer shares in an English company, an instrument of transfer must be executed.¹⁶⁶ This is normally a separate instrument and not indorsed on the share certificate itself, as is the case in the United States.¹⁶⁷ The form of the transfer is determined by the articles of association.¹⁶⁸ Only when the transfer is filed with it will the company have to transfer membership. Generally, both the transferor and the transferee must execute the transfer. But once the transferor has completed this requirement, he is free of any other obligation. He makes no warrant that the company will transfer the share into the name of the transferee.¹⁶⁹ The duty to obtain registration is on the transferee.¹⁷⁰ Until the transfer is completed, *i.e.*, until the transferee has been entered on the register as member,¹⁷¹ the transferor remains a member of the company and is liable on the share.¹⁷² However, unless

¹⁶³ Law Reform (Enforcement of Contracts) Act, 1954, 2 & 3 Eliz. 2, c. 34.

¹⁶⁴ UCC §§ 1-206, 2-201, 8-319.

¹⁶⁵ See further Guttman, *Investment Securities Under the Uniform Commercial Code*, 11 Buffalo L. Rev. 1, 18-21 (1961).

¹⁶⁶ Companies Act, 1948, *supra* note 150, § 75. This document is demanded to prevent evasion of Revenue, *i.e.*, the 2% stamp duty required on transfers. Stamp Act, 1891, 54 & 55 Vict., c. 39, § 17; see also Finance (1909-10) Act, 1910, 10 Edw. 7 & 1 Geo. 6, c. 85, as amended by Finance Act, 1947, 10 & 11 Geo. 6, c. 35.

¹⁶⁷ In England, a separate instrument is used since this is found more convenient. See Report of the Committee on Transfer of Securities, Stock Exchange, London, Dec. 1960, ¶¶ 33, 34.

¹⁶⁸ Generally the articles simply state that the transfer can be in any "usual or common form," Companies Act, 1948, First Schedule, Table A, Part I, Art. 23; *Re Letheby & Christopher, Ltd.* [1904] 1 Ch. 815. The articles may, of course, impose restrictions on transfer, *Weston's Case* (1868) 4 Ch. App. 20. Note, however, further the Exchange Control Act, 1947, *supra* note 155, which has to be complied with as well. No difficulty arises where both the transferor and the transferee reside in the sterling area and are beneficially entitled to the security. See Exchange Control (Declaration and Evidence) Order, 1954, S.I. 1635. If either party is not so resident, Treasury consent is required to the transfer. A transfer in contravention of the Exchange Control Act makes all participating parties guilty of an offence under the Act. Note, however, sections 9 and 13 which enable innocent parties to gain relief.

¹⁶⁹ *London Founder's Ass'n v. Clarke*, 20 Q.B.D. 576 (C.A. 1888). But he must not do anything which might prevent registration of the transferee, *Hooper v. Herts*, [1906] 1 Ch. 549 (C.A.).

¹⁷⁰ *Neilson v. James*, 9 Q.B.D. 546 (C.A. 1882).

¹⁷¹ Companies Act, 1948, *supra* note 150, § 26(2). The register is *prima facie* evidence of both the fact of membership and the extent of shareholding, *id.* at § 118.

¹⁷² The application by the transferee for membership takes the form of sending the transfer to the company. Where the articles do not reserve a right to refuse a transfer, the transfer can be compelled. If the right of refusal is retained, then the question arises whether it is in the unfettered discretion of the directors or subject to cause. The directors have to exercise their discretion *bona fide* and not for any collateral purpose. See *Greene, M. R.*, in *In re Smith & Fawcett, Ltd.*, [1942] Ch. 304. In the case of partially paid shares the transferor will desire a swift transfer, since for one year

the transfer is refused because the transferor had no right to execute it, the transferor holds the share in trust for the transferee¹⁷³ and the transferee will have to indemnify the transferor. The Uniform Commercial Code provides, however, that once there has been indorsement and delivery, there is a duty on the transferor to seek the registration of the transferee on the books of the corporation.¹⁷⁴

The share certificate is issued under the seal of the company and, although it is not a contractual document,¹⁷⁵ it does provide the holder with "prima facie evidence of the title."¹⁷⁶ The certificate will contain two very important statements; first, it will disclose that at the time of its issuance, the person named therein was the holder of the designated number of shares and second, it will indicate whether those shares are fully paid up. These statements are made by the company to be acted upon. The company will, therefore, be estopped from denying these facts. The first is a statement of ownership at the time of issue and is not a continuing statement. It is available only to a bona fide purchaser,¹⁷⁷ and only where the certificate has been issued by a properly authorised officer of the company.¹⁷⁸ Thus, where in reliance on this share certificate, a bona fide purchaser acquires the shares, he will ask the company for entry into the register. This may well result in the company being estopped from denying the validity of the certificate. Yet, it may also have to reinstate the true owner of the shares to the register if the transfer was invalid without the knowledge of the bona fide purchaser who relied on the certificate.¹⁷⁹

he remains liable to be placed on the B list of contributors in case of a winding up of the company.

¹⁷³ *Stevenson v. Wilson*, [1907] S.C. 445; *Hardoon v. Bello*, [1901] A.C. 118 (P.C.). The transferee will be the equitable owner, *Hawks v. McArthur*, [1951] 1 All. E.R. 22 and will have to indemnify the transferor, *Spencer v. Ashworth Partington & Co.*, [1925] 1 K.B. 589 (C.A.). Here the transfer was in blank and the share had been transferred to a third party.

¹⁷⁴ UCC § 8-316 indicates that the transferee can demand the assistance of the transferor, though if the purchase was not for value, he will have to reimburse him.

¹⁷⁵ *South London Greyhound Racecourses v. Wake*, [1931] 1 Ch. 496.

¹⁷⁶ Companies Act, 1948, *supra* note 150, § 81.

¹⁷⁷ *Romer, L.J.* in *Rainford v. James Keith & Blackman Co.*, [1905] 2 Ch. 147, 154, "The only representation is that of the date of the certificate the person named therein was the owner of the shares." The claimant must have relied on this representation and this is possible even though he be an original recipient. *Balkis Consol. Co. v. Tomkinson*, [1893] A.C. 396 (H.L.). Note the company is also bound by a statement that the share is fully paid up, *Bloomenthal v. Ford*, [1897] A.C. 156 (H.L.). The holder will be able to pass on these shares free from liability to make up any outstanding calls, even though a purchaser from him has notice of the true facts. *Barrow's Case*, 14 Ch. D. 432 (1880) (C.A.). Cf. *Buckley*, Companies Act (12th ed. 1949). This would result in the company not getting the par value for such shares.

¹⁷⁸ Thus where there has been a forgery, an estoppel cannot arise, *Ruben v. Great Fingall Consol. Co.*, [1906] A.C. 439 (H.L.), for it would not have been the act of the company which caused the representation. But see *Lloyd v. Grace, Smith & Co.*, [1912] A.C. 716 (H.L.). Note UCC § 8-205.

¹⁷⁹ Note that there would here be an overissue if both the true owner and the bona

Once an application for transfer has been filed with the company, it will communicate with the registered owner to determine whether the transfer is one he has authorised. This procedure is followed by the company because it is vulnerable to suit and subsequent damages where it registers a transfer which is invalid or forged.¹⁸⁰ There is, however, little worth in obtaining a signature attestation, because its value as evidence in the event of forgery is doubtful and its usefulness as a deterrent against forgery seems non-existent.¹⁸¹ Generally, the transfer involves delivery of the share certificate to the transferee, for the seller will have disposed of the totality of his holding. Where this is not the case, the transferor will most likely be the one who will apply to the company to have the purchase registered. In such case, the company will certify that it has received documents which *prima facie* indicate that the transferor has title to the number of shares about to be transferred. There is, however, no *representation* that the transferor has title. This distinction between the share certificate and the certification of title to shares, has been attacked recently by a Law Revision Committee.¹⁸² It is claimed that representation of title should be applicable not only to transfers made by the company itself, but also to transactions on the stock exchanges or in blank. Also, the protection afforded by the representation to a person taking a certificate that the shares exist should also apply to a certification to the same extent as if the

fide purchaser were entitled to shares. In English law the bona fide purchaser will be left to have his remedy in damages against the company, and the true owner will be restored to the register. *Re Bahia & San Francisco Ry. Co.*, L.R., 3 Q.B. 584 (1868). Compare UCC § 8-104 permitting the corporation to purchase a security in the open market for the person injured. This is not possible in English law, *Trevor v. Whitworth*, 12 App. Cas. 409 (1887) (H.L.). German law permits it subject to restrictions, AktG. § 65. French law also permits repurchase, but it is doubtful whether they can be kept as treasury shares. *Escarra*, *Droit Commercial*, No. 888 (1952).

¹⁸⁰ *Welch v. Bank of England*, [1955] Ch. 508. Failure to reply does not estop the owner from subsequently raising his title, *Barton v. London & North Western Ry. Co.*, 24 Q.B.D. 77 (C.A. 1889). There is a remedy against the person who lodged the forged transfer, *Welch v. Bank of England*, *supra*, and if he was innocent, a permissive remedy would apply. *Forged Transfer Acts*, 1891, 54 & 55 Vict., c. 43 and 1892, 55 & 56 Vict., c. 36.

¹⁸¹ The Report of the Committee on the Transfer of Securities, Dec. 1960, Stock Exchange, London, at ¶ 27(b), under Lord Ritchie recommended:

We suggest that the attestation [of signatures of transferers] should be replaced by the stamp of the selling agent as emphasising his legal responsibility for warranting the genuineness of the document he puts forward. Signatures in the case of non-Market transactions should be confirmed by professional persons, e.g., Bankers and Solicitors. We believe this is in the best interest of the investor since it is more important to make forgery as difficult as possible than to provide for compensation if a forgery is successful.

Whether a signature guaranty is the answer is doubtful, but no better method has so far occurred. The French approach is rather cumbersome, i.e., appearance at the office of the company, see discussion *supra*.

¹⁸² *Jenkins Committee*, Cmnd. 1749/62, ¶ 482 criticises this distinction which is made by *Companies Act*, 1948, *supra* note 150, § 79.

transferee had been shown a share certificate, *i.e.*, the company should be estopped from denying title when it has certificated the documents. However, the only recommended change made by the Law Revision Committee was that the provisions allowing a company to evade responsibility for the unauthorised acts of its agent in certifying the existence of shares should be narrowly construed so that wherever the agent has apparent authority, the company should be bound.¹⁸³

In this respect, English and American laws are drawing closer together. The circumstance here envisaged is where, because of its previous conduct, the company is precluded from denying the authority of the agent. The mere fact that an agency exists will not be enough; there must be more, *i.e.*, a "holding out" which is relied upon by a third party in dealing with the agent. The approach in England appears to be that the employee is assumed to be an honest agent and the company is to be protected in the rare case of a dishonest agent.¹⁸⁴ Commercially, this presumption is unsound when it results in placing the loss on a third party dealing with the agent. The principal is in a much better position to assess the honesty of his agent and is much better able to guard against his dishonest acts.¹⁸⁵ Moreover, it was he who placed the agent in the position where he could act dishonestly. Thus, the burden should be on the principal rather than on the third party who deals with the agent.

This argument has been adopted by the Uniform Commercial Code which provides an objective standard to determine the corporation's liability to a purchaser for value who lacks notice of a forgery or unauthorised signature.¹⁸⁶ The liability of the corporation depends upon its having *entrusted* the wrongdoer with the responsibility for the signing the security or similar securities, the immediate preparation for signing or the responsible handling¹⁸⁷ of the security. Liability will also lie for the acts of a sub-agent when someone so entrusted delegates these duties.

This not only makes more explicit those situations which preclude the corporation from setting up the defence of lack of authority, but it also places the burden of choosing a responsible and reliable agent on the corporation. The responsibility is confined, however, only to an agent who has been entrusted with the duties set out in the Code.¹⁸⁸ The

¹⁸³ *Id.* at ¶ 483(k), relating to Companies Act, 1948, § 79(3).

¹⁸⁴ This reflects the approach of the Negotiable Instrument Law, 5 U.L.A. § 23; see *Buckley v. Second Nat'l Bank*, 35 N.J.L. 400 (1872); *Budelman v. White's Express & Transfer Co.*, 49 N.J. Super. 511, 140 A.2d 552 (1958).

¹⁸⁵ *E.g.*, by taking a fidelity bond.

¹⁸⁶ UCC § 8-205.

¹⁸⁷ Is this an extension of the "Organic Theory" of corporate responsibility? It seems much wider since it extends to even minor officials if they were entrusted to act. See Gower, *Modern Company Law* (2d ed. 1957).

¹⁸⁸ See UCC §§ 8-205, 8-208; note UCC § 8-406.

form by which such duties must be conferred is not prescribed. Negligence or apparent authority is not needed to make the corporation liable. A difficulty is met by the phrase "entrusted with responsible handling of the security" in Section 8-205. It has not yet been determined how far this phrase is synonymous with "scope of employment."

Where the transfer is signed by a personal representative, English law requires that he produce evidence of his due appointment. This would be evidence of probate of the will, letters of administration or confirmation as executor.¹⁸⁹ Similarly, only a person under the authority of an order in lunacy can act for a person of unsound mind.¹⁹⁰ There is no need for these representatives to become members of the company.¹⁹¹ Of course, the company is not concerned whether they, in making the transfer, are complying with the terms of their trust.¹⁹²

The Uniform Commercial Code, in Section 8-308(3), names those who are deemed "appropriate persons" to execute indorsements for the purpose of transferring shares in a corporation governed by the Code. Section 8-308(6) indicates that the time of signing determines whether the person is an "appropriate person." A subsequent change of circumstances will not affect the signature.

In connection with the existence of equitable rights, there has developed in the United States the Taney doctrine.¹⁹³ This has resulted in excessive documentation of share transfers. English law indicates that a company is under no duty to inquire into the propriety of a particular transfer and thus need not accept any intimation of the existence of a trust in regard to the shares on its register.¹⁹⁴ This rule applies even in those instances where, having refused to register a transfer, the company is aware that there is a possibility that the registered holder is holding the shares in trust for another.¹⁹⁵ This rule, which became

¹⁸⁹ Companies Act, 1948, *supra* note 150, § 82.

¹⁹⁰ Lunacy Act, 1890, 53 & 54 Vict., c. 5, §§ 133-38.

¹⁹¹ Companies Act, 1948, *supra* note 150, § 76. It is usual to have provisions to this effect in the articles of association, see Companies Act, 1948, First Schedule, Table A, Part I, Arts. 29-32. If such personal representatives desire to be registered, they become personally liable for outstanding calls even though they are designated as personal representatives on the register. *Buchan's Case*, 4 App. Cas. 549 (H.L. 1879).

¹⁹² Companies Act, 1948, *supra* note 150, § 117; see also Companies Act, 1948, First Schedule, Table A, Part I, Art. 7. Note, however, R.S.C. Order 46, Rules 3-11, as to a notice in lieu of *distringas* as to dealings with shares.

¹⁹³ *Lowry v. Commercial & Farmers' Bank*, 15 Fed. Cas. 1040 (1848).

¹⁹⁴ *Supra* note 192.

¹⁹⁵ Note here the danger of an exempt private company losing its exemption as a result of a transfer of shares to a corporation which is not itself an exempt private company. See Companies Act, 1948, *supra* note 150, § 129 and Schedule 7. Although the company may refuse to register the transfer, the transferor becomes the nominee of the corporate transferee. A difficulty may thus arise in regard to the certificate which must be filed annually to claim the exempt status. The Board of Trade may waive a temporary breach, Companies Act, 1948, § 129(1).

established in English law at an early stage,¹⁹⁶ later was embodied into statutory law.¹⁹⁷ At first, American courts also followed this approach.¹⁹⁸ An issuer could effectuate a transfer of securities to a fiduciary and, thereafter, transfer the shares in accordance with the instructions of the fiduciary without inquiring into the rightfulness of the transfer. The only duty was to satisfy itself that the fiduciary was duly constituted as such.

Judge Taney in *Lowry v. Commercial & Farmers Bank*¹⁹⁹ indicated that he considered the corporation

the custodian of the shares of stock, and clothed with power sufficient to protect the rights of every one interested, from unauthorized transfers; it is a trust placed in the hands of the corporation for the protection of individual interests, and like every other trustee, it is bound to execute the trust with proper diligence and care, and is responsible for any injury sustained by its negligence or misconduct.²⁰⁰

Thus the corporation was held liable for a transfer in contravention of provisions in a will, treated by the learned judge as a public document once probate had been granted.

Much litigation followed the adoption of this rule and the legislatures have been kept busy in attempts to limit it.²⁰¹ Great uncertainty surrounds the question of "knowledge" of facts that the transfer is in breach of a fiduciary duty. As a result, transfer agents required indemnities to protect themselves and, thereby, the cost of transfer was increased.²⁰² Article 8 does not completely clear the trust from the register of the corporation. It does, however, limit the proof which can be required by a transfer agent and protects the agent from liability if he complies with the provisions of the Article.²⁰³

An English company which refuses to register a transfer must so notify the applicant within two months of receipt of the application.²⁰⁴

¹⁹⁶ *Hartga v. Bank of England*, 3 Ves. Jun. 56, 30 Eng. Rep. 891 (Ch. 1796).

¹⁹⁷ Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16, § 20. See now Companies Act, 1948, *supra* note 150, § 117.

¹⁹⁸ *Bank of Virginia v. Craig*, 50 Va. (6 Leigh) 399 (1835); *Hutchins v. State Bank*, 47 Mass. (12 Metc.) 421 (1847).

¹⁹⁹ *Supra* note 193.

²⁰⁰ *Id.* at 1047.

²⁰¹ See Uniform Fiduciary Act, 9B. U.L.A.; Model Fiduciaries Securities Transfer Act, adopted in Connecticut, Delaware and Illinois; The Uniform Act for Simplification of Fiduciary Security Transfers.

²⁰² See Braucher, *Security Transfers by Fiduciaries*, 43 Minn. L. Rev. 193, 194 (1958) as to the involved procedures established; Christy, *The Transfer of Stock*, § 225 (3d ed. 1958), as to the form adopted by those involved in attempting to evade responsibility under the doctrine and Conard, *Simplifying Securities Transfers*, 30 Rocky Mt. L. Rev. 33, 34 (1957) as to the resultant exorbitant cost.

²⁰³ UCC §§ 8-402, 8-404.

²⁰⁴ Companies Act, 1948, *supra* note 150, §§ 78, 80.

Such refusal may be due to the restrictive nature of the company's membership or the company may have a lien on the shares. Any such liens would have to be reserved in the articles of association, since these are the basis of the contract between the shareholders and the company, and being public documents their contents are deemed to be known to anyone having dealings with the company.²⁰⁵ Since, in the United States, the articles are not treated quite in the same way, and in view of the negotiability of the share certificate, the Uniform Commercial Code, Section 8-103 requires that the lien be *noted* on the security.²⁰⁶ The notification must be "conspicuous," *i.e.*, "so written that a reasonable person against whom it is to operate ought to have noticed it."²⁰⁷

The articles of association of an English company therefore contain any provision authorising the company to exercise a lien in respect to outstanding calls or in respect to any other debts owed to the company by the shareholder. In this connection, a conflict of claims may very well arise. Thus, although Section 117 of the 1948 Companies Act²⁰⁸ provides that the company need not take notice of any trust, and the articles generally extend this to any equitable lien claimed against the share by an outsider, can the company set up its own lien as against a transferee? It is submitted that although such claims or liens are not binding upon the company, surely it would be inequitable to allow it, nonetheless, to claim a priority over such liens or claims where it has notice thereof.²⁰⁹ Where the company's lien would be effective and the company has the right to refuse to register a transfer, the better view appears to be that the registration of such transfer does not amount to a waiver of the lien.²¹⁰ Should other shares have been

²⁰⁵ *Allen v. Gold Reefs of West Africa, Ltd.*, [1909] 1 Ch. 656 (C.A.); *Mahony v. East Holyford Mining Co., L.R.*, 7 H.L. 869, 893 (1875). Note, however, that the London Stock Exchange requires that shares can only be traded on the exchange if the articles provide that fully paid up shares are free from all liens. Rules of the Stock Exchange, London, Appendix 34, ¶¶ 178-186.

²⁰⁶ By using the term *noted*, the Code obviates the difficulty previously caused by the term *stated*, since this was sometimes construed as requiring the whole lien to be set forth.

²⁰⁷ UCC § 1-201 (10); *Allen v. Biltmore Tissue Corp.*, 2 N.Y.2d 534, 141 N.E.2d 812 (1957).

²⁰⁸ *Supra* note 150. *New London & Brazilian Bank v. Brocklebank*, 21 Ch. D. 302 (C.A. 1882).

²⁰⁹ In *Bradford Banking Co. v. Briggs*, 12 App. Cas. 29 (H.L. 1886), notice of a mortgage of the shares was given priority over a lien in the company arising subsequent to the receipt of such notice. Section 117 refers to notice of a "trust." Is notice of a mortgage excluded from the section? Normally the articles extend the exemption to "equitable, contingent, future or partial interest." Companies Act, 1948, *supra* note 150, First Schedule, Table A, Part I, Art. 7. Does this exclude the mortgage in *Briggs*? Gower, *op. cit.* *supra* note 187 suggests the prior notice would be effective, *sed quaere*, *McArthur v. Gulf Line, Ltd.* (1909) S.C. 732 (Scotland).

²¹⁰ *Bank of Africa v. Salisbury Gold Mining Co.*, [1892] A.C. 281 (P.C.). An estoppel may arise, however, in *re W. Key & Son Ltd.*, [1902] 1 Ch. 467, and where only

retained, however, it could be claimed that the lien attaches only to those retained.²¹¹

Various criticisms of the two months delay have been voiced in England. One such criticism points out that the delay enables the directors to prevent a shareholder suspected of being obstreperous from exercising his rights at a forthcoming stockholders' meeting. Also, in some instances, the delay is caused with the collusion of the transferee so as to prevent the directors from acquiring knowledge of a shift in power resulting from a concentrated purchase of shares. To deal with these situations, the recent Law Revision Commission²¹² recommended that owners of a ten per cent beneficial interest in equity shares, or in any class of shares, register their acquisitions within seven days.²¹³ As to the delay, however, the Commission merely recommended that registration be speeded up to five weeks from the filing of the transfer,²¹⁴ with power to be in the transferee to apply to the court and, on showing of good cause, to obtain a declaration ordering that the transfer be effectuated forthwith.

A further Committee under Lord Ritchie recently recommended certain alterations in the procedure for the transfer of shares. These have been partially enacted in the 1963 Stock Transfer Act.²¹⁵ The main attack on the existing system was based on the existence of a "common form," which required attestation of the transferor's signature, transfer by deed (should this be required by the company's articles of association) and various other retarding measures. The first recommendation by the Ritchie Committee was a "transfer by endorsement and delivery," whereby the equitable right or title to shares was to be conveyed. The first stage, indorsement, would be on the back of the certificate²¹⁶ and the second, the delivery, would take place when the holder's agent delivered the certificate to the transferee or his agent. The intention was to cut down the possibility of the certificate's becoming bearer paper, with it the resultant dangers of misappropriation and increased revenue liability.

The procedure suggested would involve participation by the stock

a right to refuse a transfer for outstanding debts to the company has been retained, the transfer may amount to a waiver, *Higgs v. Assam Tea Co.*, L.R. 4 Exch. 387 (1869), for the transfer effects a novation of the contract between the company and the transferor; a new contract comes into existence with the transferee.

²¹¹ *Gray v. Stone and Funnell*, 69 L.T. 282 (1893).

²¹² *Jenkins Report* 1962, Cmd. 1749/62.

²¹³ *Id.* at ¶ 147.

²¹⁴ *Id.* at ¶¶ 476, 483(d)-(e). It is suggested by the Commission that this will enable the monthly directors' meeting to deal with the application for transfer. Note also the proposed amendment of Companies Act, 1948, *supra* note 150, § 116 referred to in the text.

²¹⁵ 11 & 12 Eliz. 2, c. 18.

²¹⁶ This merely involves the signature of the transferor. There would be no "endorsement clause" and the signature need not be attested, nor need the transferee sign. Attestation and signature by the transferee were required under the "common form."

exchange in the transfer and would become more complicated where a certification²¹⁷ by the company would be involved. The use of a special form of "Notice of Endorsement and Delivery" would require a transmission to the buying broker who, after completing parts thereof, would obtain registration of his client on the books of the company.

This method was rejected by Parliament which adopted an alternate method suggested by the Committee,²¹⁸ that of "Transfer by the Stock Transfer Form". The seller here signs a Stock Transfer Form and hands it to the selling broker, who retains it until the "shapes" are known.²¹⁹ The "Stock Transfer Form" and a "Broker's Transfer Form," where more than one sale is involved in the dealings with the holder's shares, will be certified by the stock exchange which will send the "Stock Transfer Form" and the share certificate to the company. If this be an over-the-counter market transaction, the selling broker will send the "Stock Transfer Form" to the company after having indorsed it.²²⁰ The "Broker's Transfer Form" will then be sent to the buying broker, who will present it to the company for transfer of the shares to his client. If any shares remain in the hands of the transferor, the company will have issued a certification prior to the broker's submitting the "Stock Transfer Form" and "Broker's Transfer Form" to the stock exchange. The company will then issue new certificates in the amounts sold and retained.

The 1963 Stock Transfer Act²²¹ provides that any registered, fully paid up security can be transferred by the company upon presentation to it of the "Stock Transfer Form" executed by the transferor only. The Form must indicate the full name and address of the transferee.²²² The execution of the stock transfer need not be attested.²²³ The provisions of the Act apply, notwithstanding anything in any enactment or instrument relating to the transfer of such securities.²²⁴ The Act thus overrides any provisions in the articles of association of the issuing company.

²¹⁷ Certification is discussed above. See also Martin, *Share Transfer and Registration* (1951).

²¹⁸ The Committee itself suggested the alternate method after examining the shortcomings of the first method. Report of the Committee on Transfer of Securities, The Stock Exchange, London, Dec. 1960, Lord Ritchie, Chairman, ¶ 48.

²¹⁹ "Shapes" is defined in the Report, ¶ 51 as "the amounts of each security which will be the subject of separate deliveries to different purchasers and which will correspond to the "tickets" passed by the purchasing broker in accordance with the rules of the Stock Exchange."

²²⁰ Where a number of "shapes" are involved, a "Broker's Transfer Form" would be indorsed and passed to the buying broker or to the company as to each "shape."

²²¹ *Supra* note 215.

²²² *Id.* at § 1(1) and Schedule 1.

²²³ *Id.* at § 1(2).

²²⁴ *Id.* at § 2(1).

Although rejecting the keeping of shares in "street" names as adding to the complications rather than reducing them, the Ritchie Committee was prepared to consider the introduction of a Stock Exchange Nominee system, whereby all sales would be to and by the Stock Exchange Nominee (SENO). In effect, this method amounts to the existing clearing house procedure, adopted by the Uniform Commercial Code²²⁵ and previously noted in connection with the French *Sicovam*.²²⁶ The need to centralise the English stock exchanges²²⁷ and to modernise them by the introduction of electronic devices was recognised by the Committee. This study, however, is still in the investigatory stage and no useful purpose can be served to discuss this matter further at present. Not until there is a change in approach by the English stock exchanges can such modernisation occur. Delays are still accepted as normal; thus, the present two weeks settlement delay on the stock exchange is not considered unreasonable but rather it is deemed conducive to exactitude.²²⁸ The attempts to speed up transfer of stocks by means of the new method of the "Stock Transfer Form" is, however, to be welcomed.

V

Arising out of the discussion of the means by which a share can be transferred, two important aims seem to crystallize. The transferor wishes to facilitate the easy acquisition of the rights embodied in the instrument transferred and the transferee wishes to acquire these rights without interference from anyone claiming rights in the instrument. The Code purports to introduce "a negotiable instrument law dealing with securities."²²⁹ In defining an investment security, it requires that the instrument be "commonly dealt in upon security exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium of investment."²³⁰ Although it avoids the pitfalls of the Negotiable Instrument Law²³¹ and follows the policy of the English Bills of Exchange Act of 1882,²³² enabling merchants to

²²⁵ UCC § 8-320.

²²⁶ Société interprofessionnelle pour la compensation des valeurs mobilières.

²²⁷ Note however the setting up of a new stock exchange in Edinburgh last year.

²²⁸ Supra note 85, at ¶ 21. In the United States, the time is usually four days. In rejecting the "North American system," though recognising it as speedier, the Committee indicated that it has been geared to cash dealings but it would not be more economical in terms of labour. This is a clear reference to the absence in England of mechanisation (automation) in this field. Yet it is the lapse of time the Committee was set up to help eliminate. Sometimes more than three months would elapse from the time of the purchase to the final entry on the register and receipt of a share certificate by the buyer.

²²⁹ Official Comments to UCC § 8-101.

²³⁰ UCC § 8-102(1)(a)(ii).

²³¹ 5 U.L.A. § 1, i.e., an unconditional promise, etc. (requirements which might be apposite to short term credit devices but not to investment instruments).

²³² 45 and 46 Vict., c. 61.

develop new instruments within the purview of the Code as commercial necessity may arise, it is unfortunate that the Code insists upon the presence of certain formal requisites such as issuance of the security "in bearer or registered form."²³³ This requirement, dependent on the form of issue and not on any subsequent indorsement,²³⁴ may negate the lead shown by the functional definition. Despite a practice that may result in certain instruments being dealt with as "media of investment," Article 8 will not be applicable merely because the instrument runs to order rather than to a bearer or to a registered holder. The exclusion of "order" instruments from the purview of Article 8 is a policy decision, the reasons for which are not apparent.²³⁵

Let us now examine the result of this restriction. In German law, the nominal share is clearly a "medium for investment" and it is "commonly dealt in upon security exchanges." But since it is negotiable and payable to order, even though this may not be discernible from the face of the share certificate, it would be excluded from the definition of a security given by Article 8. Similar objections can be made with regard to the French nominal share or the English share certificate. It may be contended that these are not the types of securities to which the Code was intended to apply. However, there would have been no difficulty in expanding the requirement of form to include the order security nor in removing the question of form entirely from the requirements of Article 8 and, thus, to leave the functional definition to govern its applicability.

The functional definition raises no difficulty with regard to shares which are originally non-negotiable. No change of *locus in quo* will make such shares negotiable by being "dealt in" as such in "any area." The law of the place of issuance normally will govern the negotiability of a security, but Article 8 refers to the law of the place of the organisation of the issuer.²³⁶ Although these two laws are not necessarily the same, a reference to these laws should prevent negotiability being imposed on instruments not intended to have such status.

An argument in favour of excluding the foreign share from the purview of Article 8 may be the recent development of the American Depositary Receipt. This method of investment in foreign corporations works in the following manner. An American issuing house or trust company which invests in a foreign corporation will appear as the shareholder of a nominal share on the register of such foreign corporation, or it may hold bearer shares in the foreign corporation. The

²³³ UCC § 8-102(1)(a)(i).

²³⁴ UCC §§ 8-102(c), (d).

²³⁵ The negotiability of such instruments may develop outside Article 8. UCC §§ 3-102, 3-103. See Braucher, UCC Article 3—Commercial Paper—New York Variations, 17 Rutgers L. Rev. 57 (1962).

²³⁶ See text accompanying note 44, *supra*.

American corporation will then sell depositary receipts to investors in this country for American dollars. The receipt, indicating the number of shares held for the American investor in the named foreign corporation, entitles him to dividends, payable in dollars, from the American company, after the latter has received dividends and has subtracted administrative costs. In effect these depositary receipts are very similar to investment certificates in the portfolio of an American investment corporation. Their number has now reached proportions of such dimensions, and demand for them has been created to such an extent, that they are themselves being traded on the stock exchanges.²³⁷ In so far as the American corporation is concerned, it treats the holders of such depositary receipts in the same way as a clearing house might do; *i.e.*, by balancing its accounts to reflect transactions with the depositary receipts. Since they are media for investment and are either being dealt in upon the security exchanges or over-the-counter markets, such depositary receipts would fall under Article 8 of the Code.²³⁸ The American corporation would constitute an "issuer" under Section 8-201(1).

The ultimate aim of the commercial law is to bring about the unification not only of the commercial laws within a federal system, but internationally as well. Commerce knows very few international boundaries outside those set by national security. The Uniform Commercial Code has drawn heavily on German precedents, but fortunately the influence of the common law has not been lost. It is submitted, that being a purely national product, it can only serve as a starting point for any future international unification of law.

A much more serious effort has been made in Europe, where the Common Market has forced members to consider unifying their laws. The Treaty of Rome²³⁹ contains provisions for the freedom of establishment in member countries by individuals and by corporations "under the conditions laid down by the country of establishment for its own nationals."²⁴⁰ Though the Treaty facilitates the ready flow of capital and labour, it does not create order out of the chaos resulting from the variance of corporate laws. In general, these

²³⁷ Europe's Securities Lure U.S. Investors, 35 Investor's Reader, No. 8, 1.

²³⁸ UCC § 8-320 would thus apply. Also note that they are subject to the Securities Act of 1933, 48 Stat. 74, 15 U.S.C. § 77 (1958).

²³⁹ Treaty Establishing the European Economic Community. U.N.T.S., Vol. 298 I, no. 4300 (1958).

²⁴⁰ *Id.* at Art. 52. Art. 58, relating to companies, states:

Companies constituted in accordance with the law of a Member State and having their registered office, central management or main establishment within the Community shall, for the purpose of applying the provisions of this Chapter, be assimilated to natural persons being nationals of Member States. . . . The term "companies" shall mean companies under civil or commercial law including co-operative companies and other legal persons under public or private law, with the exception of non-profit making companies.

corporate laws firmly control the activities of corporations formed under them by requiring strict compliance with their provisions.²⁴¹ As a result, certain industries, affecting more than one country, must be carried on by corporations which are governed, not by national laws, but by the provisions of special conventions.²⁴² It is clear that the ordinary commercial corporation does not warrant such special treatment.²⁴³

Recognising this difficulty, the Treaty of Rome provides:

Member States shall, in so far as necessary, engage in negotiations with each other with a view to ensuring for the benefit of their nationals: . . . the mutual recognition of companies within the meaning of Article 58, second paragraph,²⁴⁴ the maintenance of their legal personality in cases where the registered office is transferred from one country to another,²⁴⁵ and the possibility for companies subject to the municipal law of Member States to form mergers.²⁴⁶

It was realised that the unification of corporation laws in the member states would be too great a task. A European Commercial Company was, therefore, proposed by Professor Sanders.²⁴⁷ It was to embody the principal approaches of the differing corporation laws and it was not to be subject to the common form of European taxation²⁴⁸ but rather only to the tax laws of the country wherein it was situate. Such European corporations would be available to those commercial enterprises having transactions crossing existing national borders, and would exist side by side with corporations formed under present national laws. At the International Congress held in Paris in June 1960, the idea was adopted and five commissions were set up to study the

²⁴¹ Germany: AktG. (1937); France: The law of July 24, 1867 and its amendments as well as the Code de Commerce.

²⁴² Note, e.g., Franco-Swiss Convention of October 20, 1949 setting up the Bâle Airport.

²⁴³ In 1951, a proposal by the Council of Europe for the creation of a European company to exploit public services, failed because of unpopular attempts to give it a favourable tax position.

²⁴⁴ Supra note 240.

²⁴⁵ E.g., German law does not permit a domestic corporation to move its seat (domicile) out of the country. B.G.H. Bd. 19, S.105. An attempt to do so will be deemed a decision to dissolve the corporation, R.G. Bd. 88, S.54; R.G. Bd. 107, S.97. Even though the corporation is generally foreign controlled the statutory domicile must be in Germany, R.G. Bd. 99, S.218; R.G. Bd. 177, S.217.

²⁴⁶ Supra note 239, Art. 220. Note the document recently presented by the E.E.C. Commission to the Council. "Proposition d'une directive du Conseil tendant à coordonner, pour les rendre équivalentes, les garanties qui sont exigées, dans les Etats membres, des sociétés au sens de l'article 58, alinéa 2 du Traité, pour protéger les intérêts tant des associés que des tiers. III/COM(63)520 final, Bruxelles, le 19 février 1964."

²⁴⁷ Vers une Société anonyme, Droit European 9 (1960).

²⁴⁸ Supra note 243.

various problems involved in establishing such a corporation.²⁴⁹ Unfortunately, the resultant draft contains little of Anglo-American jurisprudence. For the purposes of this paper it is interesting to note that the commission considering the shares of the European Commercial Company recommended that there should be a minimum share capital divided into nominal and issued capital,²⁵⁰ and that the shares, having a fixed par value,²⁵¹ should be either bearer or registered shares, but should not be transferable until fully paid up.²⁵² Although these recommendations have not yet been acted upon, they do show a progressive trend, one contributed to in no small way by the Uniform Commercial Code.

²⁴⁹ Congrès International pour la Création d'une Société Commerciale de Type Européen, *Revue du Marché Commun* (1960).

²⁵⁰ The source here was the Netherland *Naamloze Vennootschap* rather than the English limited company.

²⁵¹ A rule of general application outside the North American continent. The value fixed upon was 100 New Francs or its equivalent European unit.

²⁵² This requirement sought to create negotiability and thus the German rather than the French approach was adopted.