

THE TRANSFER OF INTERESTS IN ASSOCIATIONS.

SECOND PAPER.¹

Let it be supposed that A has purchased from B innocently and for value a certificate which affirms that B is the registered owner of the number of shares of stock therein specified. Let it be further supposed that this certificate has been improvidently issued by the corporation and that B is not in fact the owner.² The question is, what are the rights of A against the corporation? It is assumed that A purchased upon the faith of the formal representation by the corporation of B's ownership of the shares, as distinguished from the case in which A is deceived into buying from a thief or from the forger of a power of attorney, a certificate which truthfully certifies to the ownership of the person whose name it bears and afterwards effects a

¹ The former paper appeared in *AMERICAN LAW REGISTER*, vol. lli, page 737. The transfer of a partner's interest was there considered and the discussion of the transfer of shares made transferable by statute was begun. It was suggested that a transferable share in the common stock is property of such a kind that legal title to it passes only by transfer upon the books of the company. Delivery of the certificate, with an assignment and power of attorney duly executed, confer upon the holder an equitable right to effectuate a transfer and, upon surrender of the old certificate, to compel the issue of a new certificate to him. As the certificate is evidence of ownership of property, it is not regarded as a negotiable instrument. By putting it within the power of the holder of the certificate to induce belief that he has a right to the shares, the registered owner may estop himself from setting up the legal title. In the present paper it is proposed to discuss the liability of the corporation for falsely or mistakenly certifying that the person named in the certificate is the owner of a share and also its liability in case transfer is permitted without the surrender of the old certificate.

² The corporation may have been led to issue such a certificate in a variety of ways. The case may be one in which a forged transfer has been brought in, as in the cases discussed in the former paper. Or the corporation may have permitted the transfer and issued a new certificate at the request of one who has in good faith purchased a duly endorsed certificate from the person who has stolen it from the owner. Or, again, the corporation may have carelessly issued the new certificate without requiring the production of the old certificate accompanied by a power of attorney to transfer.

transfer into his own name and causes a new certificate to be issued.³ Where A gives value on the faith of the representation by the corporation it seems clear that the corporation should be liable to A and should be compellable to issue stock to him or to respond in damages. The corporation is estopped from disputing the facts upon which A relied.⁴ Wherever specific relief can be given, the plaintiff should seem to be entitled to it.⁵ It often happens, however, that specific performance is impossible because the full amount of authorized stock is outstanding, in which case the plaintiff can obtain nothing but damages.⁶

X was the registered owner of stock in the B company. Y, X's clerk, instructed a broker to sell X's stock. C, D, and E became the ultimate purchasers and gave the names of F and G as the names of the transferees. Y forged the transfer to F and G. Upon presentation of the transfer the company sent a written notice to X which Y intercepted. Receiving no answer from X, the company permitted the transfer, but before a new certificate was issued to F and G, F and G executed a further transfer to A of a number of shares which included those supposed to have been bought from X and others in addition. This transfer to A was duly registered and the company issued a certificate certifying that A was the registered holder of the stock. F and G were merely the nominees of C, D, and E, and A accepted the stock as trustee for C, D, and E, subject to any lien or claim which a certain bank might have thereon. Subsequently the forgery of X's name was discovered, and X claimed to be the proprietor of the stock. The indebted-

³ See citation from the opinion of Mr. Justice Gray in *Moore v. Citizens' Nat'l Bank* (111 U. S. 156, 1883), page 242 *infra*, note.

⁴ *Dewing v. Perdicaries*, 96 U. S. 193 (1877), is a decision perhaps not in harmony with this view. For a criticism of this case, see "The Compulsory Duplication of Stock Certificates," by E. A. Harriman, *AMERICAN LAW REGISTER*, vol. xxxvi, N. S., page 83. The decision is probably attributable to the fact that the certificates relied upon by innocent purchasers were issued by the corporation under the compulsion of a confiscation act passed by the Confederacy. See Cook on Corps. (5th ed.), § 371.

⁵ *Barkinslaw v. Nicolls*, 3 A. C. 1004 (1878).

⁶ *In re Bahia, etc., Ry. Co.*, L. R. 3 Q. B. 584 (1868); *New York, N. H. and H. R. R. Co. v. Schuyler*, 34 N. Y. 30 (1865).

ness to the bank was paid off, so that A's position was that of trustee for C, D, and E. A, C, D, and E brought one action against the B company for having made wrongful representations respecting the ownership of the stock and another action for indemnity. Lindley, J., gave judgment for the plaintiffs, but on appeal the judgment was reversed on the ground that the defendant had made no representations upon the faith of which the plaintiffs had acted. Lord Bramwell used the following language: "C, D, and E sent to the company a document purporting to be transferred from X, and in effect demanded to be registered as transferees of the stock; to this demand the company assented. How can these facts constitute an estoppel against the company? . . . The company have made no untrue representation: they issued certificates to C, D, and E, but this they were induced to do by the conduct of that firm." *In re Bahia, etc., Ry. Co.* (*supra*) was distinguished from the case before the court on the ground that in that case the company's representation in the certificate had been the inducement to the plaintiffs' action.⁷

⁷ *Simm v. Anglo-American Telegraph Co.*, 5 Q. B. D. 188 (1879). Lord Justice Lindley appears to have been misled by the introduction into the controversy of the rights of the bank under the terms of A's trust. The bank undoubtedly relied upon the company's representation that A was the owner of the stock and had made advances accordingly. If at the time the actions were brought the bank's debt had remained unpaid, A would have been entitled to recover as trustee for the bank. The indebtedness to the bank having been discharged, however, A was merely a dry trustee for C, D, and E, who had not been misled by the company's affirmation that A was the owner of the stock. On the contrary, they had themselves unintentionally misled the corporation by bringing in the forged transfer with which they had previously been deceived by Y.

In *Moore v. Citizens' Nat'l Bank* (111 U. S. 156, 1883) Mr. Justice Gray used the following language:

"When a corporation, upon the delivery to it of a certificate of stock with a forged power of attorney purporting to be executed by the rightful owner, issues a new certificate to the present holder, who sells it in the market to one who pays value for it, with no knowledge or notice of the forgery, the corporation is doubtless not relieved from its obligation to the original owner, but must still recognize him as a stockholder, because he cannot be deprived of his property without any consent or negligence of his. *Railway Co. v. Taylor*, 8 H. L. Cas. 751; *Bank v. Lanier*, 11 Wall, 369; *Telegraph Co. v. Davenport*, 97 U. S. 369; *Pratt v. Copper Co.*, 123 Mass. 110; *Pratt v. Railroad Co.*, 126 Mass. 443. And the corporation is obliged, if not to recognize the last purchaser as a stockholder also, at least to respond to him in damages

A situation may arise in which A purchases upon the faith of the company's certificate that X is the owner of the stock although A has knowledge of facts which make X's title doubtful. If these facts are not known to the company, it should seem that A cannot enforce liability against the company. On the other hand, if the facts known to A were also known to the company at the time the certificate was issued in X's name, A is regarded as having a right to believe that the company had deliberately recognized X's title and had assumed liability to him and his transferees after a full investigation of the subject.⁸

Let attention now be directed to the case in which a new

for the value of the stock, because he has taken it for value without notice of any defect, and on the faith of the new certificate issued by the corporation. *In re Bahia and S. F. Ry.*, L. R. 3 Q. B. 584. Whether, before the last sale has taken place, the corporation is liable to the holder of the new certificate, is a question upon which there appears to have been a difference of opinion in England. According to the decision of Lord Northington in *Ashby v. Blackwell*, 2 Eden, 299, Amb. 503, it would seem that the corporation would be liable. According to the decisions of Sir Joseph Jekyll in *Hilyard v. South Sea Co.*, 2 P. Wms. 76, and of the court of appeal in *Simm v. Telegraph Co.*, 5 Q. B. Div. 188, it would seem that it would not, because the holder of the new certificate takes it, not on the faith of that or any other certificate of the corporation, but on the faith of the forged power of attorney. However that may be, it is clear that the corporation is not liable to anyone taking with notice of the forgery in the transfer, or of any other fact tending to show that the new certificate has been irregularly issued, unless the corporation has ratified, or received, some benefit from the transaction.

"In *Hart v. Mining Co.*, L. R. 5 Exch. 111, the plaintiff, a bona fide purchaser of the shares, had paid assessments thereon to the company upon the faith of the certificate issued by it to him after his purchase. In *Barwick v. Bank*, L. R. 2 Exch. 259, and in *Mackay v. Bank*, L. R. 5 P. C. 394, the bank had derived a benefit from the fraud of its agent, and was held liable upon that ground. The decision in *Swift v. Winterbotham*, L. R. 8 Q. B. 244, that a bank was liable upon its official manager's representation to one of its customers that the credit of a certain person was good, was reversed in the Exchequer Chamber. *Swift v. Jewsbury*, L. R. 9 Q. B. 301. The decision in the Exchequer Chamber in *Queen v. Shropshire Union Railways and Canal Co.*, L. R. 8 Q. B. 420, that a railway company owning shares of its own stock, the legal title of which was registered in the name of one of its directors as trustee for the corporation, should transfer them to a person who, believing the director to be the absolute owner of the shares, had lent him money on the deposit of the certificate as security, was contrary to the judgment of the court of Queen's Bench, and was reversed in the House of Lords. L. R. 7 H. L. 496." For a statement of the case which Mr. Justice Gray was deciding, see page 247, *infra*.

⁸ *Mandlebaum v. North American Mining Co.*, 4 Mich. 465 (1857).

certificate is issued by the corporation without requiring the production and surrender of the old certificate. In such a case the new certificate may be issued after there has been an actual transfer upon the books or it may be issued without any such transfer. If A, the registered owner, persuades the corporation to permit him to transfer his shares to B without the production or surrender of the old certificate, a new certificate will be issued to B upon the face of which it is represented (and in that event truly represented) that B is the owner of the shares. It may happen, however, either that the old certificate properly endorsed is outstanding in the hands either of a vendee or pledgee to whom A has delivered it for value, or it may happen that after the issue of the new certificate to B, A may sell or pledge the old certificate to one who gives value in ignorance of the transfer of the share. In all these situations it may happen that A is a stockholder who occupies no official position in the corporation, or it may happen that A is himself an officer or transfer agent.

In such cases as those just suggested various problems must receive consideration. In the first place, it must be determined whether or not the legal title to the shares has passed in virtue of the transfer on the books to B, notwithstanding the failure to produce and surrender the old certificate. If the legal title does not pass by such transfer, then it is either still in A (absolutely or subject to a pledge) or in A's vendee in virtue of the delivery of the endorsed certificate to the latter. Upon this view of the case the vendee or pledgee could upon surrender of the old certificate compel the corporation to transfer the share to him and issue a new certificate. It would follow that the loss resulting from A's fraud would fall upon B, since B has acquired no title to the stock and has taken no action in reliance upon any representation made by the corporation and therefore has no rights against it. Discarding the view that the legal title is either in A or his vendee or pledgee, it will follow that the title by A's transfer has passed to B, who has now become the legal owner of the shares. Two questions then immediately

present themselves for decision: first, whether B by accepting the transfer without insisting upon the production and surrender of the old certificate is put upon his inquiry respecting its whereabouts and is thus subjected to an equity in favor of A's vendee or pledgee; and, second, if B is not subject to such an equity, does the corporation owe a duty to those who may be the holders of the old certificate for value to make no transfer of the shares which it represents without requiring its production and surrender, for breach of which duty it may be held answerable in damages?

B was the president, director, and transfer agent of the New York, New Haven, and Hartford Railroad Company. For a period of more than seven years he was permitted by the directors to have sole charge of the company's New York transfer office. During that time he fraudulently over-issued stock and committed various frauds. In the course of B's dealings, B and his partner became the registered owners of certain shares of valid stock in the corporation for which certificates were regularly issued to them. These certificates, properly endorsed, were pledged by B with persons who in good faith advanced money upon them. Thereafter B, without the knowledge of the pledgees, transferred the shares upon the company's books to S and others who were purchasers in good faith. The outstanding certificates were not surrendered or accounted for. Subsequently the pledgees presented their certificates at the transfer office, offered to surrender them, and requested permission to transfer the shares which they represented. Permission to transfer was refused. In an equitable proceeding instituted by the company against large numbers of persons affected in various ways by B's fraud it was determined that the legal title had passed by the transfer on the books to B and the other purchasers; that B's title was not subject to any equity in favor of S, since B has "a right to presume that no certificate has issued, or if one has, that his vendor has duly surrendered it for cancellation;" and that the corporation was liable to S for breach of its duty to insist upon the surrender of the old certificate before

making the transfer and permitting the new certificate to issue. To the objection that A in permitting the transfer acted in excess of his powers the court replied, first, that the non-performance of the duty to insist upon production of the old certificate charged the principal; second, that as between two innocent persons he must suffer who has trusted the fraudulent agent; and, third, that the company, by insisting upon the transfer as effective to the extent of cutting off S's equitable title, were ratifying the act of the agent, which therefore they could not affirm in part and disaffirm as to the residue.⁹

In the celebrated case just summarized it will be perceived that the questions now under discussion were considered with reference to the claim of the pledgee to be indemnified by the corporation against loss sustained through the transfer of the shares to a purchaser for value. Involved in the decision was the view that the purchaser was not at fault in accepting the transfer without requiring the production of the old certificate. If the facts be varied by assuming that B, the fraudulent officer, were to issue a false certificate to the purchaser without making any transfer upon the books, the question would arise whether the purchaser or pledgee who has advanced money on the faith of the new certificate could recover damages from the corporation for the misrepresentation. If in the Schuyler case the purchaser who acquired the legal title by transfer acquired it free from any equity in favor of the holder of the old certificate, it must have been because the non-production of the old certificate was a circumstance immaterial to the purchaser's rights. If, then, it be conceded that the corporation cannot with legal propriety permit a transfer and issue a new certificate without calling in the old certificate, it will follow that, where a new certificate is fraudulently issued without any precedent transfer, one who advances money on the faith of the fraudulent certificate is himself guilty of no omission of duty and may hold the corporation liable for

⁹ *New York, New Haven and Hartford R. R. Co. v. Schuyler*, 34 N. Y. 30 (1865).

his loss. Upon such a case of facts, however, it has been held by the Supreme Court of the United States¹⁰ that one who lent money to the fraudulent officer upon the faith of a new certificate issued in the name of the lender and purporting to represent stock transferred on the books by the officer to the lender, though no transfer was in fact made, was to be regarded as "having distinct notice that the surrender and transfer of the former certificate were prerequisites to the lawful issue of the new one, and having accepted a certificate that she owned stock without taking any steps to assure herself that the legal prerequisites to the validity of her certificate, which were to be fulfilled by the former owner and not by the bank, had been complied with, she does not, as against the bank, stand in the position of one who receives a certificate of stock from the proper officers without notice of any facts impairing its validity." In so deciding the court declared that the Schuyler case was distinguishable from the case at the bar. The two points of distinction mentioned are these: first, that the directors had been negligent in not making any examination of the books or of the conduct of the transfer office; second, that none of the purchasers of false certificates had any means of knowing that they were not such as the fraudulent officer was authorized to issue. As to the second point, it is to be observed that the purchasers of valid shares transferred without production of the old certificates were in a position scarcely distinguishable from the position of one who advanced money on the faith of a new certificate fraudulently issued without any preceding transfer. Again, if the purchaser or pledgee is in default for not requiring the production of the old certificate and cannot recover for that reason, it should seem to be immaterial whether the first ground of distinction stated by the court is or is not present—because to increase the degree of negligence of the corporate officers does not better the position of the plaintiff, who is said to be disentitled to recover because he is himself in default. It is submitted that if the two decisions are in

¹⁰ *Moore v. Citizens' National Bank of Piqua*, 111 U. S. 156 (1883).

conflict, the advantage of position rests with the New York court. A reading of the facts of *Moores v. Citizens' National Bank* will satisfy most people that the decision worked actual injustice. It is interesting to note that Mr. Justice Bradley dissented.

In *Fifth Avenue Bank of New York v. Forty-second Street and Grand Street Ferry Railroad Co.*¹¹ the individual who was secretary, treasurer, and transfer agent of a corporation issued a fraudulent certificate bearing his own signature and a forgery of the president's name purporting to certify that X, who was the transfer agent's partner and privy to the fraud, was the owner of the shares specified in the certificate. X applied to A for a loan on the security of the certificate properly endorsed, and A, not knowing of the relation between X and the transfer agent, sent a representative to the office of the corporation to inquire whether X was in fact a stockholder and whether the certificate was in order. The representative happened to make his inquiry of the transfer agent himself, who assured him that all was as represented. The loan was made and the collateral was subsequently sold by X's direction. Transfer to the purchasers was, however, refused; A refunded the purchase money, took an assignment of the purchasers' rights, and sued the corporation for damages. Judgment on a verdict in favor of A was affirmed. The court cited the Schuyler case with approval and added, "We cannot see how forgery of the name of the president can relieve the defendant from liability for the fraudulent acts of its secretary, treasurer, and transfer agent." It will be perceived in this case that the position of the pledgee of the fraudulent certificate is different from that of the plaintiff in the case of *Moores v. Citizens' National Bank* (*supra*) in two particulars: first, because the certificate was not issued in the name of the pledgee, and, second, because the pledgee did endeavor to ascertain from the corporation whether or not the transaction was regular. In the Schuyler case the registered owner transferred the shares to the purchaser, the title

¹¹ 137 N. Y. 231 (1893).

passed, and the corporation was held liable to the holder of the old certificate for permitting the transfer without requiring the production of the certificate. In the Moores case there was no transfer, but there was the fraudulent issue of a false certificate to a lender who was held to have no right against the corporation because he should have been put upon his guard by the non-production of the old certificate. The distinction between both these cases and the Fifth Avenue Bank case has just been stated.

If the corporation is liable to the certificate-holder when the owner is permitted to make a transfer without surrender of the old certificate, it should follow that the corporation would likewise be liable where transfer is permitted at the instance of one who has attached the stock standing in the name of the registered holder and has bought in his legal title at a judicial sale.

S was the owner of shares in a national bank. He assigned the certificates to H accompanied by a signed power of attorney. H demanded a transfer but was refused. The bank sued S, attached the stock standing in his name, caused it to be sold, and it was purchased by R. H then sold his certificates to A. While H held them, dividends were declared by the bank, but that proportion of the dividends applicable to the shares represented by H's certificates was not paid to him. After A acquired the certificates, further dividends were declared, and A, without demanding transfer, sued the bank for the sum to which he would have been entitled had a transfer been made. A was permitted to recover. The court was of opinion that S's assignment of the certificates to H had transferred the "entire legal and equitable title" to H and that this title had passed to A. The stock was therefore A's stock and he was not bound to demand a transfer, in view of the fact that the demand of his vendor, H, had been met with refusal. "It is further argued," said the court, "that plaintiff's remedy was an action in equity to compel a transfer on the books, or an action against the bank for its wrong and to recover the damages suffered. That such remedies exist does not alter plaintiff's right to pursue that which he has chosen. Each

of those remedies would inevitably stand upon H's ownership. To compel the bank to register is to concede the validity of the transfer and found a right upon it, and damages could only be awarded to the extent of the stock and dividends on the same theory. And if, as we have said, H became the absolute owner as between himself and the bank, he must be awarded the right of an owner, whatever other remedies exist."¹² The court in this case seems to assume that its decision cannot be justified except upon the theory that the delivery of the certificates passed title to the stock. It is submitted that this assumption is unwarranted. When the bank attached S's stock the attachment bound nothing except what S had. S had the legal title to the shares because they still stood in his name, but he had subjected that title to an equity in favor of H, who had given value for the certificates and had acquired a right against the corporation to compel a transfer of the shares to him upon surrender of the old certificate. The corporation owed H a duty which it broke when the stock was sold. H, having demanded transfer, might have compelled an issue of new shares to himself or he might have sued for damages.¹³ Had he sued for damages, his right would have been to recover the value of the stock, which would, of course, include and exceed the amount of the dividends declared upon it. In the case under discussion, therefore, A was clearly entitled to recover the sum which was awarded to him.¹⁴ The decision that no new demand need be made

¹² *Robinson v. National Bank of New Berne*, 95 N. Y. 637 (1884).

¹³ Strictly speaking, since his right was an equitable right, his remedy should have been sought in equity. There is a widespread tendency, however, to allow the certificate-holder to maintain an action at law for damages when there has been a wrongful refusal to permit a transfer. See, for example, *London, Paris, and American Bank v. Aronstein*, 117 F. 601 (1902).

¹⁴ In *Telford Turnpike Co. v. Gerhab* (13 Atl. Rep. 90, 1888) the certificate-holder was regarded as entitled to recover only the actual damage resulting from refusal to permit transfer and not to recover the value of the stock. This result was reached upon the theory that title was in the certificate-holder and not in the transferee. Even on this view, the refusal to transfer was a conversion. It is submitted, however, that the certificate-holder had no legal title and that his right against the corporation arose out of the breach of its duty to require surrender of the old certificate.

by him certainly has common-sense to commend it. The real difficulty in the case would arise if A, after recovering his dividend claim, were then to assert his right to have shares issued to him or to recover damages for their full value. On the theory on which the case was decided he would seem to have the right to do this. On the theory that he had never acquired a legal title, his proper course would not be to sue for a dividend but to seek in the first instance to compel an issue of stock or the payment of full damages.¹⁵

In the cases hitherto discussed there has been a collision of equities between the holder for value of the old certificate and one who has purchased the new certificate. Let a case now be supposed in which a trustee causes stock constituting a part of the trust estate to be registered in his own name. The beneficiary knows nothing of the registration. The corporation supposes the trustee to be the absolute owner, and this belief is shared by A, to whom the trustee sells the certificate. The trustee converts the proceeds. No transfer is made upon the books. What are the relative rights of A and the beneficiary? In *McNeil v. Bank*¹⁶ the legal owner was regarded as having given to his broker an opportunity to deceive the innocent purchaser by placing in the broker's hands a certificate and an assignment duly endorsed. In the case now under discussion it cannot be said that the beneficiary has been derelict in not investigating the condition of the registry. If not, how can an estoppel

¹⁵ It has been decided that where the assignee of a certificate notifies the corporation after a dividend has been declared but before it is paid, he is entitled to the dividend and may sue the corporation for it although there has been no transfer. *Timberlake v. Shippers' Compress Co.*, 72 Miss. 323 (1895). It will be perceived, however, that such a case as this presents a different problem from that under discussion. In the Mississippi case the corporation had not disputed the right of the holder of the certificate to be registered as a shareholder. The only question was whether the corporation might safely rely upon the rule which requires it to pay dividends to the registered owner of the shares, or whether it was bound by a notice that the registered owner had assigned his rights so that it became liable to pay to the assignee. The decision is of doubtful soundness, however. There should be as little relaxation as possible of the rule which protects the corporation if it pays dividends to the registered stockholder.

¹⁶ 46 N. Y. 325 (1871). See AMERICAN LAW REGISTER, vol. lii, 749.

be alleged against him? If he is not estopped, shall he be permitted to assert his prior and equal equity against the equity of A? If the view were to be accepted that the legal title passed to A when he purchased the certificate, then the beneficiary could not compel a surrender of the certificate nor could he prevent A from causing a transfer to be made to himself on the company's books. On the same theory, if the company, upon discovering the fact of trusteeship, were to issue a certificate to the beneficiary without A's consent, A could compel the company to recognize his right by issuing a new certificate to him or could treat the refusal to transfer to him as a conversion. If, however, A has no legal title, is he in a position to complain in case the corporation leaves him in possession of the old certificate and issues a new certificate to the beneficiary, whose equity is equal and prior?

The facts thus supposed to exist are not dissimilar to those of *Holbrook v. New Jersey Zinc Co.*¹⁷

R was trustee under the will of S. An equitable proceeding was instituted against R in Maryland alleging a misapplication of trust funds, including certain shares of stock in the B company which stood in R's individual name.¹⁸ A temporary injunction was granted and while the suit was pending R removed to New York. R was dismissed from his trusteeship in the proceeding above referred to and one P was substituted, and R was directed to transfer to P the stock standing in his name. An action was then brought against R in New York to enforce the transfer, and the final judgment in that action declared that the shares standing in R's name belonged to the trust estate and directed the B company to issue new certificates to P, the substituted trustee, and ordered that the certificates outstanding in the name of R be surrendered for cancellation.

¹⁷ 57 N. Y. 616 (1874).

¹⁸ If the registration, and therefore the certificate, discloses trusteeship, one claiming as vendee will acquire no right if the trustee has no power of sale. Where the corporation has notice of the trust it should permit no transfer without making inquiry for the cestui and for evidence of his assent to the transfer. *Geyser-Marine Gold Min. Co. v. Stark*, 106 Fed. Rep. 558 (1901).

The B company issued new certificates to P and cancelled the entries of stock standing in the name of R but did so without surrender of the old certificates. While the Maryland proceeding was pending R had executed blank powers of attorney annexed to the certificates for the stock in question. The certificates with annexed powers of attorney came into the possession of one G. After the issue of the new certificates to P, but without any notice of the issue, A lent money to G and took the old certificates as collateral. A as pledgee subsequently attempted to sell them, but B's president made announcements at the sale such that A was compelled to bid in the certificates himself for a nominal sum. He thereupon demanded a transfer, which was refused. Judgment upon a verdict for A was affirmed upon appeal. The court regarded the old certificates as a "continuing affirmation" of R's absolute ownership of the shares represented by the certificates. To the contention that there was no affirmative evidence of the delivery of these certificates by R to G, the answer was given that as the certificates were regular upon their face, gave no notice of R's trusteeship, and were accompanied by a power of attorney in proper form, the inference must be that they were delivered in the ordinary course of business unless there was evidence to the contrary. To the suggestion that under the doctrine of *lis pendens* A was affected with notice of R's trusteeship it was replied that certainly the pendency of an action in Maryland was not constructive notice to a New Yorker, and that while the pendency of the action in New York might have the effect contended for in the case of real estate it had no application to a commercial transaction.¹⁹ The discussion by Dwight, J., in this case of the extremely interesting questions above suggested is most unsatisfactory. He cites *McNeil v. Bank* in support of the proposition that "one who takes an assignment of a stock certificate, as between him and the transferrer, takes the whole title, both legal and equitable." If this be true, then (as already intimated) the

¹⁹ The applicability of the doctrine of *lis pendens* to stock transactions was considered but not decided in *Dovey's App.*, 97 Pa. 153 (1881). See also *Sprague v. Cocheco Mfg. Co.*, 10 Blatchf. 173 (1872).

act of the company in refusing a transfer was a conversion of the stock for which an action at law would lie. No question of estoppel or misrepresentation arises. It is the simple case of an unauthorized refusal to recognize an owner's legal dominion. The court, however, does not rest the decision upon this ground, but prefers to regard the old certificate as a continuing affirmation that R was the owner and to award damages to A on the ground that the company was estopped from disputing the title of one who had purchased on the faith of the affirmation. This view is inconsistent with the proposition just cited. If when G took the old certificates from R he acquired "the whole title, legal and equitable," then obviously A acquired that title from G. Since A, on this view, himself became the owner, he could not have been deceived by a representation that R was the owner. If, however, R was the holder of the legal title until but not after the moment when transfer was made to P, then there is a basis for the view that the corporation, by suffering the certificate to remain outstanding, represented to A as a subsequent holder that R continued to be the owner. But if this view be accepted, immediately a question arises which the court failed to consider: How was A damaged by the representation? Suppose A had bought from G while R actually was the registered owner. Which equity would prevail—A's or that of the beneficiary? As pointed out above, the beneficiary, represented by P, the substituted trustee, has not estopped himself from asserting his prior equity. Nevertheless, commercial convenience seems to require that protection shall be given to A as being the holder of the certificate. Upon such a state of facts, the two theories of the passage of the legal title approach each other almost to the point of contact. If A is the title-holder, the refusal to transfer to him is a conversion. If A is not the title-holder, he has, in virtue of his possession of the endorsed certificate, so clear a right to compel the conveyance of the legal title that the transfer of that title, even to the holder of a prior equity, is an infringement of that right. If, instead of permitting a transfer to P, the corporation had caused P and A to interplead while the legal

title remained in R, it is submitted that A would have been entitled to a decree. To reach this conclusion in a case in which there is no element of estoppel against P involves the weighing of the opposing equities. Much as can be said in favor of their abstract equality, A, in the judgment of commercial men, would be regarded as occupying the stronger position in virtue of his possession of the document which (like the bill of lading) is the symbol of property. It follows that the court should have assigned as the basis of decision either the view that A held the legal title or the view that he had acquired G's right as certificate-holder and that this right, even prior to the transfer to P, was an equity enforceable as against that of the beneficiary. The simultaneous adoption of both views leads, it is submitted, only to confusion of thought.

Hardly less satisfactory than the attempt to accept both views is the expedient of regarding title as passing by delivery of the certificate "between the parties," but not "as to the corporation or third persons."²⁰ The title either passes or it does not. If it passes, it passes as to all the world. In *Winter v. Montgomery Gas-Light Co.*,²¹ the right of an unregistered holder of a certificate assigned to him by a trustee was held to prevail over the prior right of the cestui que trust. The stock had been transferred by the trustee into the name of an individual who had delivered the endorsed certificate back to the trustee. The trustee then made delivery to the purchaser, who had no notice of the trust. The title was regarded as having passed to the transferee in virtue of the transfer and as having then passed to the purchaser in virtue of the delivery of the certificate. The result is in harmony with that reached in *Holbrook v. New Jersey Zinc Co.*, *supra*, and in other American cases.²²

²⁰ Another illustration of the same conception is seen in the attempt to treat persons as "partners as to third persons, but not inter se." See remarks of Lord Bramwell in *Bullen v. Sharp* (L. R. 1 C. P. 86; 1865). If such a conception is permissible in the case of the commercial relation of partnership, why not in the domestic relation of husband and wife?

²¹ 89 Ala. 544 (1890).

²² *Salisbury Mills v. Townsend*, 109 Mass. 115 (1871); *Stenson v. Thornton*, 56 Ga. 377 (1876).

In England, on the other hand, the unregistered certificate-holder is not recognized as having a weightier equity than the cestui que trust. In *Dodds v. Hills*,²³ indeed, effect was given to the suggestion that the certificate-holder was essentially in the position of a legal owner, as he has the right to call in the legal title. The court accordingly declined, on a bill filed by the cestui, to set aside a transfer on the books made, after notice of the trust, by one who had innocently acquired the certificate before such notice. But in the later English cases²⁴ the prior right of the cestui is protected; and in one case²⁵ protection was given him even as against one who had taken a transfer, where it appeared that certain of the essential blanks in the power had been filled in by the transferee himself. The English decisions on this point are, therefore, consistent only with the view that the legal title passes by transfer on the books. The American decisions have been influenced by the conception that title passes with the certificate; but they are consistent with the other view, provided it is supplemented by the theory that the equity of the certificate-holder should prevail over the prior equity of the cestui que trust.

An important aspect of stock transfers is that which involves the relative priorities of the certificate-holder and attaching creditors of the registered owner.²⁶ If the attachment has been levied by service at the office of the corporation, the dominion of the registered owner over his shares is suspended. A subsequent delivery of the certificate, even to a bona-fide purchaser for value and without notice, cannot disturb the priority of the attaching creditor.²⁷

Let it be supposed, on the other hand, that the delivery

²³ 2 Hem. and M. 424 (1865).

²⁴ *Shropshire, etc., Co. v. Regina*, L. R. 7 H. L. 496 (1875); *Roots v. Williamson*, L. R. 38 Ch. D. 485 (1888). The attempt in this last case to "distinguish" *Dodds v. Hills* is hardly satisfactory.

²⁵ *Powell v. London, etc., Bank* [1893], 2 Ch. 555.

²⁶ A debtor's stock may, by statute, be reached by levying an attachment at the office of the corporation. Some statutes give to the purchaser at a judicial sale the right to insist on the issue of a new certificate. For instances of seizure of stock certificates see *Puget Sound Bank v. Mather*, 60 Minn. 362 (1895), and *Harris v. Bank of Mobile*, 5 La. Ann. 539 (1850).

²⁷ *Kentucky Bank v. Avery*, 12 Nat. Corp. Rep. 111 (1896).

of the certificate takes place before the levy of the attachment. The attaching creditor is not a purchaser for value. He takes only what his debtor has—a legal title subject to an equity in favor of the certificate-holder.²⁸ If the certificate-holder is regarded as having a legal title, the same result follows. If the attaching creditor is to be given priority, it must be upon the theory that he is in some way benefited by the statutory provision that stock shall be transferable only in the company's books.²⁹ If such a view is adopted, it is possible to argue that his priority can exist only if he has no notice of a delivery of the certificate.³⁰ If, however, the theory is that the debt was contracted in reliance upon the debtor's record title, it is difficult to perceive how notice subsequent to the origin of the debt and before levy³¹ or sale³² can deprive him of his rights. If the theory is that he should be preferred because he has been led by the record title to incur the expense of the attachment, the answer is twofold: first, that his prior right ought not in any event to entitle him to more than repayment of his disbursement; and, second, that the creditor of a failing debtor knows perfectly well that the attachment will probably be barren and levies it only in the forlorn hope that no pledge or sale of the certificate has been made.

Mr. Cook, in his excellent work on corporations,³³ suggests that the distinction between the "legal" and the "equitable" title is unsatisfactory. Mr. Lowell³⁴ takes a similar view. It is submitted, however, that the distinction exists and must be recognized. The real difficulties arise from a failure to recognize and enforce the consequences of

²⁸ See *Continental Nat'l Bank v. Eliot Nat'l Bank*, 7 Fed. Rep. 369 (1881), and other cases cited by Harriman in the excellent discussion of this subject already referred to. AMERICAN LAW REGISTER, vol. xxxvi, N. S., at page 86. The concluding paragraphs of this paper, relating to the right of attaching creditors, are scarcely more than a summary of Mr. Harriman's conclusions.

²⁹ *Fisher v. Essex Bank*, 5 Gray, 373 (1855).

³⁰ See, for example, the opinion of Story, J., in *Black v. Zacharie*, 3 How. 483 (1845).

³¹ *Central Nat'l Bk. v. Williston*, 138 Mass. 244 (1885).

³² *Wilson v. St. Louis, etc., Co.*, 108 Mo. 588 (1891).

³³ A Treatise on the Law of Corporations (5 ed.), § 414.

³⁴ Lowell on Transfer of Stock, 104.

the distinction. Unless attention is paid to the difference between registration and the right to be registered (in whatever terms we choose to express the discrimination) it will not be surprising to find in the law that "confusion, doubt, and difficulty" of which Mr. Cook complains.³⁵

George Wharton Pepper.

³⁵ § 414.