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ARTICLE 8: INVESTMENT SECURITIES

The purpose of Article 8 of the *Uniform Commercial Code*¹ is to facilitate the transfer of securities by establishing concise and comprehensive, yet flexible, rules to guide issuers, brokers and investors. The article broadly defines investment securities, propagates borrowed concepts of issue and transfer and removes many of the concepts in prior law which hindered the transfer and registration of securities. The borrowed concept is that of negotiability which grants to purchasers for value, without notice, greater rights against the issuers of the security and greater protection from the adverse claims of prior holders than they enjoyed under prior law. The necessary corollary to enhancing the position of purchasers is to sharply curtail the defenses available to the issuer, and to place the burden of certain losses on the prior owner. Finally, extensive changes have been made in the law relating to registration of transfers by corporate officers, authenticating trustees, transfer agents or registrars which facilitate the formal transfer of the rights of the purchaser without extensive inquiry and documentation. In short, Article 8 is a negotiable instruments law dealing with securities; it is not a Blue Sky law; it is not a corporation code.

Certain investment securities were negotiable under prior Missouri law. Bearer bonds were covered by the *Uniform Negotiable Instruments Law*² and certificates of stock were made negotiable by the *Uniform Stock Transfer Act*.³ These uniform acts were repealed by the *Uniform Commercial Code* because the strictly interpreted formal requirements of the *Negotiable Instruments Law* had precluded negotiable securities other than bearer bonds, and because the *Uniform Stock Transfer Act* was inflexible and limited in scope. To replace the repealed uniform acts and early deci-

1. §§ 400.8-101—8-406, RSMo 1963 Supp. For a more comprehensive discussion see HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE (2 vols. 1964); Folk, *Some Problems Under Article 8 of the Uniform Commercial Code*, 5 ARIZ. L. REV. 193 (1964); Guttman, *Article 8—Investment Securities*, 17 RUTGERS L. REV. 136 (1962); Guttman, *Investment Securities Under the Uniform Commercial Code*, 11 BUFFALO L. REV. 1 (1961); Israels, *How to Handle Transfers of Stock, Bonds and Other Investment Securities*, 19 BUS. LAW 90 (1963); Israels, *Stop-Transfer Procedures and the Securities Act of 1933—Addendum to Uniform Commercial Code—Article 8*, 17 RUTGERS L. REV. 158 (1962); Israels, *Investment Securities as Negotiable Paper*, 13 BUS. LAW. 676 (1958).

2. C. 401, RSMo 1959.

3. §§ 403.010—240, RSMo 1959.

sional law, the *Uniform Commercial Code* provides Article 3 which covers negotiable commercial paper and Article 8 which covers investment paper.

Section 456.260 of the *Uniform Fiduciary Law* and the *Uniform Law for Simplification of Fiduciary Security Transfers*⁴ were not repealed.

The concept of negotiability under Article 8 is familiar, with precedents in prior law. Certain qualified purchasers acquire rights which cut off certain defenses; certain presumptions as to delivery by all prior parties remain;⁵ forged indorsements and certain unauthorized signatures prevent one for the most part from obtaining the status of "bona fide purchaser."⁶ The "shelter" provision of the *Negotiable Instruments Law* is broader and continues to guarantee the purchaser at least the rights of his transferor.⁷ But the uniqueness of the investment security provisions conceived by the framers has brought on new and interesting innovations.

What follows, after reiterating general definitions, is a brief summary of the article's substantive contents. An attempt was made to segregate and set out the nature of a purchaser's rights against the issuer of the security and against a prior owner of the security. Once the position of the purchaser is ascertained the correlative position of the issuer or prior owner follows rather easily. The section on registration of transfer not only discusses the extensive changes in documentation required, but again emphasizes the effect of negotiability on the interrelationship of issuer-prior owner-purchaser. Finally several unrelated sections are discussed because of their unique solution to past problems. However, nothing has been written which replaces the reading of the Code sections and the accompanying official comments.

I. DEFINITIONS

A "security" is an instrument which is issued in bearer or registered form and is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt

4. §§ 403.250—.350, RSMo 1959.

5. Compare § 400.8-202(4), RSMo 1963 Supp., with § 401.016, RSMo 1959; also see BRITTON, *BILLS AND NOTES*, 201 (2d ed. 1961). Thus, in the case of bearer paper (or bonds) or in the case of order paper (or registered securities) which have been properly indorsed in blank one may become a holder-in-due-course (or bona fide purchaser) even if a prior holder was a thief.

6. See § 400.8-311, RSMo 1963 Supp. One cannot, of course, acquire title to a negotiable instrument through a forged indorsement. BRITTON, *BILLS AND NOTES*, 204 (2d ed. 1961); 2 HAWKLAND, *op. cit. supra* note 1, at 873,888. *But see* the exception under § 400.8-311, RSMo 1963 Supp.

7. Compare § 401.058, RSMo 1959, with §§ 400.8-301, .3-201, RSMo 1963 Supp.

in as a medium for investment. Also, the instrument must be either one of a class or series, or by its terms be divisible into a class or series of instruments, and evidence a share, participation or other interest in property or in an enterprise or evidence an obligation of the issuer.⁸ This definition will probably cover any instrument which securities markets, including over-the-counter markets, regard as suitable for trading. The definition is possibly too ambiguous, but this possibility was accepted to allow for greater flexibility and applicability. Securities that come within this definition are declared to be negotiable instruments.⁹ Whether the instrument is a "security" under the Securities Act of 1933¹⁰ or the Missouri Blue Sky Law¹¹ is not relevant.

A security is in "registered form" when it specifies a person entitled to the security or to the rights it evidences and when its transfer may be registered upon books maintained for that purpose, or when the security so states. A security is in "bearer form" when it runs to bearer according to its terms and not by reason of any indorsement; the concept of indorsement applies only to registered securities, and a purported indorsement of bearer paper is normally of no effect.¹²

Except in certain cases,¹³ an "issuer" is a person who places or authorizes the placing of his name on a security in a capacity other than as a transfer agent, for example, to evidence that it represents a share in his property or enterprise or to evidence his duty to perform an obligation evidenced by the security.¹⁴ The definition includes a person who directly or indirectly creates fractional interests in his rights or property which fractional interests are evidenced by securities. The definition encompasses any business entity, even partnerships, joint ventures, and equipment trusts.

II. PURCHASERS OF SECURITIES

A purchaser under the Code is a person taking by sale, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other

8. § 400.8-102(1)(a), RSMo 1963 Supp. The definition does not include instruments payable to order and would therefore eliminate certain long-term obligations made payable to order which have been used as an investment device.

9. § 400.8-105, RSMo 1963 Supp.

10. 48 Stat. 74 (1933), 15 U.S.C. § 77(b)(1) (1958).

11. § 409.020(12), RSMo 1963 Supp.

12. §§ 400.8-102(c) and (d), .8-310, RSMo 1963 Supp.

13. A guarantor may be an issuer, § 400.8-201(2); also a person on whose behalf transfer books are maintained, § 400.8-201(3), RSMo 1963 Supp.

14. § 400.8-201(1), RSMo 1963 Supp.

voluntary transaction creating an interest in property.¹⁵ Upon delivery a purchaser of a security acquires the rights in the security which his transferor had or had actual authority to convey.¹⁶ An exception to this so-called "shelter" provision applies when the purchaser who has been a party to any fraud or illegality affecting the security or who as a prior holder had notice of an adverse claim attempts to improve his status by taking from a later bona fide purchaser.¹⁷ A person by transferring a security to a purchaser for value warrants that his transfer is effective and rightful, that the security is genuine and has not been materially altered, and that he knows no fact which might impair the validity of the security.¹⁸ The purchaser has a specifically enforceable right to have any necessary indorsement supplied.¹⁹ If conspicuously noted on the security, a purchaser takes the security subject to issuer's lien²⁰ and also subject to any valid restriction on transfer imposed by the issuer.²¹

Article 8 distinguishes purchasers for value without notice of a particular defect, bona fide purchasers and, to a limited extent, purchasers and subsequent purchasers. The categories are retained for the purpose of discussion.

A. *Purchaser for Value Without Notice of a Particular Defect*

The rights of a purchaser for value without notice of a particular defect are generally limited to rights against the issuer. Under the *Uniform Stock Transfer Act* the purchaser's rights against the issuer were not set out, and thus they were only found in the case law. Section 400.8-202 codifies these rights by specifying the issuer's valid defenses.

The "notice" required here is not the "actual notice" of prior law. Under the Code, a person has "notice" of a fact when (a) he has actual knowledge of it; or (b) he has received a notice or notification of it; or (c) from all the facts and circumstances known to him at the time in question he has *reason to know* that it exists.²²

15. § 400.1-201(32) and (33), RSMo 1963 Supp.

16. § 400.8-301(1), RSMo 1963 Supp.

17. *Ibid.*

18. § 400.8-306(2), RSMo 1963 Supp.

19. § 400.8-307, RSMo 1963 Supp.

20. § 400.8-103, RSMo 1963 Supp.

21. § 400.8-204, RSMo 1963 Supp. *Accord*: State ex rel. Manlin v. Druggists' Addressing Co., 113 S.W.2d 1061 (1938). Conservative advice would be to have these notices printed in different type or color, see § 400.1-201(10), RSMo 1963 Supp. See *Black & White Cabs, Inc. v. Smith*, 370 S.W.2d 669 (St. L. Mo. App. 1963), for a recent case upholding partial restraints.

22. § 400.1-201(25), RSMo 1963 Supp. *Contra*, *Commerce Trust Co. v. McGirk State Bank*, 300 S.W. 526 (K.C. Mo. App. 1927).

The purchaser's rights against the issuer may be greatly affected by certain terms which may be incorporated in the certificate by reference to another instrument, indenture or document or to a constitution, statute, ordinance, rule, regulation, order or the like. The purchaser for value and without notice takes subject to the terms in these instruments unless they conflict with the stated terms, in which event the stated terms prevail.²³ This is highly desirable since lengthy and complex restrictions in the trust indenture or in the articles of incorporation can now be referenced on the bond or stock certificate without affecting negotiability.

1. Defects Going to Validity

If a security is issued with a defect going to its validity, such as the violation of a statute providing that stock is void if issued for other consideration than money paid, labor done or property actually received, it is still valid in the hands of a purchaser for value without notice of this particular defect. If the defect involves a violation of a constitutional provision, the question is left open if the security is in the hands of a purchaser from the issuer; but if the security is in the hands of a *subsequent* purchaser the security is valid.²⁴

Securities issued by a government, governmental agency or municipal corporation with a defect going to their validity are treated differently. The public interests are protected by additional safeguards. The governmental issue is valid only if there has been a substantial compliance with the legal requirements governing issue *or* if substantial consideration has been received *and* a stated purpose of the issue is one for which the issuer has the power to borrow money or issue the security.²⁵ Complete compliance is not required; the failure to comply with a mere technicality will not defeat the innocent purchaser for value without notice of the defect.^{25a}

2. Unauthorized Signatures, Completions or Alterations

Subject to minor exceptions, lack of genuineness of a security is a complete defense even against a bona fide purchaser.²⁶ However, if the security is not genuine because of an unauthorized signature placed on the security

23. § 400.8-202(1), RSMo 1963 Supp.

24. § 400.8-202(2)(a), RSMo 1963 Supp.

25. § 400.8-202(2)(b), RSMo 1963 Supp.

25a. This works no substantial change in Missouri. See § 108.240, RSMo 1959, and a line of cases, *e.g.* Arkansas-Missouri Power Corp. v. City of Potosi, 355 Mo. 356, 196 S.W.2d 152 (1946).

26. § 400.8-202(3), RSMo 1963 Supp.

during or prior to issue by an employee or agent entrusted with the signing, preparation or responsible handling of the security, then the purchaser for value without notice of the lack of authority will prevail.²⁷ This places upon the issuer the risk of loss, which he can mitigate by the careful selection of such employees, or by bonding his personnel. He should also have an action over against the transfer agent or registrar who in turn may bond their personnel. The issuer is not held liable for the dishonesty of employees not so entrusted.

All other defenses of the issuer including nondelivery and conditional delivery of the security are ineffective against a purchaser for value without notice of the relevant defect.²⁸

If the security contains the proper signatures necessary to its issue or transfer but is incomplete in other respects any person may complete the security by filling in the blanks as authorized.²⁹ If the blanks are incorrectly filled in, the security as completed is enforceable by a purchaser for value without notice of such incorrectness.³⁰

The rights of any purchaser of an altered instrument are limited to enforcement of the instrument only according to its original terms.³¹

3. Warranties

An authenticating trustee, registrar, or transfer agent warrants to a purchaser for value without notice of the particular defect that the security is genuine; that his participation in the issue is within the scope of his authority; and that he has reasonable grounds to believe that the security is in the form and within the amount the issuer is authorized to issue.³² The warranty does not necessarily validate the security, but it gives the purchaser a right of action for damages for any loss suffered from excess issue.

The purchaser has the right to demand that the transferor supply him with any proof of his authority to transfer or with any other requisite which may be necessary to obtain registration of the transfer. This would include signature guarantees, proof of authority, transfer tax stamps and the like.³³ The person guaranteeing the signature of an indorser will be

27. § 400.8-205, RSMo 1963 Supp. The section is not concerned with indorsements. The theory is either one of estoppel or apparent authority.

28. § 400.8-202(4), RSMo 1963 Supp.

29. § 400.8-206(1)(a), RSMo 1963 Supp.

30. § 400.8-206(1)(b), RSMo 1963 Supp.

31. § 400.8-206(2), RSMo 1963 Supp.

32. § 400.8-208(1), RSMo 1963 Supp.

33. § 400.8-316, RSMo 1963 Supp.

one person to look to if the signature is not genuine, if the signer was not an appropriate person to indorse, or if the signer had no legal capacity to sign.³⁴

4. Staleness and Overissue

Two provisions of the Code control and modify the other rights of purchasers granted by the article.

If a purchaser takes the security after the principal obligation comes due, or on or after the date when the security is to be presented or surrendered for redemption or exchange, the purchaser is charged with notice of *any defect in its issue or defense of the issuer*:

- (a) If the act or event is one requiring the payment of money or the delivery of securities or both on presentation or surrender of the security and such funds or securities are available on the date set for payment or exchange and he takes the security more than one year after that date; and
- (b) if the act or event is not covered by paragraph (a) and he takes the security more than two years after the date set for surrender or presentation or the date on which such performance became due.³⁵

This recognizes a fundamental difference between negotiable securities and negotiable commercial paper. Negotiable commercial paper taken after notice of maturity deprives one of the status of holder-in-due-course. But securities are often traded after they mature (or are called) and, although they remain negotiable, the purchaser after a certain time loses certain rights and holds subject to the issuer's defenses.

Purchasers may hold securities which are valid against the issuer because of the operation of several of the previous sections—*e.g.*, a treasurer places an unauthorized signature on certain stock certificates, or a thief fills in the blanks for an excess number of shares—which, in turn, may cause the number of valid outstanding shares to exceed the amount the issuer has corporate power to issue.³⁶ A purchaser who holds these securities may have one of two alternate remedies. He may compel the issuer to purchase an identical security on the market if it is reasonably available, or if not available he may recover from the issuer the price he or the last

34. § 400.8-312(1), RSMo 1963 Supp. See *Love v. Pennsylvania R.R.*, 200 F. Supp. 561 (E.D. Pa. 1961).

35. § 400.8-203, RSMo 1963 Supp.

36. This is an "overissue" under § 400.8-104(2), RSMo 1963 Supp.

purchaser for value paid for the securities, with interest from the date of demand.³⁷ A problem could arise when the security is readily available on the market, but the corporation's assets would for various reasons prevent the expenditure.

B. *Bona Fide Purchaser*

The previous sections discussed the rights of a purchaser for value without notice of particular defects and purchasers generally. Rights against a prior holder or "owner" were not discussed; only a bona fide purchaser takes free of the claims of prior "owners."³⁸ The bona fide purchaser has all of the rights previously discussed and more. The bona fide purchaser is distinguished from other purchasers by the requirement that he take by a formally perfect transfer, *e.g.*, by delivery of a bearer-form instrument, or delivery plus indorsement of a registered-form instrument in good faith for value and without notice of any adverse claim.³⁹

1. Notice of Adverse Claim

In three specific situations the purchaser is charged with notice of adverse claims as a matter of law: (1) if the security whether in bearer or registered form has been indorsed "for collection" or "for surrender" or for some other purpose not involving transfer; (2) if the security is in bearer form and has on it an unambiguous statement that it is the property of a person other than the transferor; or (3) if the purchaser has *knowledge* that the proceeds are being used in breach of duty by a fiduciary for his individual benefit.⁴⁰ However, the fact that the purchaser has notice that the security is held for a third person or is registered in the name of or indorsed by a fiduciary does not create a duty of inquiry into the rightfulness of the transfer or constitute notice of an adverse claim.⁴¹ The list is not exhaustive and other situations can arise in which the trier of facts may determine that similar notice has been given.⁴²

Section 400.8-305 provides that staleness under certain circumstances

37. § 400.8-104(1), RSMo 1963 Supp. Compare *Nat'l Bank v. Newell-Morse Royalty Co.*, 259 Mo. 637, 168 S.W. 699 (1914).

38. § 400.8-301(2), RSMo 1963 Supp.

39. § 400.8-302, RSMo 1963 Supp. For "value" see § 400.1-201(44); for "good faith" see § 400.1-201(19), RSMo 1963 Supp.

40. § 400.8-304(1), RSMo 1963 Supp.

41. § 400.8-304(2), RSMo 1963 Supp. Compare § 456.260, RSMo 1959.

42. Comment 1 to UCC § 8-304 (1962).

will constitute notice of adverse claims. The periods necessary to constitute staleness here are six months if the securities are to be presented for money and the funds are available, or one year if the securities are presented for redemption or exchange. Unpaid overdue coupons attached to a bond do not bring it within the operation of this section, although they may give "reason to know" of claims of ownership.⁴³

2. Indorsement and Delivery

A purchaser for value in good faith and without notice of adverse claims is not a bona fide purchaser, since he must take by a formally perfect transfer, until the security has been delivered and, if required, indorsed.⁴⁴ When a security is in registered form, he may become a bona fide purchaser only as of the time the indorsement is supplied, although as between the transferor and transferee the transfer is complete upon delivery.⁴⁵ Conversely, an indorsement of a security does not constitute a transfer until the delivery of the security or if the indorsement is on a separate document until both documents are delivered.⁴⁶

An indorsement of a registered form instrument is made when an "appropriate person"⁴⁷ signs the instrument on the back of the security, or when he signs on a separate document, for example, the signing of the usual assignment form or power of attorney to transfer. The indorsement may be in blank or a special indorsement. A blank indorsement may be converted to a special one.⁴⁸ The indorser assumes no obligation that the security will be honored by the issuer which is a considerable change from prior law, and presumably reflects one of the differences in transactions in commercial paper and investment paper.⁴⁹

Section 400.8-313 states the usual requirement of an actual transfer of possession to have a valid delivery. The article, recognizing that the usual security transaction will probably involve a selling broker and a buying broker, provides that delivery may be completed when the security is still in the hands of the broker or, in the case of margin trading, when the security is in the hands of a third party who acknowledges that he

43. § 400.8-305, RSMo 1963 Supp., refers only to the "principal obligation."

44. § 400.8-302, RSMo 1963 Supp.

45. § 400.8-307, RSMo 1963 Supp., which represents a change from §§ 403.050, .090, RSMo 1959.

46. § 400.8-309, RSMo 1963 Supp.

47. Defined in section 400.8-308(3), RSMo 1963 Supp.

48. See *Morrison v. Liberty Discount & Sav. Bank*, 61 Pa. Lack Jur. 37 (1960).

49. § 400.8-308(4), RSMo 1963 Supp.

holds for the purchaser. Under a contract for sale, the duty to delivery is fulfilled by the seller when he places the security in the selling broker's possession and is fulfilled by the selling broker when he puts the securities in the buying broker's possession; or, in the case of floor trading, by complying with the rules of the exchange.⁵⁰

3. Forgeries and Wrongful Transfer

In allocating the loss between a prior holder and a subsequent innocent purchaser the article distinguishes between a forgery and a "wrongful" transfer.⁵¹ If the indorsement was unauthorized (forged) and the owner has not ratified, the owner of the security may assert its ineffectiveness against the issuer or any purchaser, unless that purchaser was a purchaser for value in good faith who has received a new, reissued or re-registered security on registration of transfer.⁵²

If the security is properly indorsed but the transfer is in fact wrongful, one may take as a bona fide purchaser from the prior holder (he does not need the reissue or registration to provide the formally perfect transfer). Thus, he can successfully defend the prior owner's action to replevy or action for conversion even if he has not as yet registered the transfer.⁵³ This distinction is also important because the bona fide purchaser has an absolute right to have the transfer registered even over claims of prior owners while one who took through a prior forged indorsement does not.^{53a}

To summarize, as we found that the purchaser without notice of a particular defect prevailed over the issuer (as would a bona fide purchaser since the former is included in the latter), we find that between the prior holder and a bona fide purchaser the balance is struck in favor of the bona fide purchaser in most situations. This of course is what Article 8 set out to accomplish. But the full effect is not understood until one remembers just how broadly the Code defines "securities," the presumptions granted to the claimant⁵⁴ and the breadth of the "shelter" provision. Prob-

50. § 400.8-314, RSMo 1963 Supp.

51. The transfer may be wrongful (as distinguished from a forged signature situation) because a thief sold bearer bonds or securities properly indorsed in blank, or because of the incapacity of the signer.

52. § 400.8-311, RSMo 1963 Supp. Presumably receiving a new, reissued or re-registered security supplies the formally perfect transfer and completes the conversion to bona fide purchaser. Case law had left the issue in doubt. Also see § 400.8-315(2), RSMo 1963 Supp. For ratification of forged signature, see *Grovens v. Gillihan*, 63 Mo. 28 (1876).

53. § 400.8-315(1), RSMo 1963 Supp.

53a. See text accompanying notes 72-78, *supra*.

54. § 400.8-105, RSMo 1963 Supp., discussed in part IV (B.), *infra*.

lems will arise when one who had notice or was a donee relies on his transferor's greater rights to prevail over the issuer or prior owner. Then the clear language of section 400.8-202, for example, will clash with the language and policy of the shelter provision.⁵⁵

C. Brokers

"Broker" means a person engaged for all or part of his time in the business of buying and selling securities, who acts for, or buys a security from or sells a security to a customer.⁵⁶ A broker under certain sections is a purchaser, even though he is representing the seller or the buyer.⁵⁷ One should remember in looking at the broker's part in a particular transaction that he is a commercially sophisticated purchaser, and this will affect the "notice" with which he is charged.

A broker gives to his customer, to the issuer and a purchaser the warranties provided in section 400.8-306, *e.g.*, that his transfer is effective and rightful, the security is genuine and has not been materially altered, and he knows no fact which might impair the validity of the security.⁵⁸ This is in addition to the warranties that arise when a broker is acting as an agent. Of course the broker may take as a purchaser for value in his own right.

A difference of opinion between the members of the brokerage community and the framers of the Code arose over the respective parties' rights when the buying broker receives notice of an adverse claim while retaining the customer's security until the customer's debt to him, if any, is paid.⁵⁹ The broker has a complete defense if he gave value and took delivery without notice of the adverse claim. The customer has an interest at least in a fungible bulk of such securities in "street name." Can the broker now deliver this security to the customer? The answer should be no, and the Code has been amended to specifically provide that as between the broker and the purchaser the latter may demand delivery of

55. A donee is a purchaser and thus qualifies for the shelter provision. If the transferor paid value, etc., then the donee would have the rights of a purchaser for value. The shelter provision is not designed to protect the transferee (although it does), but it is designed primarily to insure that purchasers will have a ready market. Should a donee be given such shelter?

56. § 400.8-303, RSMo 1963 Supp. For an in depth discussion see 2 HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE, 902 (1964).

57. See § 400.8-304, RSMo 1963 Supp. See also § 400.8-313(2), RSMo 1963 Supp.

58. See § 400.8-306(5), RSMo 1963 Supp.

59. See *Israels, How to Handle Transfers of Stock, Bonds and Other Investment Securities*, 19 Bus. Law. 90 (1963).

an equivalent security as to which no notice of adverse claim has been received.⁶⁰ As he must pass a clean security on to his customer, a broker is under a duty to see that the security is formally and perfectly transferred.

The 1957 Code stated that the broker has no duty to remember or search circulars giving notice of the theft or loss of securities which he has received more than six months previously. This six months "forgotten notice" rule is not continued in the 1962 Official Text which Missouri adopted. The matter is left to the trier of facts and could present a troublesome question. It is important to remember that not only the broker but also the customer is given notice by such circulars if the broker is the customer's agent.

III. REGISTRATION OF TRANSFER

Because of unfortunate dictum in early American cases, corporations have been held to guarantee the rightfulness of security transfers when they register transfers on their books. As a result, the corporation or any agency of the corporation registering transfers demanded extensive documentation before it would complete the transaction. Article 8 reduces the issuer's potential liability for wrongful transfer, clearly defines the circumstances comprising wrongful registration and imposes upon the issuer a duty to register the security if certain prerequisites are met. Issuers are protected in that they may demand certain assurances, and have a sharply limited duty to inquire into adverse claims.

A. *Duty to Register*

When a security in registered form is presented to the issuer with a request to register transfer, the issuer is under a duty to register if (1) the security is indorsed by the appropriate person; (2) reasonable assurance is given that indorsements are genuine and effective; (3) the issuer had no duty to inquire into adverse claims or has discharged any such duty; (4) any applicable law relating to the collection of taxes has been complied with; and (5) the transfer is in fact rightful *or is to a bona fide purchaser*.⁶¹

60. § 400.8-313(3), RSMo 1963 Supp.

61. § 400.8-401(1) RSMo 1963 Supp. See HAWKLAND, *op. cit. supra* note 56, at 890 and 891 n. 621 (for tax documentation). *Merchants' Nat'l Bank v. Richards*, 6 Mo. App. 454 (St. L. Ct. App. 1879), *aff'd*, 74 Mo. 77 (1879); *Carroll v. Mullanphy Sav. Bank*, 8 Mo. App. 249 (St. L. Ct. App. 1880).

B. *Documentation*

Section 400.8-402(1) lists the assurances that the issuer may require:

- (a) in all cases, a guarantee of the signature . . . of the person indorsing; and
- (b) where the indorsement is by an agent, appropriate assurance of authority to sign;
- (c) where the indorsement is by a fiduciary, appropriate evidence of appointment or incumbency;
- (d) where there is more than one fiduciary, reasonable assurance that all who are required to sign have done so;
- (e) where the indorsement is by a person not covered by any of the foregoing, assurance appropriate to the case corresponding as nearly as may be to the foregoing.⁶²

The issuer may require this assurance because it is absolutely liable for wrongful registration of transfer where the signature of the indorser is unauthorized or is not that of an appropriate person.⁶³ This section establishes the extent of required documentation with minor exceptions.

The difficult area is the appropriate evidence of appointment or incumbency. Section 2⁶⁴ and 4⁶⁵ of the *Uniform Act for Simplification of Fiduciary Security Transfers*, which have not been repealed, should be compared with this section. "Appropriate evidence of appointment or incumbency" means

- (a) in the case of a fiduciary appointed or qualified by a court, a certificate issued by or under the direction or supervision of that court or an officer thereof and dates within sixty days before the date of presentation for transfer; or
- (b) in any other case, a copy of a document showing the appointment or a certificate issued by or on behalf of a person reasonably believed by the issuer to be responsible or, in the absence of such a document or certificate, other evidence reasonably deemed by the issuer to be appropriate. . . .⁶⁶

In the inter vivos trust situation, for example, it will be impossible to obtain a court order or certificate. Professor Hawkland feels that a "written affidavit of the trustee, confirmed by a bank or broker, should

62. § 400.8-402(1), RSMo 1963 Supp.

63. See *Love v. Pennsylvania R.R.*, 200 F. Supp. 561 (E.D. Pa. 1961).

64. § 403.260, RSMo 1959.

65. § 403.280, RSMo 1959.

66. § 400.8-402(3), RSMo 1963 Supp. See *Bante v. Bante Development Co.*, 27 S.W.2d 481 (St. L. Mo. App. 1930) and *In re Nichol's Estate*, 24 Pa. D. & C.2d 247 (1961).

be sufficient."⁶⁷ If the securities are first registered in the trustee's name by the settlor, the named trustee's indorsement is effective until receipt of written notice that the person described as a fiduciary is no longer acting as such with respect to the particular security.⁶⁸ The issuer is under no duty to require a deed of trust, but if he does require such or a similar instrument he is charged with notice of all matters contained therein affecting the transfer and any notice of adverse claims, and is liable to a presenting party for loss "resulting from any unreasonable delay in registration or from failure or refusal to register the transfer."⁶⁹

C. *Inquiry Into Adverse Claims*

Subject to a compelling duty of good faith in registering the transfer, and to situations just discussed, the issuer's duty to inquire into adverse claims is limited to the situation where he receives written notification of an adverse claim at a time and in a manner which affords the issuer a reasonable opportunity to act on it prior to the issuance of a new, reissued or re-registered security.⁷⁰ The written notification must identify the claimant, the registered owner and the issue of which the security is a part and provide an address for communication with the claimant.

If the issuer had no duty to inquire into adverse claims or has discharged this duty, and the security contained the necessary indorsements, the issuer is not liable to the owner or any other person who suffered a loss as a result of the registration of transfer.⁷¹

D. *Registration of Lost or Stolen Securities*

In the situation where securities have been lost, apparently destroyed or wrongfully taken, the "owner" of the securities may request the issuer to issue a new security in place of the original security if he files with the issuer a sufficient indemnity bond and if the request is made before the issuer has notice that the security has been acquired by a bona fide purchaser.⁷² If, after the new security is issued to the "owner," a bona fide purchaser of the original security presents it for registration of transfer, the issuer must register the transfer unless registration would

67. 2 HAWKLAND, *op. cit. supra* note 56, at 895.

68. § 400.8-403(3)(a), RSMo 1963 Supp. Compare § 403.290, RSMo 1959.

69. § 400.8-402(4) and § 401(2), RSMo 1963 Supp.

70. § 400.8-403(1)(a), RSMo 1963 Supp.

71. § 400.8-404(1), RSMo 1963 Supp.

72. § 400.8-405(2), RSMo 1963 Supp. In *Chemical Bank & Trust Co. v. Anheuser-Busch, Inc.*, 360 Mo. 877, 231 S.W.2d 165 (1950) an open penalty bond was required.

result in overissue.⁷³ The issuer, if an overissue would result, must purchase a security if it is reasonably available, or pay the bona fide purchaser the price he paid for it. In any event the issuer has recourse on the indemnity bond, or the issuer may recover the new security from the "owner" to whom it was issued or any person taking from him except a bona fide purchaser.⁷⁴ When this bona fide purchaser of the new security (which was issued on demand after bond to the original "owner") presents it for registration of transfer he is entitled to have the security honored, unless it would result in an overissue—bringing in again section 400.8-104.

If one who is *not* a bona fide purchaser succeeds in registering the transfer, the true owner of a security, if he gave proper notice, may demand a like security if the issuer did not make a required inquiry into an adverse claim or did not require the necessary indorsements, even if a new security has been issued.⁷⁵ The article again subjects the right to the overissue provision. Notice the issuer bears the loss here because he did not comply with the requirements of the act or he ignored a stop-transfer order. A change from prior law is that the true owner no longer has an alternate claim for damages, but must take the like security (except in the case of overissue).⁷⁶ The issuer here may proceed against the forger and the guarantor of the latter's signature,⁷⁷ but he should not be allowed to proceed against the presenting purchaser on any implied warranty of title theory. The warranties made to the issuer by one *not* a purchaser for value without notice of an adverse claim—that he is entitled to registration, payment or exchange⁷⁸—when he presents the security for registration of transfer, or for payment or exchange, would also allow the issuer recourse.

The distinctive feature of these Code provisions, recognizing the validity of the original security, overrules the *Uniform Stock Transfer Act*, and gives rise to several interesting possibilities, summarized by Professor Folk:

73. § 400.8-405(3), RSMo 1963 Supp.

74. *Ibid.* Compare *Keller v. Eureka Brick Mach. Mfg. Co.*, 43 Mo. App. 84 (St. L. Ct. App. 1890).

75. § 400.8-404(2), RSMo 1963 Supp. See *Trimble v. Wollman*, 71 Mo. App. 467 (K.C. Ct. App. 1897), and *Lesavoy Industries, Inc. v. Pennsylvania Gen. Paper Corp.*, 404 Pa. 161, 171 A.2d 148 (1961).

76. *But see* *Love v. Pennsylvania R.R.*, 200 F. Supp. 561 (E.D. Pa. 1961), where plaintiff is apparently seeking damages.

77. *Ibid.*, where the guarantor was impleaded.

78. § 400.8-306(1), RSMo 1963 Supp.

- (1) *A* loses his bond, and *Y* Corporation issues a replacement bond. The original bond is found and transferred to *B*, a bona fide purchaser. *Y* must register *B*'s bond.
- (2) Same situation as (1) except that registration of *B*'s bond would result in overissue. *Y* Corporation must give *B* the rights under section 8-104.

In both (1) and (2), *Y* Corporation may recover the replacement bond issued to *A*, and may also recover on the indemnity bond *A* gave.

- (3) Same situation as (1) except that, before the original bond was found and transferred to *B*, *A* sold the replacement bond to *C*. *C* is entitled to registration as of course. When *B* acquires the original bond, *B* is also entitled to registration.
- (4) Same situation as (3) except that overissue would result if *B*'s bond is registered. *B* is not entitled to registration. He may enforce his rights under section 8-104.
- (5) *A* loses his bond, and *Y* Corporation issues a replacement bond. The original bond is found and transferred to *B*, a bona fide purchaser. *Y* Corporation must register *B*'s bond. Thereafter *A* sells the replacement bond to *C*. *C* is entitled to have his bond registered.
- (6) Same situation as (5), except that overissue would result if *C*'s bond is registered. *C* would presumably be relegated to rights under section 8-104, with *B* keeping the bond itself.⁷⁹

Transfer agents, registrars and the like are expressly held liable for both wrongful registration and improper refusal to register.⁸⁰ Prior cases, including the Missouri case of *Lewis v. Hargadine-McKittrick Dry Goods Co.*,⁸¹ had refused to recognize their liability to the owner for mere non-feasance.

IV. RELATED PROBLEMS

A. *The Statute of Frauds*

The Code throughout—particularly in Article 2 and Article 8—places emphasis on the need to put agreements in writing. The propriety of including such an anachronistic doctrine has been challenged.⁸² The Code

79. Folk, *Some Problems Under Article 8 of the Uniform Commercial Code*, 5 ARIZ. L. REV. 193, 223 (1964).

80. § 400.8-406, RSMo 1963 Supp. See *Welland Inv. Corp. v. First Nat'l Bank*, 81 N.J. Super. 180, 195 A.2d 210 (Super. Ct. 1963).

81. 305 Mo. 396, 274 S.W. 1041 (1924).

82. Guttman, *Article 8—Investment Securities*, 17 RUTGERS L. REV. 136 (1962); Guttman, *Investment Securities Under the Uniform Commercial Code*, 11 BUFFALO L. REV. 1 (1961).

in Article 8 simply states that a contract for the sale of securities is not enforceable unless there is some writing, signed by the party against whom enforcement is sought, sufficient to indicate that a contract has been made for sale of a stated quantity of securities at a defined or stated price.⁸³ A "defined" price would seemingly allow the court to refer to the readily available standard to interpret terms uncommon to the court, but common in the brokerage community. No minimum amount is stated, which is a change from the usual statute of frauds, reflecting the nature of the investment security transaction.

Part performance does not make the entire contract enforceable; it makes the contract enforceable only to the extent of such part performance.⁸⁴

In many cases the purchase (or sale) of securities will be handled by telephone through a broker. The statute of frauds section provides for a written confirmation (again specifying quantity and price) to be sent within a reasonable time to the party against whom enforcement is sought which will suffice if the party does not send a written objection within ten days.⁸⁵ Of course, one is under no duty to object if there was no contract.

B. *Presumptions and Burden of Proof*

In any action on a security, unless specifically denied in the pleadings, signatures on the security or in a necessary indorsement are admitted. When the effectiveness of a signature is put in issue, the burden of establishing it is on the party claiming under the signature, but that party has the benefit of a presumption that the signature is valid.⁸⁶ "Burden of establishing" means burden of persuading the trier of facts that the existence of the fact is more probable than its non-existence.⁸⁷ "Presumed" means that the trier of facts must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its non-existence.⁸⁸ Once the signatures are admitted or established, pro-

83. § 400.8-319, RSMo 1963 Supp. See *Martin v. Livingstone Sec. Corp.*, 192 F. Supp. 862 (D. Mass. 1961). In *Fine v. Hornsby*, 2 Mo. App. 61 (St. L. Ct. App. 1876) shares of stock were "goods, wares and merchandise" and under the general statute of frauds which required at least a memorandum in writing.

84. § 400.8-319(b), RSMo 1963 Supp.

85. § 400.8-319(c), RSMo 1963 Supp.

86. § 400.8-105(2), RSMo 1963 Supp. See *Bank of America Nat'l Trust & Sav. Ass'n v. Rocco*, 241 F.2d 455 (3rd Cir. 1957).

87. § 400.1-201(8), RSMo 1963 Supp.

88. § 400.1-201(31), RSMo 1963 Supp.

duction of the instrument entitles a holder to recover on it unless the defendant establishes a defense or defect going to the validity of the security. Once it is shown that a defense or defect exists, the plaintiff has the burden of establishing that he or some person under whom he claims is a person against whom the defense or defect is ineffective.⁸⁹ Thus, the rules under Article 3 are adapted to securities, and Mr. Richard Skouby's discussion on this portion of Article 3 is pertinent here.⁹⁰ These provisions arguably do not apply when a prior owner of the securities attempts to replevy them or sue for their conversion against a subsequent purchaser because he is not suing "on the security." But in the latter case the prior owner has the burden of establishing the forgery or lack of apparent authority and the result is initially the same.

C. A Choice of Law Rule

Unless the parties otherwise agree (which they may if there is some contact with the agreed law), the UCC as adopted in Missouri applies to transactions bearing an appropriate relation to Missouri.⁹¹ However, the Article 8 exception to this rule provides that the validity of a security and the rights and duties of the issuer with respect to registration of transfer are governed by the law of the jurisdiction of organization of the issuer.⁹² The "law" referred to is the whole law including the conflict of laws rules, thus bringing in the *renvoi*, e.g., the conflict of laws rules of the place of organization of the issuer may direct the inquiry to a third state or back to the state where the transfer took place. Generally, American courts have not recognized the *renvoi* principle. The law applicable to the negotiation of the security is not set out and presumably the law of the place of transfer would govern, unless a court decided it had sufficient contacts or sufficient policy considerations to apply the forum law.

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89. § 400.8-105(d), RSMo 1963 Supp.

90. Skouby, *Article 3: Commercial Paper*, 29 Mo. L. Rev. 395 (1964).

91. § 400.1-105, RSMo 1963 Supp.

92. § 400.8-106, RSMo 1963 Supp. See *Welland Inv. Corp. v. First Nat'l Bank*, *supra* note 80.