

1987

In the Matter of the Registration Statement of Amenity Inc. Capital general Corporation v. Utah Securities Division and the Department of Business Regulation : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Amenity Inc v. Utah Securities*, No. 870567 (Utah Court of Appeals, 1987).
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DOCKET NO. 870567-CA ~~IN THE COURT OF APPEALS OF THE STATE OF UTAH~~

In the Matter of the
Registration Statement of
AMENITY, INC.

CAPITAL GENERAL CORPORATION,

Petitioner and Appellant

UTAH SECURITIES DIVISION
AND THE DEPARTMENT OF
BUSINESS REGULATION,

Respondents.

No. 870567-CA

Priority No. 14.a

REPLY BRIEF

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COURT OF APPEALS

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CLARIFICATION OF PARTIES AND FACTS

Parties: In discussing the case, respondents' brief has at various times referred to the wrong party or entity, apparently through inadvertance, but extensive enough to perhaps cause some confusion. For example, on page 33, respondents state that "...Amenity presented some self serving evidence...", and on page 26 that "...Amenity received the value...", and on page 25, "...whether the distribution of stock by Amenity was a disposition for value." Such misstatements in respondents' brief may not be material in all instances, but it was felt pertinent to call attention to the fact that Capital General Corporation and not Amenity is the party to this appeal; and that it was Capital General Corporation who distributed the stock by way of gift and who allegedly received value therefrom, and its vice president testified at the hearing, not Amenity, etc. Nor is the appellant corporation a "he" or a "his" notwithstanding various such designations in respondents' brief.

Facts: It appears appellant was wrong in its footnote on page 4 of its brief in predicting that respondents would not deny the stipulation reached at the first hearing June 19, 1986. Respondents' brief has denied not only the stipulation, but that such hearing even occurred. Counsel for respondents acknowledges that he was not counsel at the time of the hearing, but instead of inquiring of prior counsel who was present at the hearing he cites R. 28 and 75 as proof that there was no hearing. On the

contrary these pages in the record support appellant's claim that a hearing was held. R. 75 is a notice of the hearing, and there is nothing in the record or otherwise to indicate it was ever cancelled or continued to a different date. R. 28 is the first page of the findings and recommendations of the administrative law judge, dated October 28, 1986, and the second line has reference to the missing stipulation in that it states that counsel for the respective parties "agreed" to submit the matter on memoranda. The administrative law judge must have obtained the facts for his findings of fact¹ (R. 28,29) from said "agreed" upon stipulation since no evidence had been presented by anyone up to that time. Even respondents' brief (page 34) refers to the evidence presented at the evidentiary hearing as "additional" evidence, indicating their knowledge that there had been some prior time that evidence was received, i.e. the stipulation.

Clearly respondents' denial of the occurrence of the hearing and stipulation is irresponsible. Respondents are empowered to hold hearings before themselves and are charged with keeping accurate records of such proceedings. Having failed to do so with respect to the said June 19, 1986 hearing, and thereafter trying to cover it up by claiming it didn't occur (even though

¹Said facts, though not word for word, follow pretty closely the stipulation which is further indication of its existence.

the record is replete with corroborative references²), would make one wonder how respondents can keep a straight face while accusing someone else of bad faith.

Appellant is confused, to say the least, at the motives of respondents' in their discussion of this matter in their brief. At the top of page 5, appellant is criticized for failing to object previously, and at the bottom of the same page, respondents say that appellant could not have objected if it had wanted to (with authorities cited). In response, appellant would call attention to the comments of counsel for appellant at the beginning of the only evidentiary hearing that was ever held (R. 118, page 15) which show a spirit of cooperation and that appellant

²See also R. 118 at 3, 4 and 15 for unchallenged references to the first hearing which respondents now deny occurred, and there are others. See also R. 78 where respondents admit at least to an "informal meeting" at which something was "agreed" between the parties. It was because such admissions were equivocal that counsel in his District Court memorandum challenged respondents to state their position with respect to the stipulation unequivocally and offered to submit affidavits if respondents were to deny it. Attached to said memorandum was another copy of the written stipulation, and it would be presently part of the record on appeal but for the fact that the Salt Lake County Clerk's Office has misplaced the entire memorandum. Personnel in the Clerk's office are presently looking for it, and appellant intends to submit another copy if they are unsuccessful. In any event, in respondents' responsive memorandum in the District Court, respondents' former counsel did not deny the stipulation, but did disagree with some of the factual matters contained in it based on what he considered conflicting facts which came out of the January 20, 1987 evidentiary hearing. Appellant, in its still ever persevering spirit of cooperation, does not object to such as it has never intended to prevent any facts from being considered. To remedy respondents' said failure to keep a proper record, attached to this reply brief as an addendum is a current affidavit of counsel for appellant respecting the occurrence of said hearing and the proceedings thereat.

was willing to provide any information requested and answer any questions any of the respondents or their counsel may wish to ask. In other words, there has never been an attempt on appellant's part to limit respondents only to the evidence in the stipulation. Appellant's posture and attitude from the beginning has been, and still is, that it has wanted the ruling on the merits, not on technicalities or by taking advantage of the opponent's mistakes. Furthermore, because appellant has had no reason to know that respondents failed to retain the said written stipulation in the record, it has had no reason to protest such failure or make specific statements or introduce evidence in later portions of the record to establish it or its contents, etc. Having personally handed the written stipulated facts to the Division when it held its first hearing June 19, 1986, how was counsel possibly to know that the Division was going to fail to put it in the record or deny that it occurred.

Respondents' brief wonders of what impact is the missing stipulation since appellant does not seek to limit respondents only to those facts. The answers are:

1. The written stipulation of facts received on June 19, 1986 and discussed in some detail at that time was part of an opinion of counsel, one of two received by appellant, discussing statutes and precedents indicating there is no registration requirement respecting the gifted shares. This, in corroboration with appellants testimony at the later evidentiary hearing that it sought and followed the advice of counsel (R. 17), totally does away with respondents' bad faith argument as it establishes an intent to comply with the law and a belief that it had.

2. Appellant should not be limited to facts received subsequent to the stipulation, as it relied on said document being

part of the record as represented by respondents on June 19, 1986. There were no subsequent facts adduced inconsistent with the stipulation or which are damaging to appellant's position, but that isn't reason to omit part of the record. Respondents don't believe this anyway, and it appears they have sought to exclude it because of inconsistencies they perceive.

3. Respondents' discussion of this point is obviously aimed at casting doubt on appellant's credibility, but the attempted cover up has only cast doubt on their own. While appellant's failure to object earlier is due to the fact it didn't know the document had been omitted and because of its cooperative spirit in supporting the inclusion of all material evidence, respondents have little more to say in defense of their failure to meet their obligation of keeping accurate records of their proceedings than that if appellant doesn't like it, it can sue (Respondents' brief at page 6).

Discussion of factual clarifications to this point has centered on respondents' omissions from the record. In footnote 1 on page 7 of respondents' brief, there is again seen an effort on respondents' part to cast doubts on the credibility and character of appellant or its counsel, but this time by bringing in materials admittedly outside of the record. Appellant's response to said footnote is that it is true that there were more than 30 companies, but appellant's District Court brief comments were based on the number of companies indicated in the record at the Division level (R. 118 at page 18), and counsel for appellant was not aware that there were more than 30 companies. As is seen from R. 118, the transcript, the president of appellant who had attended the two prior hearings, was not present and a relatively new employee was present to respond to the questions of respondents about the number of companies. The correct information was evidently not known by said employee and it definitely was never

conveyed to counsel, a rather innocent situation to be sure since the number of companies doesn't matter anyway. But it can be seen that respondents cannot resist a personal attack after discovering there were more than 30 companies. Perhaps it never occurred to respondents in their drafting of said footnote that counsel for appellant was relying on the record and had no reason to question it.

The comments in said District Court brief are still appropriate even though it turned out the numbers were wrong. This is because the number of companies is simply not relevant, and respondents' preoccupation with high numbers, as is again indicated in said footnote, shows their insensitivity to the real issues of the case. The conduct of appellant in the gifting of shares in Amenity is either legal or it isn't, and if it's legal with one company, it's legal with 10 or 50, etc. If there is no speed limit, as was the case in parts of Nevada prior to the energy crunch, it matters not if one travels fast one time or a hundred times. Instead of discussing irrelevant numbers, appellant would direct attention to the real issues of the case. These have to do with the rights of citizens in reading statutes to rely on their plain meanings in conducting their affairs, and the obligations of legislatures to define with clarity what is against the law, and the obligations of regulating agencies to follow those plain meanings the same as is expected of the citizens.

Notwithstanding it is improper for respondents to have mentioned the material in said footnote 1 which is outside of the record, once again in the spirit of cooperation, appellant does not object and would not object to consolidating the other cases with the present one. This is particularly advantageous to appellant, now that respondents have brought these other cases up, because at the factual hearing in the other cases, unlike the present case the president of the appellant was present and testified, shedding further light on the good faith aspects of appellant's conduct, including the fact that in addition to seeking legal advice before making the gifts he called respondents' offices and was informed that the gifting of stock did not require registration, that he has obtained "no action" letters from other states' securities divisions with respect to gifting of stock without registration, etc.

SUMMARY OF ARGUMENT

In appellant's brief filed February 5, 1988, appellant established three arguments, any one of which requires reversal of the decision below. On the first issue, whether §7 of the Utah Uniform Securities Act applies to gifts, appellant cited several precedents on the subject of gifting of stock favorable to appellant and stated that respondents are not able to produce even one case in any jurisdiction under any securities laws where gifts had been considered sales. Respondents have not met the

challenge. Instead they have made unsupported assertions in attempting to cast doubts on the authorities cited by appellant, and they have cited cases, not having anything to do with gifts, about how securities laws are to be liberally construed, etc., but they have failed to grasp the real issue and attack it.

With respect to the second issue, that of the good or bad faith nature of appellant's gifts, in response to appellant's challenge to show even one shred of evidence of appellant's bad faith, respondents state only that the "good faith and sincerity of the giver" is not what counts. No facts are offered, and the bad faith finding is still a mere supposition and unsupported conclusion. Respondents' bad faith argument is nothing more than saying that the lack of registration is in and of itself the evidence of intent to violate the law, but without establishing it is against the law or that there was any intent to violate the law. Nor did respondents' brief refute the evidence presented on good faith.

Response to appellant's third point, that respondents have no statutory authority to bring an action under §14 for a violation of the registration requirements of §7, was not even attempted by respondents. Respondents have evidently misunderstood appellant's argument in this regard, as they spent the portion of their brief in response to it supporting the doctrine that respondents have been given statutory authority to issue summary orders prior to a hearing, something appellant has made

no mention of. The thrust of appellant's argument is that even if there was a violation of §7, the decision below must be reversed because respondents proceeded under the wrong section, that is, §14(3) under which they proceeded does not grant them authority to suspend the exemptions for a violation of §7, but only for a violation of §14. Since there was no summary order in this case or any question about respondents' authority to issue such, respondents' discussion of it shows either a deliberate attempt to divert attention from the real issue or a complete lack of understanding of it.

Instead of being responsive to the specific cases and facts in the cases reported in appellant's brief and statutes and other authorities, respondents have talked around the issues, colored their arguments with personal attacks and materials outside of the record, and raised numerous suppositions and conjecture of things which are neither true, in the record, or have anything to do with the real issues of this case. The only conclusion to be drawn is that 1) the statute does not prohibit the conduct of appellant, 2) the appellant acted in good faith, and 3) if there were a violation the specific remedy attempted by respondents is not authorized by the statute. Appellant has established all three of these points, but the establishing of any one would require reversal of the decision below.

ARGUMENT

POINT I. APPELLANT'S RESPONSE TO RESPONDENTS' POINT I: RESPONDENTS' FINDINGS AND CONCLUSIONS ARE UNSUPPORTED AND UNREASONABLE.

Appellants do not take issue with the quoted language of Technomedical Labs, Inc. v. Utah Securities Division, 744 P.2d 320, (Utah App. 1987) to the effect that the decisions of respondents' should be reversed if they are outside the "tolerable limits of reason." However, respondents are attempting to establish by said case that the definition of "sale" or "sell" is "special law" and that therefore the respondents can place whatever meaning on it they may determine in the exercise of their "expertise."

Respondents' failure to follow the plain meaning of the statutes is in and of itself outside of the tolerable limits of reason and is against the law. Respondents have not taken issue with the numerous authorities cited in Point I of appellant's brief that courts must follow the plain meaning of the words used in statutes, but they seek to overcome such by the simple expediency of the "special law" doctrine. Should agencies (which do not have the status of either courts or legislatures) be under any lesser standard than the courts in being required to follow the plain meaning of the words used? To accept a yes answer ignores the fact that the reason for the plain meaning doctrine in the first place was not that courts lack the "expertise" of

agencies and therefore aren't qualified to make the interpretations, but that the rights of the citizens who read and rely on the plain meaning of the words must be protected.

The obvious logic that agencies are under no less an obligation than courts to follow the plain meaning of legislative pronouncements is fully backed up by numerous precedents. The Utah Supreme Court in Olson Construction Company v. State Tax Commission, 361 P.2d 1112 (Utah 1961), at page 1113, stated that an administrative interpretation "contrary to the express provisions of a statute cannot be given weight and, to do so, would in effect amend the statute." (Citations to other cases). That such is the law is so obvious that no doubt one could find a similar quote in many cases in every state in the country. See for example Gibb v. Spiker 718 P.2d 1076 (Hawaii 1986) at page 1079: "An agency statutory interpretation, though, cannot contradict the clear statutory language..." and State Department of Social and Health Services v. Island County Juvenile Court, 740 P.2d 907 (Wash. App. 1987) at page 911: "There is no need for deference to an agency's interpretation if the statute is not ambiguous."

This latter quotation perhaps best harmonizes the claims of the appellant and the respondents with respect to statutory interpretation by administrative agencies, that is, deference to agency interpretation is indeed the correct rule of law, but it comes into play only if it is first made to appear that the words

used by the legislature are ambiguous. It is obvious there is nothing ambiguous in the words "sell" or "give" and hence no deference is due to the agency's interpretation of "sell" to include "give."

Technomedical Labs, Inc. supra, is not out of harmony with the above reasoning. In discussing special law the Court describes it as those terms that bespeak a legislative intent to delegate their interpretation to the responsible agency. There is nothing in this statute that indicates an intent to delegate the definition of word "sell" to respondents. The legislature has chosen a well understood word to begin with and in addition has defined it in the statute and provided examples. This shows an intent to establish the statute's meaning by the words used, and not to leave any of it for respondents or anyone else to interpret.

In a further attempt to support their position in this regard, Respondents have quoted the title of the Act and emphasized certain provisions therein, but none of the quoted material (respondents' brief, p. 13) has anything to do with the claimed right of respondents to alter the plain meaning of the words "sale" or "sell" by the use of alleged "expertise." For example, the portion underlined by respondents merely indicates that the changes enacted in 1983 modified prior definitions, not that respondents have such authority.

POINT II. APPELLANT'S RESPONSE TO RESPONDENTS' POINT II:

THE PURPOSES OF THE UNIFORM SECURITIES ACT IS IN
HARMONY WITH THE POSITIONS ESPOUSED BY APPELLANT AND
NOT WITH THOSE ESPOUSED BY RESPONDENTS.

Respondents seek to overcome the clear wording of the statutes by use of the "legislative purpose" doctrine. Appellant has no disagreement with the general statements found in numerous cases, one of which is quoted in respondents' brief, to the effect that securities laws are remedial in nature and should be broadly and liberally construed to give effect to the legislative purpose, that such laws are to prevent fraud, encourage the disclosure of information and protect investors from sales of fraudulent and worthless securities, etc. But none of that has anything to do with this case. There is no allegation of fraud or worthlessness or speculativeness of the securities in this case, and there are no investors. This case involves whether a citizen of this state is allowed to give away securities without registration, or to be more specific, does §7 of the Act prohibit it. Yet respondents can't resist references to things like "ingenious subterfuge by fraudulent means" (page 15), etc., all of which are impertinent and introduced as inuendos against appellant's character to take attention away from said real issue of the case.

In Point II respondents have discussed the various provisions of the Act with respect to registration and point out that registration provides protection not only for initial purchasers

of the issue, but also subsequent purchasers. Respondents' have not argued that the registration of gifted stock is needed to protect the giftees, but that the registration provisions of the Act show a purpose that such gifts be registered in order to protect subsequent purchasers. Instead of accepting such unsupported speculation, appellant would urge the Court that the purpose of any act can best be determined by careful study of its provisions and that respondents' analysis of the Act, while referring to some of the relevant provisions, is incomplete and misleading. Appellant will supplement it as follows:

Section 61-1-11(8) of the Act is the key section for an understanding of the interaction between the registration process and the exemption process in secondary trading situations. Said subsection 8, cited by respondents, establishes that a registration expires in one year. That is, anyone selling stock who complies with §7, i.e., registers the stock with the Division, will still be in violation of §7 if he makes sales beyond the one year period (unless of course he comes within an authorized exemption under §14). In other words, after a year is up the stock is in the same situation as if it had not been registered. As was pointed out in appellant's brief on page 33, §7 is an either/or statute, i.e., to sell stock one must either register it or come within one of the exemptions under §14. There is no other way one can sell stock under the statutory scheme of the Utah Uniform Securities Act. And §11(8) establishes that the registration

aspect is only valid for one year, and that thereafter all sales come under §14.

So this matter is really quite simple if one will take the time to read the statutes. Pursuant to the either/or language of §7, one must comply with §§8, 9 or 10 cited by respondents on registrations of stock (the either), or with §14 (the or) for unregistered stock, which includes both stock which has never been registered and previously registered stock after its one year registration expires. Sales of a stock which has never been registered must fit within one of the exemptions in §14 from day one whereas sales of previously registered stock need do so only after the one year period.

Now that this is all clear, it can easily be seen that while it cannot be denied that registrations also protect subsequent purchasers, it is equally obvious that the converse is not true, i.e. that there must be registration or secondary purchasers will be left unprotected. This is because §14 is to protect purchasers of all unregistered stock, and it does not apply to any stock that is registered. Clearly there is no other way to interpret the statutory scheme and the legislative intent other than that:

1. Protection is provided to secondary purchasers (as well as original purchasers) of registered stock for the first year by the registration statements under §§8, 9 and 10 and supplements to it under §11(9), and after the first year by the exemptions under §14, and

2. Secondary purchasers (as well as original purchasers) of unregistered stock are protected under the exemptions under §14 at any time, including the first year.

Therefore respondents' claim that because the gifted stock is not registered, secondary purchasers do not have the benefit of the protection they would have had for the first year had it been registered is begging the question. The problem in respondents' argument is that §14 does not require that secondary purchasers of stock (now remember, §14 exemptions have application only to unregistered stock), whether previously registered or not, receive prospectus type information, i.e. the fact they don't receive it is statutorily approved (provided it fits a §14 exemption). Such claim of respondents', though correct, is not an argument against appellant's position but merely a correct statement of how the statute works.

Respondents' are saying in effect that since the same kind of protection for the first year as would be provided in a registration statement is not provided in the present case, the registration provisions must apply. But that totally ignores the language of §7 which says you can sell stock either/or, i.e., either if it registered, or if it comes within an exemption. Respondents are reading into the statute that either/or means either registration or exemption after first registering and the registration has expired. But not only is such totally contrary to the wording of §7, there is nothing anywhere in the Act that states, implies or suggests that the exemptions of §14 were to apply only to stocks that had been previously registered, and its specific provisions overwhelmingly indicate to the contrary. To

twist the statutory scheme and specific provision as respondents have done is clearly beyond the "tolerable limits of reason." and in fact it is much worse than that!³

Respondents have sought to advance their position by suggesting that the requirements under §14 are not rigorous enough to be adequate protection to investors in the secondary market. They say that the registration requirements in the Act are very detailed and provide full disclosure, whereas the information requirements under §14 are limited and therefore a company like Amenity, if the lower court's decision is reversed, will be a bad thing for secondary purchasers because of the lack of more detailed information about the stock. If indeed it is true that §14 information requirements are deficient, the obvious remedy for that is for the legislature to beef up the requirements of §14, not for respondents to disregard its provisions and interaction with the either/or provisions of §7. Furthermore, the same criticism (if true at all) would apply to any registered company beyond the first year. That is, just because more complete information was provided initially, the status of particular companies, i.e., their financial situation, their officers,

³It doesn't help respondents' position (but may confuse, hence this footnote) for them to say (p.18) the disclosure required by §14 is an update of the prior disclosure under a registration. Although it may have that effect in a particular instance, there's nothing in the statute that states or implies exclusiveness of application to the type of unregistered stock which was previously registered. Nor, in view of the clear and unequivocal either/or operation of §7, can such be presumed.

all of the other information cited in respondents' brief that must be supplied in registration statements, etc. sometimes changes rather rapidly, and after the first year when the secondary purchasers have only the protection of §14, such purchasers are no better off because the company was initially registered than they would be in a case like Amenity where the stock was originally gifted and not registered, i.e., the more detailed information furnished some time ago, which may have no resemblance to current information, would be useless.

In summary, the either/or statutory scheme enacted by the legislature provides such protections to purchasers as is desired by the legislature. Clearly such legislative scheme establishes that the vast majority of protection of secondary purchasers in all companies is provided in the §14 exemptions, the only exception being the first year for registered stock. The reasoning for that exception is also clear: the legislature does not deem the §14 provision to be adequate protection to initial purchasers of a public offering. Why? Because these people are paying their cash to a new untried enterprise, which also establishes why §7 doesn't apply to gifts - because those people aren't paying anything. And even though appellant acknowledges that registration statements sometimes do provide information to secondary purchasers during the first year, it is obvious (again, if one will take the time to read the statute) that the purpose of the one year provision, §11(8), and the very next subsection (9)

requiring supplemental information during the one year, is that it takes about that long in many cases to sell out the issue to the initial purchasers, and the possibility of it also providing information to secondary purchasers during that year is only incidental, if it was thought of at all by the legislature.

A careful reading of the argument in Point II of respondents' brief will show that such argument has accomplished nothing more than inform readers that the statutory provisions are inadequate to accomplish their desires in this particular case and not that the failure to register the gifted stock violates the purpose of the securities laws. Furthermore, the suggestion of respondents respecting deficiencies in the protections of §14 are mere unverified assertions anyway. It is true they are less demanding than the registration provisions, but the legislature apparently feels they are adequate. The parade of horrors in respondents' brief of possible scenarios relating to donees trying to sell their stock and other things is just so much speculation and not based on any facts in or out of the record. Specifically, with respect to the speculation in footnote 3 on page 19, it is clear that even if such were the case, respondents have their remedy and could bring an action to suspend the trading if it did not come within a §14 exemption as therein speculated. But that is not what respondents are attempting to do here. (See Point III of appellant's brief).

Another problem with respondents' conclusion and the speculative parade of horrors used to support it is that while their point was that the gift distribution violated the purposes of the Act, i.e. that the gifting of stock by appellant is an evil the legislative purpose is against, they failed to respond to appellant's point on pages 29 and 30 of its brief, that when the speculation has been put aside, there are no facts to show that any secondary purchaser of the gifted stock has made any complaint or has been hurt or has needed protection some two years after the gifts took place. And if there were an evil, appellant respectfully submits that the American way is to legislate it away with clear and unmistakable language rather than do violence to the language not only of the specific section, §7, but the entire statutory scheme.

POINT III. APPELLANT'S RESPONSE TO RESPONDENTS' POINT III.

THE DISTRIBUTION OF AMENITY STOCK WAS NOT AN
OFFER OR SALE.

Appellant agrees it made offers of stock to the giftees, but not for value. Appellant does not dispute that "sale" is broader as used in securities laws than in commercial transactions. It is obvious from the legislative enactment that the Utah Legislature considered it to be broader because it defined specific examples - some of which in commercial usage might be called a trade or something else. These examples, however, listed in §13(15)(c), clearly show the intent of the lawmakers was only to

make it clear that anything which exacted value from the recipient would be considered a sale, not that gifts would be considered sales, as argued by respondents. Every single itemized example in the Utah Act is an example where the recipient provides some value. Such is totally consistent with appellant's brief in which it was pointed out on pages 13 and 14 that the obvious difference between a gift and a sale is that even though a gift also provides something for the giver that it connotes a bargain and a contractually agreed upon consideration, i.e., value provided by the recipient for the stock, whether it be in connection with a bonus or an assessment or some other trade of property from the recipient. Further, since the legislature decided to list examples of "gifts" which are sales, the fact the legislature did not list the type of gifts in this case conclusively establishes that such are not to be considered as sales. That this cannot be refuted is seen in the fact that the two examples of "gifts" cited by respondents (§15(15)(c)(i) a bonus and (ii) assessable stock) are not gifts at all but are merely ways of exacting a purchase price from the recipient.

Respondents have relied upon two Federal spin-off cases to the effect that the value need not flow directly from the recipient in order to constitute the value required to make a "disposition for value," and hence, a sale. Since appellant admits it received benefit (though not from the recipients) from making the gifts, it is argued that these cases are controlling. However,

it is readily apparent that the spin-off cases are distinguishable as having nothing to do with gifting of stock. In the present case the benefits received by appellant are only incidental to the gifts, i.e., not directly related, could have been received in a different way, were speculative, i.e., only hoped for, and the recipients paid nothing for the gifts, i.e. had no investment or contract rights. In contrast, in the spin-off cases, the recipients of the stock had paid something for the right to receive the stock (their initial purchase of stock), and so even though there is discussion in the cases about that value accruing to the defendants, such as the enhanced value of a public company, such value could never have arisen or be discussed at all had not the recipients purchased stock in the parent company which entitled them contractually to their pro rata share of the spin-off stock. That is no different than the bonus situation is under §13(15)(c)(i) of the Utah Act, i.e., the original purchase of stock in the parent company entitled the purchaser to the "bonus" of the stock of the subsidiary. Under those facts the recipient still paid value for both stocks, and it was therefore not necessary for those courts to do as much violence to the English language to determine that the distribution of the stock was a sale. In stark contrast, in the present case there is no relation at all between the recipients of the stock and any value or purchase they may have made to the ultimate benefit to appellant.

In summary, although respondents have cited both cases and statutes, neither involve true gifts as those in the present case are acknowledged to be, and in both the statutory and case law examples cited by respondents the recipients did in fact pay for their shares.

Next, respondents suggest that the authorities cited by appellant in its brief are not valid as precedents. The devastating effects to respondents' position coming from the case of Andrews v. Chase, 49 P.2d 938, (Utah 1935) are such that respondents took no less than five pages to respond to this one case to attempt to show that it was not analogous or applicable. In attempting to do this respondents have made unsupported statements such as, "neither the aim nor the effect of the distribution was to create a publicly held company." It doesn't matter whether it was or not, because there is nothing in the statute which would make §7 apply differently if the aim or effect⁴ was to create a publicly held company. So this misstatement of respondents' is perhaps not relevant, but it's another example of their attempts to confusion the issues. Nevertheless, in response appellant would point out that such information as asserted by respondents is not found in the Andrews opinion, and the implication therein is strictly to the contrary since the

⁴Further, there is nothing in the record to support respondents' assertion on page 22 that the purpose of appellant's gift distribution was to create a public company. That was, however, one of the effects, among many others.

gifts were "...to such members of the public as would receive it...." Id at page 939.

Respondents' chief argument against Andrews is their claim that the 1963 Legislature overruled it in enacting the Uniform Securities Act. There are lots of reasons why this isn't so. To begin with, it stretches the imagination to suggest that some thirty years later in the adoption of a uniform act prepared outside the State by others there was any intent to consider the old 1935 case at all. More significant, however, is the fact that the provision of the old statute discussed in Andrews was not changed in the new enactment. The specific issue discussed in Andrews was whether the gifts constituted a disposition "for value" within the meaning of the statute, and that has not changed. The additional definition added in the 1963 total enactment of a new law did not change the basic "for value" requirement or affect the validity of the reasoning of the Supreme Court quoted on page 17 of appellant's brief. It merely carved out an exception for a "purported gift of assessible stock."⁵ Also of significance is that if the legislature

⁵ Obviously there is no value paid for a gift of assessible stock unless and until the assessment is made and paid by the recipient. And equally obvious is that the legislature in 1963 simply decided that since such assessment would in all likelihood be the intent of the distribution, it might as well stop it at the outset by carving out the exception and thus avoid the issue that was lost in Andrews. In reality, by carving out the exception, the legislature rather than overruling Andrews has acknowledged its correct application of the "for value" test, and hence the need to exempt assessible stock from such test and simply define it as a "sale."

intended that a purported gift of assessible stock be a sale, what if it is a real gift and not just a "purported" gift? Furthermore, the assessible stock in the Andrews case was only voluntarily assessible.⁶ But even without getting into issues of whether it was voluntarily assessible or otherwise, or whether it was a purported gift or an actual gift of assessible stock, the main flaw in respondents' attempts to discredit Andrews is that even if the legislature did in fact intend to overrule the result with respect to assessible stock, it cannot possibly have affected the more basic holding that "had the lawmaking power intended

⁶Because of its significance to this appeal and the conflicting claims of the parties, included in the addendum to this reply brief is the entire opinion in Andrews. Note the dissent's extensive discussion of the difference between normal assessible stock and the voluntary assessments there involved. This provides a better understanding into the unusual nature of the voluntary assessments, i.e. they were different than those exempted from the "for value" requirement by the 1963 legislature.

In addition, although respondents quote and take comfort in the dissent's statements, a reading of the entire dissent shows they have taken Justice Hanson's statements out of context, i.e. he does not question the present appellant's position that the law does not apply to gifts, but he merely provides various reasons why he thinks the transfers of the assessible stock was not a gift even in the ordinary plain meaning of the word. In the present case not even respondents challenge that appellant's transfers were true gifts under ordinary usage. So it can be seen that if the present case were before the 1935 Supreme Court, whether before or after the 1963 enactment, there would be no dissent and Justice Hanson would go with the majority since none of the reasons he cited that the transfers of assessible stock are not true gifts are even remotely involved in the present case.

See also the Supreme Court's arguments (at page 941) similar to those in appellant's brief on page 20 (unresponded to by respondents) examining other provisions of the Act in concluding it did not show a purpose to regulate gifts. Appellant recommends reading the entire case - it may be an old one, but its doctrines are timeless and irrefutable. It is on "all fours" with the present case, and it has not been overruled.

the Act should apply to gifts of securities, it would have been a simple matter to have so provided." At best, the legislature has provided only that "purported gifts of assessible stock" are exempted from the said holding. Clearly, the legislature cannot overrule the holding in Andrews because it is based on such obviously correct principles and unchallenged authority, to-wit, that if a legislature is going to prohibit conduct, it is a simple matter to spell it out and their obligation is to do so in plain English so that people can understand it (see Point I of appellant's brief and authorities there cited). To attempt to overrule that would be unconstitutional.

The fact is, the Andrews case still stands firmly in place in support of appellant's position totally, whether or not the 1963 amendment referred to by respondents can be considered as having changed the result of the case as applied to assessible stock. The fact that the legislature has determined that purported gifts of assessible stock should be registered is not support for the proposition that the gifts of Amenity stock should be registered, but on the contrary is further evidence that they should not, i.e., the fact that the legislature was specific with respect to the gifts of purported assessible stock eliminates other kinds of gifts of stock. Further, the fact that the 1983 amendment establishing that a purported gift of assessible stock is a sale as part of the same amendment establishing that a good faith gift is excepted raises serious doubts as to

respondents' entire good faith gift argument, i.e. it indicates that the good faith gift amendment was added to allow somebody to give assessible stock in good faith and not be accused of a "purported gift."⁷

Respondents have suggested that the other cases cited by appellant in its brief are "wholly inapplicable." Appellant respectfully requests respondents to please read them again. Appellant cited a total of four cases, including the Andrews case, which dealt specifically with persons giving away securities with the issue as to whether or not such was a violation of specific securities laws relating to the prohibition of sales of securities. If that is not applicable, appellant wonders what is. In contrast, respondent has not cited a single case that involves even remotely any gifts of securities. Respondents' brief gives as its "most compelling case" Technomedical Labs, Inc. v. Utah Securities Division, supra, but it has nothing to do with the giving of stock. But that's what the present case is about, i.e., does §7 of the Act prohibit the giving of stock without registration? Obviously the federal cases, Truncale v. Blumberg, 80 F. Supp. 387 (S. Dist. N.Y. 1948) and Shaw v. Dreyfuss, 172 F.2d 140 (S. Cir. 1949) cited by appellant are

⁷This is logical because it would indeed be bad faith to give a "purported gift" of assessible stock with the intent to thereby exact consideration from the donee. It's not a real gift, it's a lie, and so it's a bad faith transfer.

based on a different statute other than §7 of the Utah Securities Act. But the issue is the same, i.e., the securities laws involved in those cases contain the same question, i.e., whether the gifts of securities constituted sales, and for respondents to style said cases as "wholly inapplicable" or not remotely related is further indication of respondents' brief's consistent unsupported statements and attempts to confuse the real issue of the case. As an indication that respondents have not even read these cases they say don't apply, see top of page 32 of respondents' brief in which respondents represent in their brief that Shaw involved gifts to charities, when in fact the case did not apply to charities, and the dissenting opinion specifically stated it did not (at page 143). Respondents have pointed out that those companies were already public companies, yet that doesn't seem to be material to anyone but respondents, i.e., the statute makes no distinction, etc. Nowhere in the statute or in the case law is there any provision establishing that an act which is otherwise legal under the statute, i.e., giving stock, becomes illegal within the provisions of the Act if the effect is to create a publicly held company.

POINT IV. APPELLANT'S RESPONSE TO RESPONDENTS' POINT IV:
THERE IS NO EVIDENCE OF BAD FAITH ON THE PART
OF APPELLANT.

Respondents' brief states on page 33, "The Act does not concern itself in this setting regarding good faith with the sincerity of the giver...." At page 24, appellant's brief

pointed out specific evidence in the record showing appellant's good faith intent and that there was no contrary testimony introduced. In response respondents refuse to discuss the specific evidence but seek to avoid such by asserting that it doesn't matter about the good faith and sincerity of the giver! Arbitrary and capricious? You bet! In the above quoted admission, respondents have acknowledged that they ignored the evidence in the record and that no amount of evidence of the good faith of appellant would have been sufficient.

Appellant has no disagreement with respondents' definitions of good faith and citations therein. Nor does appellant dispute that if there is any evidence that appellant intended to evade the requirements of the law, appellant would be guilty of bad faith. But there isn't any such evidence. It accomplishes nothing for respondents to recite some of the factual history as they have done on pages 34 and 35 of their brief, as these are only inuendos at best and have no real bearing on the question of the good faith of appellant. While it is unclear just what point is being made of the fact for example that appellant received a fee for performing services (should they work for nothing?) and the other matters listed, it is clear that as pointed out in appellant's brief (p. 27) respondents' conclusions that appellant is guilty of bad faith are not based on the facts bearing on appellant's intent, but are based solely on the fact that there was no registration. That is, respondents have merely presumed

that no registration is irrefutably equated to bad faith. That such is arbitrary and capricious and severely restrictive of the rights of one attempting to comply with the law is obvious. Lack of registration of gifts does not amount to bad faith or any intent to circumvent any laws when the undisputed evidence in the record shows that the giver intended to comply with the law, sought legal advice, would have registered had it been advised to or believed that it was required, is still willing to register if such is the law, and had no intent whatever to do anything outside of the law.

It is not known nor has it been stated whether or not the trading of the shares referred to in respondents' brief was illegal, i.e., a violation of §14 of the Act, but if there were any trades that did not comply with §14, there is no evidence that it was the intent of appellant that such happen or that such would not have happened had there been a registration, and certainly respondents have a remedy to prevent such trades without the necessity of asserting the fiction that appellant is guilty of making bad faith gifts because they weren't registered.

Contrary to respondents' suggestion on page 35, there is nothing typical about a grandfather giving his grandson a stock certificate. Nor is there any indication that the statute was to apply to such to the exclusion of other good faith gifts. On the contrary, appellant is entitled to rely upon the wording of the statutes and the advice of counsel in determining whether or not

to register gifts of stock, and since the statutes clearly do not require such (or at the very least, and everyone should be able to admit this, do not appear to require such) respondents claim that failure to register displays an intent to evade the statutory requirements is nothing but a circuitous argument and in reality is only a policy statement on the part of respondents that they would like to require gifts to be registered. But the decision in the case must rest upon the law and the facts, not on respondents' desires.

Once again, respondents fall back on their claim of expertise and technical knowledge in this area of "special law" in drawing their conclusions. However, their findings and conclusions are out of the tolerable limits of reason and are arbitrary and capricious because they ignore the statutes and the intent of appellant and simply conclude that because registration was not done there must have been some evil intent. That truly is arbitrary and capricious and is only in furtherance of their plan to create their desired result irrespective of the law and the facts.

POINT V: APPELLANT'S RESPONSE TO RESPONDENTS' POINT V:

RESPONDENTS HAVE FAILED TO RESPOND TO APPELLANT'S ARGUMENT, POINT III OF APPELLANT'S BRIEF, THAT THE REMEDY SOUGHT BY RESPONDENTS IS NOT AUTHORIZED BY STATUTE.

In respondents' discussion in Point V, the brief continues the pattern of attempting to confuse the real issues by bringing in allegations and speculations not in the record and other

unsupported assumptions and "parade of horrors" type statements without basis. It is unclear whether respondents' discussion of irrelevant matters is to give the appearance of having answered the points of appellant without having done so or because of lack of understanding of such point. For example, respondents' have stated that appellant has claimed that §14(3) can only be exercised by them after the fact, i.e., that they can't shut the door to the hen house until all the chickens are out. Respondents have stated that appellant is "nonplused" and "dead wrong" (page 42) and the brief goes on to spend a considerable amount of detail in setting appellant right. The problem with such is that appellant has never made any of those claims attributable to it! Of course appellant would be dead wrong if it claimed the respondents didn't have powers to summarily suspend exemptions under §14(3). Appellant has never suggested that it is nonplused at that type of authority, but it is now nonplused at respondents' having made such allegations and having felt the need to discuss it, particularly in light of the fact that no such summary order was ever issued in this case.

Appellant does not question respondents' authority under §14(3) to issue summary orders suspending exemptions under §14. What appellant stated in its brief was that their ability to do so, whether it be a summary order or after a hearing, is dependent on a criteria and that criteria is whether or not the particular transaction or security being suspended in fact comes

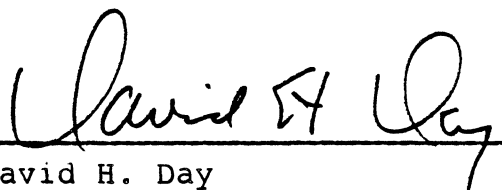
within one of the described exemptions of §14. In this case, respondents have suspended the trading of Amenity, Inc. stock based on an alleged violation of §7. Assuming such a violation, nowhere in §14, subsection 3, or anywhere else in the statute is such authority given, whether summarily prior to a hearing or after three hearings as was done in this case. As pointed out in the main brief, if there is any violation of §7 by appellant in its gifting of stock, the remedy is provided in §§20 and 21 (see Point III of appellant's brief). Section 14 is limited to issues relating to §14 exemptions, and respondents nowhere in their pleadings or in their arguments have made any claim that any exemptions have been violated.

To be sure it is clear: Suppose ABC Company sold stock to the public for cash without registration in violation of §7. Respondents could bring severe punishments against ABC and its principles under §§20 and 21, but they can do nothing under §14. Not only is that the clear statutory language, but the reason for such is obvious. A suspension of exemptions under §14 would only add further hurt to the very people the Act is to protect - first they unwittingly buy stock without the protections of registration, and now respondents are going to tell them they can't sell it even if exemptions under §14 are complied with! (See Point II above and Point III in appellant's brief).

CONCLUSION

Respondents have sought to sustain their position by personal attacks, inuendos and skirting the issues and discussing irrelevant and redundant material to take attention away from the real issues in the case. The real issues of the case involve the statutory authority of regulatory agencies, their right to alter the plain meaning of legislative enactments, go against established precedents, etc. and the right of the public to be secure in relying on the English language, common meanings and prior precedents in interpreting statutes governing their conduct. Appellant once again, as a member of the public, asks the above Court for protection against respondents. Appellant's brief conclusively establishes that the conduct of appellant is not prohibited by statute, that it acted in good faith, and that even if there were violations the remedies sought by respondents is not authorized by statute. Respondents have failed to refute any one of these points.

Respectfully submitted this 4th day of April, 1988.

A handwritten signature in black ink, reading "David H. Day", is written over a horizontal line.

David H. Day
DAY & BARNEY
45 East Vine Street
Murray, Utah 84107

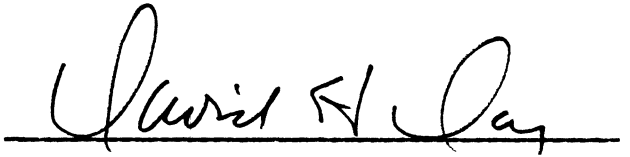
Attorneys for Petitioner
and Appellant

CERTIFICATE OF MAILING

I hereby certify that four true and correct copies of the foregoing Reply Brief was mailed, postage prepaid, to:

David L. Wilkinson
ATTORNEY GENERAL
Steven G. Schwendiman
CHIEF, ASSISTANT ATTORNEY GENERAL
William B. McKean
ASSISTANT ATTORNEY GENERAL
TAX & BUSINESS REGULATION DIVISION
130 State Capitol Building
Salt Lake City, Utah 84114

on this 4th day of April, 1988.



A D D E N D U M

- I. Affidavit re June 19, 1986 hearing proceedings and stipulation.
- II. Andrews v. Chase opinion.

AFFIDAVIT

STATE OF UTAH)
 (ss.
COUNTY OF SALT LAKE)

David H. Day, being first duly sworn upon oath deposes and says:

1. That he is an attorney licensed to practice law in the State of Utah, and that he makes this affidavit as an officer of the Court to supply information relative to missing portions of the record in the appeal before the Court of Appeals of the State of Utah, Case No. 870567-CA

2. That on or about the second week of June 1986 his client and appellant in said appeal, Capital General Corporation, presented him with a copy of a petition and notice of hearing on said petition, scheduled for June 19, 1986, before Stephen Ecklund, Administrative Law Judge, of the Utah Department of Business Regulation. A copy of said petition and notice of hearing is in the record in the said appeal, pages 73, 74 and 75.

3. That he appeared at the time and place set for said hearing with David R. Yeaman, president of appellant. Also present were Sherwood Cook of the Utah Securities Division and Nicholas E. Hales of the Utah Attorney General's Office, representing the Division.

4. That the Division, through Mr. Hales and Mr. Cook, suggested that the matter could be handled on legal memoranda based on stipulated facts, provided that we could stipulate to

the facts at such time, and if so, it would not be necessary to have the administrative law judge come down and be present, but he could decide it based on the said stipulated facts and written memorandums of law to be filed.

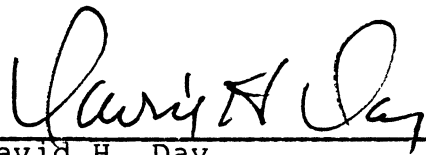
5. That he presented a letter addressed to his said client from himself, dated February 13, 1986, and suggested to Mr. Cook and Mr. Hales that it was his understanding that the facts of the case were as represented on the first two pages of said letter. Mr. Yeaman affirmed that those were the facts, and he answered additional questions of Mr. Hales or Mr. Cook. Mr. Hales and Mr. Cook read said factual description and both indicated that that would be used as the stipulated facts and delivered to the administrative law judge. It was also agreed that the Division would file its memorandum first, the undersigned would file second, and the Division would file a reply, and dates were agreed upon for such filings.

6. That he personally handed said stipulated facts to the Division's said representatives, with the understanding that such would become part of the record. That he had never at any time prior to the Final Order of the Department of Business Regulation, dated February 18, 1987, had any indication from any attorney or other personnel of, or representing, the Division that such was not the case, and that he did not learn that it had apparently been omitted by the Division until after the Final Order was entered while preparing for the District Court review.

7. That the second hearing held September 25, 1986, was not agreed to as part of the stipulation, as the stipulation original envisioned that the administrative law judge would make his ruling based on the written memorandums only. However, after reading the written memorandums, the undersigned requested the hearing which was granted by the law judge, which request is referenced in said administrative law judge's findings (R. 28).

8. That the agreed upon facts in said stipulation are quoted on pages 3 and 4 of appellant's brief.

DATED this 4th day of April, 1988.

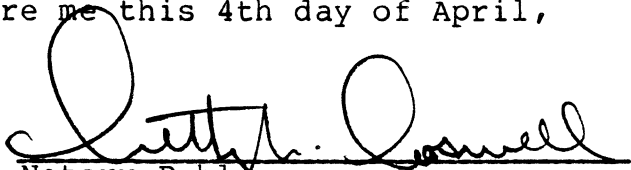


David H. Day

Subscribed and sworn to before me this 4th day of April, 1988.

My Commission Expires:

5/15/90



Notary Public
Residing in Salt Lake City, Utah

the facts at such time, and if so, it would not be necessary to have the administrative law judge come down and be present, but he could decide it based on the said stipulated facts and written memorandums of law to be filed.

5. That he presented a letter addressed to his said client from himself, dated February 13, 1986, and suggested to Mr. Cook and Mr. Hales that it was his understanding that the facts of the case were as represented on the first two pages of said letter. Mr. Yeaman affirmed that those were the facts, and he answered additional questions of Mr. Hales or Mr. Cook. Mr. Hales and Mr. Cook read said factual description and both indicated that that would be used as the stipulated facts and delivered to the administrative law judge. It was also agreed that the Division would file its memorandum first, the undersigned would file second, and the Division would file a reply, and dates were agreed upon for such filings.

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signments as provided for in Paragraphs 4 and 5 hereof."

The defenses, based on this paragraph of the contract, were presented by a general demurrer to the complaint, which was overruled; by the second defense in the answer; by motion for nonsuit and motion for new trial. The substance of other material parts of the contract is to the effect that plaintiff should give to defendant a complete list of all its customers, and on the first of each month a list of new customers to whom oil was furnished the month preceding, and, at any time that defendant felt insecure, defendant was entitled to an assignment of the accounts of plaintiff, and, if such assignment was not made, defendant could notify plaintiff's customers.

From a casual reading of the contract, it is apparent that both parties realized the uncertainty of full performance and made provision therefor, in that certain benefits were to inure to either party upon non-performance by the other. The relative rights of the parties were determined by their own words of agreement in paragraph 8, which undoubtedly were intended to, and do, control as to damages, if any. No other purpose would have called for such provisions of the contract, and, when so fixed and agreed upon, it was an establishment of the limitations of the benefits and liabilities, and the remedy thus provided is to the exclusion of all others. If these were improvident provisions of the contract, we cannot offer a substitute. Only a breach of these conditions or an interference with their performance would provide grounds for damage. From the record herein, we find that no such breach was alleged or proven.

Plaintiff centered its cause of action upon paragraph 1 of the contract, and claimed its damages on the failure of defendant to deliver. If this was the entire contract, a proper measure of relief might be available. Plaintiff cannot select certain portions of the contract, beneficial to it, to the exclusion of other provisions it had made and agreed upon. It is evident that the parties themselves understood the uncertainties surrounding the performance of this contract and meant by its provisions to allow for—upon consideration to be given—the failure of performance. This intent is so apparent from the contract

that it controls its construction, and effect must be given to the document as a whole.

Plaintiff, in failing to base its cause of action on the remedy provided in the contract in case of nonperformance, failed to state a cause of action, and the demurrer of defendant to the complaint should have been sustained.

Error has been assigned to the giving of alleged improper instructions and to fixing an erroneous measure of damage. In view of the conclusions above reached, it is unnecessary to discuss these assignments.

Judgment is reversed, with directions to sustain the demurrer, and for such further proceedings as may be proper in accordance with the views herein expressed.

BOUCK, J., dissents.



ANDREWS v. CHASE et al.

No. 5504.

Supreme Court of Utah.

Sept. 25, 1935.

1. Statutes §206

In construction of statute, effect must be given to all language used in act when possible.

2. Licenses §18½

Disposal of securities by gift *held* not within statute regulating sales of corporate securities (Laws 1925, c. 87, as amended).

3. Corporations §90(2)

Where articles of incorporation provide that stockholders of corporation shall not be liable for corporate debts, owner of full paid stock is not liable for unpaid assessment, which can be enforced only by sale of stock or so much thereof as may be necessary to pay assessment.¹

4. Appeal and error §917(1)

Supreme Court must assume truth of allegations of complaint for purpose of demurrer.

5. Licenses §39

Gift of corporation's stock to public with understanding that assessment would be lev-

—For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

¹ Dotson v. Hoggan, 44 Utah, 205, 140 P. 123.

led for development of corporate assets, but that persons to whom stock was given were not obligated to pay such assessment, held not "sale" or "attempt to sell" stock within Securities Act, and hence agreement with statistician who was employed to assist in disposition of stock was not void under terms of Securities Act (Laws 1925, c. 87, §§ 2, 7, 10, 27).

[Ed. Note.—For other definitions of "Sale," see Words & Phrases.]

6. Gifts \S 5(2)

Gift does not become sale merely because donor hopes to receive something for gift.

EPHRAIM HANSON, J., dissenting.

Appeal from District Court, Salt Lake County; James W. McKinney, Judge.

Action by Hal Andrews against Ogden C. Chase and others. From a judgment dismissing the action, the plaintiff appeals.

Reversed and remanded, with directions.

Allen T. Sanford and E. A. Rogers, both of Salt Lake City, for appellant.

Van Cott, Riter & Farnsworth, Cheney, Jensen & Marr, and Ray McCarty, all of Salt Lake City, for respondents.

ELIAS HANSEN, Chief Justice.

In the court below defendants' demurrers to plaintiff's amended complaint were sustained. Plaintiff refused to further amend his complaint, whereupon defendants moved to dismiss the action. The motion was granted and the action dismissed. Plaintiff appeals. He assigns as errors the order sustaining the demurrers and the order dismissing the action. It is in substance alleged in the complaint: That defendant companies are, and at all times alleged in the complaint were, Utah corporations; that plaintiff is, and at all times alleged in the complaint was, a statistician, analyst, and adviser of the value of stocks, bonds, and various kinds of securities and as such engaged in business at Salt Lake City, Utah; that at the times complained of plaintiff had a list of numerous clients to whom he was, and for two years had been, sending weekly letters advising them of his opinion and analysis of mining stocks and other securities; that during the month of April, 1932, defendant Ogden C. Chase was a director, secretary and treasurer, and defendant S. F. Hunt was a director and the president, of defendant corporation Rio Tinto Copper Company. Para-

graph 4 of the amended complaint contains the allegations which form the basis for the questions which divide the parties. We quote it in full:

"That on or about the 1st day of April, 1931 the said defendant Rio Tinto Copper Company, was desirous of giving some of its shares of treasury stock to such members of the public as would receive it, upon the understanding that the Rio Tinto Copper Company would for the purpose of carrying on development of said property levy one two-cent assessment and three one-cent assessments, or as many thereof as might be necessary to finance the development of its mining property and with the understanding that the persons receiving said stock were not obligated to pay such assessments, or any of them, and on or about said date the said Rio Tinto Copper Company and the said Ogden C. Chase and said S. F. Hunt, knowing that the said plaintiff had a large number of clients residing outside of Utah who reposed confidence in the judgment of the plaintiff and who relied upon the advice of the plaintiff with reference to the value of mining stocks and other securities, entered into an agreement with the said plaintiff wherein and whereby the said defendants, Rio Tinto Copper Company, Ogden C. Chase and S. F. Hunt, agreed to and with the plaintiff that if the plaintiff would assist the said Rio Tinto Copper Company in placing its treasury stock with his clients residing outside of Utah upon the aforesaid basis, the said defendants, Rio Tinto Copper Company, Ogden C. Chase, and S. F. Hunt, would transfer, convey, and deliver to the plaintiff 20,000 shares of the Class A capital stock of the said Rio Tinto Copper Company after the aforesaid assessments or as many thereof as might be necessary, had been levied and paid; that the said Rio Tinto Copper Company levied one two-cent assessment and three one-cent assessments, assessment No. 4 having been levied on or about the 17th day of March, 1932, and the collection of said assessment having been consummated on or about the 17th day of May, 1932; that pursuant to said agreement the plaintiff immediately commenced upon said work, circularized his said clients frequently and wrote personal letters to about one hundred twenty-five of his clients, such circulars and letters all having been delivered outside of Utah, recommending the acquisition of the said stock of the said Rio Tinto

Copper Company upon the aforesaid basis, and as a result of the efforts of the plaintiff approximately 145,000 shares of stock were accepted by plaintiff's customers; that the plaintiff duly performed all things in said contract upon his part to be performed."

It is further alleged in the complaint that in October, 1932, defendant Mountain City Copper Company acquired all of the assets and property of the defendant Rio Tinto Copper Company, and in consideration therefor agreed to exchange its stock share for share to the stockholders of the Rio Tinto Copper Company and to assume all contracts and liabilities of the Rio Tinto Copper Company; that plaintiff has made demand of defendants that they issue to him the 20,000 shares of stock which they agreed to convey to him, but defendants have failed and refused, and continue to refuse, to deliver the stock. Plaintiff prays judgment that defendants deliver the stock, or, if delivery thereof cannot be had, that he be awarded judgment for the value thereof.

One of the principal questions of law upon which the parties divide is whether or not the alleged agreement relied upon by the plaintiff is or is not void. Defendants contend that the alleged agreement was and is unenforceable and void because inhibited by the provisions of Laws of Utah 1925, c. 87, p. 171, which act is sometimes referred to as the Securities Act, and is commonly known as "the Blue Sky Law." Plaintiff contends that the agreement pleaded in his complaint did not involve a sale, and therefore was not within the provisions of the act.

In the main, the present law touching the matter in hand is the same as it was at the time plaintiff alleges that he entered into the agreement sued upon. Rev. St. Utah 1933, title 82, chap. 1, p. 981 (82-1-1 et seq.). We quote from chapter 87, Laws of Utah 1925, such provisions of the act as we deem bear upon this controversy:

"When used in this Act the following terms shall, unless the text otherwise indicates, have the following respective meanings: * * *

"'Sale' or 'sell' shall include every disposition, or attempt to dispose, of a security or interest in a security for value. Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing, shall be conclusively presumed to constitute a part of

the subject of such purchase, and to have been sold for value. 'Sale' or 'sell' shall also include an exchange, an attempt to sell, an option of sale, a solicitation of sale, a subscription or an offer to sell, directly or by an agent, or a circular, letter, advertisement or otherwise.

"'Dealer' shall include every person other than a salesman who in this State engages either for all or part of his time directly or through an agent in the business of selling any securities issued by another person or purchasing or otherwise acquiring such securities, from another for the purpose of reselling them or of offering them for sale to the public, or offering, buying, selling or otherwise dealing or trading in securities as agent or principal for a commission or at a profit, or who deals in futures or differences in market quotations of prices or values of any securities or accepts margins on purchases or sales or pretended purchases or sales of such securities provided that the word 'dealer' shall not include a person having no place of business in this State who sells or offers to sell securities exclusively to brokers or dealers actually engaged in buying and selling securities as a business.

"'Issuer' shall mean and include every person who proposes to issue, has issued, or shall hereafter issue any security, Any natural person who acts as a promoter for and on behalf of a corporation, trust or unincorporated association or partnership of any kind to be formed shall be deemed an issuer.

"'Salesman' shall include every natural person, other than a dealer, employed or appointed or authorized by a dealer, or issuer to sell securities in any manner in this State. The partners of a partnership and the executive officers of a corporation or other association registered as a dealer shall not be salesmen within the meaning of this definition." Section 2.

"All securities required by this Act to be registered before being sold in this State, and not entitled to registration by notification shall be registered only by qualification in the manner provided by this section." Section 7.

"No dealer or salesman shall engage in business in this State as such dealer or salesman or sell any securities including securities exempted in Section 3 of this Act, except in transactions exempt under Section 4, of this Act unless he has been registered as a dealer or salesman in the of-

office of the commission pursuant to the provisions of this section." Section 10.

"Any person, issuer, dealer, agent or salesman, who, not being at the time exempt or registered pursuant to the provisions of this Act, in any manner or by any means shall issue, sell, assign, transfer or offer to or negotiate for the issuance, sale or assignment, or transfer, of any securities said securities not being exempt or registered at the time of such issuance sale assignment or transfer, pursuant to the provisions of this Act, shall be guilty of a felony and upon conviction thereof shall be punished by a fine of not less than \$100.00 or more than \$10,000.00, or by imprisonment in the State prison for a term of not more than ten years, or by both such fine and imprisonment." Section 27.

[1] The stock here involved is not one of the kinds of securities which are exempt from the provisions of the Securities Act. Appellant does not contend otherwise. What he does contend is that the act merely regulates the sale of securities and has no application whatever to securities which are given away. It will be observed that "sale or sell" is defined as every disposition, or attempt to dispose, of a security or interest in a security for value. The words "for value" are descriptive of, and constitute a limitation on, the kind of transactions which the Securities Act was intended to regulate. It is a cardinal rule in the construction of a statute that, when possible, effect must be given to all of the language used in an act. If the Legislature had intended that the words "sale or sell" should include "gift or give," it would not have limited the former words to such disposals, or attempted disposals of securities as are made for value. The second sentence of section 2, subd. 3, further indicates a legislative intention to limit the act to transactions where securities are disposed of for value. It provides that, if one security is transferred for value and another shall be given or delivered as a bonus, the latter "shall be conclusively presumed to constitute a part of the subject of such purchase." The provision of the act last quoted was evidently intended to prevent evasion of the act by one or more of the parties to a transaction involving the transfer of security from contending that such transfer was a gift in a transaction where the transferor may have received value for the stock disposed of

by him. Had the lawmaking power intended that the act should apply to gifts of securities, it would have been a simple matter to have so provided. In such case there would have been no occasion for the provision with respect to the giving or delivering of security as a bonus "on account of, any purchase of securities or any other thing," being "conclusively presumed to constitute a part of the subject of such purchase."

It will also be observed that the provisions of the act defining a dealer, an issuer, and a salesman are confined to those who have to do with the disposal of securities by means of a sale, and is silent as to such persons as may participate in the disposal of securities by gift. So also the only securities which the act requires to be registered are such as "shall be sold within this State." Section 5. To hold that the act applies to securities which are given away would be to read into the act a meaning which is not expressed or implied by the language used. On the contrary, the clear implication to be drawn from a number of the provisions of the act is that gifts of securities were not intended to be covered by the act.

[2-6] It will be noted that it is in substance alleged in the complaint that plaintiff was employed to assist in giving the stock of the defendant Rio Tinto Copper Company to such members of the public as were willing to accept it; that the stock was so given with the understanding that the company would levy assessments for the development of its mine, but that the persons securing the same were under no obligation to pay such assessments. It is contended by respondents that in giving away the stock with the knowledge that assessments would be levied thereon, and with the hope that such assessments would be paid by the donees, was, within the meaning of the Securities Act, an attempt to sell the stock. If, in the transaction under review, the transferees had agreed to pay the future assessments when levied, it would seem reasonably clear that the transaction would have been a sale. The allegations of the complaint, however, allege that there was no such agreement. In the absence of an agreement to pay assessments, the transferees of the stock were not obligated to pay the assessments. The law is settled in this jurisdiction that, when the articles of incorporation provide that the stockholders thereof shall not be

liable for the corporate debts, the owner of full paid stock of such corporation is not liable for an unpaid assessment. The only means of enforcing the assessment is by a sale of the stock or so much thereof as may be necessary to pay the assessment. *Dotson v. Hoggan*, 44 Utah, 295, 140 P. 128. In light of the allegations of the complaint that the persons to whom the stock was given assumed no liability to pay assessments, it is to be assumed the articles of incorporation of the defendant Rio Tinto Copper Company contain a provision that the stockholders thereof were not liable for its debts. Such a provision is usually contained in the articles of incorporation of mining companies. If the allegations of the complaint are true, which we must assume for the purpose of demurrer, it follows that there was neither a sale nor an attempt to sell the stock in question. A mere hope or anticipation that the transferees of the stock would pay the assessments if and when levied may not be said to be a disposition or an attempt to dispose of the stock for value within the meaning of the act. A gift does not become a sale merely because the donor hopes to receive something for the gift. Counsel for the respective parties have at considerable length argued two other questions, viz.: Assuming the transaction alleged in the complaint was a sale within the meaning of the Securities Act, may the defendants avail themselves of such fact to escape liability? Was the transaction alleged in the complaint interstate commerce and as such not subject to the provisions of the Act? Having reached the conclusion that the transaction as alleged by plaintiff is not covered by the provisions of the Securities Act, it becomes unnecessary to determine the other questions presented. We therefore express no opinion concerning them. From what has been said, it follows that the judgment dismissing the action should be, and it accordingly is, reversed.

This cause is remanded to the district court of Salt Lake county with directions to reinstate the action and overrule the demurrers. Appellant is awarded his costs.

FOLLAND, MOFFAT, and WOLFE, JJ., concur.

EPHRAIM HANSON, Justice (dissenting).

I am unable to concur either in the views expressed in the prevailing opinion

or in the results therein reached. Hence this dissent.

As stated in the prevailing opinion, the demurrers of the defendants to the complaint were sustained. The plaintiff having elected to stand on his complaint, the case was dismissed. Plaintiff appeals. The issues on this appeal are therefore determined by the sufficiency of the allegations of the complaint.

It is assumed by the plaintiff, and also by the prevailing opinion that it is alleged in the complaint that the defendants were making gifts of the capital stock of the Rio Tinto Copper Company to such members of the public as would accept the same. In my opinion, the allegation of the complaint does not justify such conclusion. The complaint merely asserts that the copper company "was desirous of giving some of its shares of stock to such members of the public as would receive it upon the understanding that the Rio Tinto Copper Company, would for the purpose of carrying on development of said property levy one two-cent assessment, and three one-cent assessments, or as many of these as might be necessary to finance the development of its mining property and with the understanding that the persons receiving said stock were not obliged to pay such assessments or any of them." Nowhere is there any allegation of any intention to make a gift, nor is there any allegation from which such intention may be inferred, nor is there any allegation from which it may be inferred that any kind of delivery of the stock would be made prior to the payment of the assessments to be levied. It is inconceivable to assume that the stock certificates would be executed and issued promiscuously to any and every person who might be on plaintiff's mailing list, or to whom a certificate could be sent by the simple process of depositing the same in the mails. The fair inference is that, if stock certificates were issued at all, they were only issued to those particular persons who would accept the same, knowing that they would have to pay as much as five cents per share if they were to keep the stock. Even such an arrangement could in no sense be distorted into a gift, granting a sufficient delivery, as there would still be lacking the necessary intention by the copper company to make a gift.

"A clear and unmistakable intention on the part of the donor to make a gift of his property is an essential requisite of a gift

inter vivos. And this intention must be inconsistent with any other theory." 28 C. J. 627, § 19.

The only word in the complaint which might characterize the transaction as a gift is the word "giving." This word has no fixed and definite meaning, so that the mere use of it would necessarily make a sufficient allegation of the ultimate fact of a gift. While the primary meaning of the word "give" is to bestow a gratuity, yet it also has a secondary meaning, widely and frequently employed in ordinary business and other transactions. In *Smith v. Burnet*, 35 N. J. Eq. 314, at page 324, the court says: "The question arises whether it appears that such possession was delivered with an intention to confer upon him dominion over the stock as the absolute owner thereof. Proof of such an intent is absolutely essential to support the gift. * * * The word 'give' is often used with other meaning than as evincing an intent to confer the title in the thing delivered."

In *Johnston v. Griest*, 85 Ind. 503, the plaintiff sued upon a writing which read: "This will certify that I do give to Charles E. Johnston \$100, the money to be paid as soon as my financial condition will allow; and if I do not live to pay it, I wish it paid out of my estate." This was held to be a promise to make a gift and not a promise to pay. The court said: "The word 'give' does not always signify a mere gratuitous act; at all events it is not one of those words which have a fixed and unalterable meaning." *Galloway v. Jenkins*, 63 N. C. 147; *Spencer v. Potter's Estate*, 85 Vt. 1, 80 A. 821. In *Revere Oil Co. v. Bank of Chillicothe* (Tex. Civ. App.) 255 S. W. 219, and in *Southern Express Co. v. State*, 1 Ga. App. 700, 58 S. E. 67, the words "giving" and "give" were construed to be synonymous with "delivering" and "deliver" respectively.

In *Crews v. Crews* (Mo. Sup.) 240 S. W. 149, 151, it was contended that the word "give" in a will permitting the executrix to "give such of my children at such time as she may think proper such of my property as she may think just and right," necessarily implies a gratuity. The court said: "Such, however, is not the case. Even if the word 'give' does generally mean a gift or gratuity, it depends entirely upon the circumstances and the context as to whether that meaning should be attached to it. The word is used to mean 'deliver,' 'supply,' 'grant,' 'furnish,' 'pay,'

'convey.' * * * We have been unable to find any case where it is held that the term necessarily implies a gratuity or a gift without consideration. On the other hand, there are cases where it is held that it does not necessarily imply want of consideration. * * * The word must be considered in the light of circumstances."

As a further aid to the proper construction of the complaint, the provisions of our Constitution and statutes relative to the issuance of corporate stock should be considered. Article 12, § 5, of our Constitution provides: "Corporations shall not issue stock, except to bona fide subscribers thereof or their assignee. * * * All fictitious increase of stock or indebtedness shall be void." The clear purpose of this provision is to prevent the issuance of "watered stock" and to assure that no corporate stock will be issued without receiving something of value therefor. The import of plaintiff's complaint and his contentions before this court are that the persons receiving the copper company's stock were in no sense subscribers thereto. Indeed, a donee of stock from the corporation could not be a bona fide subscriber therefor. In the case of *Frame v. Mahoney*, 21 Ariz. 282, 187 P. 584, 586, the Arizona Supreme Court construed a provision of the Arizona Constitution identical with ours. It said: "A bona fide subscriber is one who actually turns over to the corporation something of value in lieu of the stock issued to him."

In a later case, *Overlock v. Jerome-Portland Copper Min. Co.*, 29 Ariz. 560, 243 P. 400, 401, the same court, after quoting the same constitutional provision, says: "A proper construction of the language quoted doubtless would be that the stock in the hands of Frame should be annulled, since he paid nothing for it and was not a bona fide subscriber. * * * The evident purpose of the clause, which says, 'No corporation shall issue stock, except to bona fide subscribers therefor or their assignees,' was to prevent the issuance of stock except to parties who paid for it at its face value, and was intended more for the protection of creditors of the corporation than otherwise. This same provision is found in the Constitutions of Washington and Utah, and if we rightly understand their courts, that is their view. *Gordon v. Cummings*, 78 Wash. 515, 139 P. 489; *Rolapp v. Ogden, etc., R. Co.*, 37 Utah, 540, 110 P. 364."

The Constitution of the state of Washington also contains a provision identical with our provision above quoted. In the case of *Gordon v. Cummings*, 78 Wash., 515, 139 P. 489, 494, the court of that state held that the "holders of unpaid stock cannot defeat an action for the balance due by claiming that they hold such stock as a mere gratuity." The court further says:

"Indeed, it seems to us that the framers of the Constitution of this state anticipated, and intended to prevent, just such frauds on the law as was here attempted. 'Corporations shall not issue stock, except to bona fide subscribers therefor, or their assignees.' Article 12, § 6. If this means anything, it is that one who takes the stock of a corporation is liable for its value and that a subscription that is not made in good faith is no subscription. * * *

"Within the limit of the authorized capital stock, no person can hold a share of the stock, by whatever name it may be called, without meeting the responsibilities and the liabilities that the law attaches to such holding. To hold otherwise would defeat the very purpose of the law; for it would then be possible, by adopting the very plan that was adopted in this case, to make all but a nominal number of the shares of the capital stock unresponsive to the liability put upon it by law."

This court in the case of *Rolapp v. Ogden & N. W. R. Co.*, 37 Utah, 540, 110 P. 364, has indicated a construction of our constitutional provision and the statutes of the state in harmony with the foregoing principles. After quoting said provision and referring to those sections of our statutes which are now sections 18-2-6, 18-2-7, and 18-2-13, Rev. St. Utah 1933, Mr. Justice Frick says: "If we keep in mind all of our own constitutional and statutory provisions, we think it is manifest that it was the intention both of the people who adopted the Constitution and the Legislature who passed the foregoing sections that the capital stock of corporations excepting those created for mining and irrigation, shall represent full actual value either in money or property, and further, that the subscribers for stock shall pay 100 cents on the dollar, or its equivalent, for the stock subscribed for by them, and until so paid that they are liable to creditors of the corporation in a proper proceeding for any balance remaining unpaid on their subscriptions. No doubt

when stock is once 'full paid,' whether in money, property, or labor, it may be bought and sold at any price, but commercial business corporations in this state may not issue stock to their subscribers for less than the face value thereof, which must be paid for, either in money or property."

Fletcher, in *Cyclopedia of Corporations*, vol. 11, § 5202, says: "For a corporation to issue its stock as a gratuity violates the rights of existing stockholders who do not consent, and is a fraud upon subsequent subscribers, and upon subsequent creditors who deal with it on the faith of its capital stock."

It is clear that the issuance and delivery of its corporate stock by a corporation gratuitously and without any consideration violates the constitutional and statutory provisions of this state. Under plaintiff's theory, all of the copper company's capital stock could have been given away, development work done, and debts incurred with no one liable or responsible for the obligations thus incurred. Such a proceeding would be, in my opinion, directly contrary to the law of this state. It is not necessary for us to determine, in this case, however, what the legal effect of such violation would be as between the holders of stock and others. It is sufficient to note that plaintiff's theory is based entirely upon such a violation on the part of the copper company, and he is asking us to give his complaint that effect. It is elementary that an agreement will not be construed as involving the performance of something forbidden by law when it is open to a construction that does not involve such violation. As I have already stated, the complaint here in question does not allege a gift by appropriate and sufficient allegations as to either of the essential elements of intention or delivery, and it is not within our province to make any inferences that would lead to a result which the law prohibits. We must assume, therefore, that the defendants were disposing, or attempting to dispose, of the stock of the copper company for value. Consequently, it is my opinion that the word "giving" must be construed, not as indicating a gratuity, but as synonymous with "delivering."

In view of the foregoing conclusions, it becomes necessary to consider the word "assessment" as used in the complaint. The transactions involved in the complaint occurred in 1931 and 1932, before the enactment of the Revised Statutes of 1933. The

plaintiff and the prevailing opinion assume that this word, as used in the complaint, necessarily refers to assessments levied on full paid stock. However, that is not the case. The provisions of sections 900, 901, 902, and 905, Comp. Laws Utah 1917, as amended in the 1921 Session Laws, c. 22 p. 71, and sections 903, 904, and 919, Comp. Laws Utah 1917, were then in effect. The word "assessment" is there used to denote a "call" upon subscribed and unpaid stock as well as an assessment on full paid stock, and the same procedure is provided for the collection of both kinds of "assessments." In either case the stock may be sold to pay the assessment. Stock thus sold passes to the purchaser or the corporation, as the case may be. As to an "assessment" on unpaid stock, at least, under section 919, the company can waive the sale and sue to collect the delinquent "assessment." The corporation has the option to sell the stock or proceed by suit to collect on the promise to pay. Having such option, it could agree with a subscriber that it would look exclusively to the sale, and no express or implied promise to pay the "assessments" need be made. 14 C. J. 537, § 803. A sale and forfeiture of the stock would preclude any action against the subscriber under such conditions. 14 C. J. 650, § 989. Rev. St. 1933, 18-4-1 et seq., makes the distinction between "calls" and "assessments" and uses the words in their respective meanings. It will also be noted that section 919 is omitted entirely, and that on a sale of stock for a "call" the purchaser becomes liable for the subsequent and unpaid "calls."

Since the word "assessment" has a dual meaning, as indicated and since admittedly no consideration for the stock was to be given at the time plaintiff's customers should indicate their willingness to accept it, or even after it was delivered, if delivered before the assessments were levied, and since no gift of title to the stock can be inferred from the allegations of the complaint, it necessarily follows that the "assessments" contemplated were in effect "calls," which the copper company was authorized to make and which the holders of the stock must pay to obtain and keep title thereto. This conclusion is borne out by an analysis of the complaint. The "assessments" are limited to four in number, and each is for a particular amount. As to creditors, at least, the company could not agree in advance that upon the issue of fully paid but assessable stock it would

or could levy only certain specified assessments. Especially would this be true where such agreement was made with only certain persons who acquired the assessable stock. It is not to be inferred from the complaint that the only persons who acquired the assessable stock of the copper company were those who had this understanding concerning these four assessments. There is nothing in the complaint that would warrant the conclusion that the copper company was disposing of its assessable stock only through the method by which plaintiff operated. It is not shown that his assistance or employment was exclusive and that the assessable stock was not to be disposed of by other means. In my opinion, however, it must be inferred that the four stipulated assessments were to be levied only on the stock issued or to be issued according to said understanding under which plaintiff operated. The only legitimate construction that can be placed upon the arrangement thus pleaded, therefore, is that upon the payment of these "assessments" or "calls" the stock would be deemed fully paid for.

From what has been said it is clear that the disposition of the copper company's stock, as alleged, would be a sale for value within the definition of that term as stated in chapter 89, Laws of Utah 1925, as amended by chapter 79, Laws of Utah 1929, commonly called the Blue Sky Law. Certainly such disposition was an attempt to dispose of a security for value. It may be conceded that a gift of stock does not come within the purview of the Blue Sky Law. But, as herein shown, to call the arrangement described in the complaint a bestowing of gratuitous issues of stock, is begging the question and fails to distinguish between form and substance. If this court gives legal sanction to such a plain and palpable attempt to evade the intent and purpose of our constitutional and statutory provisions, then indeed will the doors be wide open to every one who may resort to the specious expedient of making "gifts" of stock. The law would be nullified; the legislative regulations intended to protect the public would be inoperative; and additional impetus would be given to the ever present tendency to invent means to circumvent such regulations.

It must be conceded that the stock here involved is not exempt from the provisions of the Blue Sky Law. Before it could be sold, as defined by the law, it must have been registered with the State

Securities Commission. There are no allegations in the complaint showing that the stock disposed of was so registered.

It does not appear from the complaint that the plaintiff was a dealer as defined by chapter 79, Laws of Utah 1929. But it is alleged that plaintiff was to "assist the said Rio Tinto Copper Company in placing its treasury stock with his clients residing outside of Utah" upon the basis heretofore explained; that, as a result of plaintiff's efforts, approximately 145,000 shares of stock were accepted by his customers. Under such allegations he would come clearly within the definition of "agent"; it being established that the transactions thus involved constituted "sales" within the statutory definition. Under section 10x, c. 79, Laws Utah 1929, "no person shall engage in business in this State as such agent to sell any securities of an issuer as set forth in this Act unless he has paid a fee of five dollars (\$5.00) and has been registered as an agent in the office of the commission pursuant to the provisions of this chapter. Every agent before selling, offering to sell or advertising the sale of any security of an issuer under the provisions of this Act shall file in the office of the commission an application for registration in writing," etc. Section 27 of chapter 87, Laws of Utah 1925, makes it a felony for an unregistered dealer, salesman, or agent to sell, or offer for sale, or negotiate for the sale of, unregistered securities.

Plaintiff is suing for the compensation he claims he earned in assisting in the disposition of the copper company's stock. He does not allege that he was registered as required by the provisions above quoted. In my opinion, having failed to allege that the stock which plaintiff assisted in disposing of was not registered, and having failed to allege that he himself was registered, plaintiff has failed to state a cause of action.

The Blue Sky Law was enacted for the protection of the public. It specifically provides that corporate securities must be registered before being sold or offered for sale, and every dealer, salesman, or agent must be registered before selling or offering to sell such securities. Selling unregistered securities by an unregistered person is made a felony. Even though the statute does not expressly so provide, it must follow that any contract which plaintiff may have had with defendants made in violation of such provisions is utterly

void. *Neil v. Utah Wholesale Grocery Co.*, 61 Utah, 22, 210 P. 201; *Levinson v. Boas*, 150 Cal. 185, 88 P. 825, 12 L. R. A. (N. S.) 575, 11 Ann. Cas. 661; *Payne v. De Vaughn*, 77 Cal. App. 399, 246 P. 1069; *McKinlay v. Javan Mines Co.*, 42 Idaho, 770, 248 P. 473; *McManus v. Fulton*, 85 Mont. 170, 278 P. 126, 130, 67 A. L. R. 690; *Zerr v. Lawlor* (Tex. Civ. App.) 300 S. W. 112; *Brandenburg v. Miley Petroleum Exploration Co.* (D. C.) 16 F. (2d) 933. To permit plaintiff to recover in this case would be to give legal sanction to, and enforce, an illegal contract. This the courts will not do. They will not aid either party to such a contract. Though it may be said that it illy becomes a defendant to take advantage of such illegality, yet such defense is allowed, and the courts, even sua sponte, will take cognizance thereof, not for the benefit of either party, but for the public good and for the maintenance of their own dignity and the laws of the state. As stated by the Supreme Court of the United States in the case of *McMullen v. Hoffman*, 174 U. S. 639, 19 S. Ct. 839, 851, 43 L. Ed. 1117: "To refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly towards reducing the number of such transactions to a minimum. The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined will they be to enter into them. In that way the public secures the benefit of a rigid adherence to the law."

Because section 18, c. 79, p. 140, Laws of Utah 1929, amends the original act and makes a sale in violation of the act voidable at the election of the purchaser, can be of no assistance to plaintiff in this case. His rights do not depend upon whether the purchaser may or may not make such election. As stated in *McManus v. Fulton*, supra: "The provisions that the sale shall be void at the election of the purchaser does not in any wise detract from the criminal character of the prohibited act on part of the seller. * * * Under the law a contract between the seller and the purchaser was voidable at the option of the purchaser; but that has no relation whatever to a contract between the issuer and the agent, solicitor, or broker, or between the agents of the issuer; such, in the ab

sence of a compliance with the Act, is wholly void."

Plaintiff seeks to avoid the effect of the foregoing principles by arguing that the sales of stock took place outside the state of Utah and were made in interstate commerce, and therefore were not subject to our Blue Sky Law. As to the first contention, it is utterly impossible to conclude from the allegations of the complaint that the sales were actually made outside the state of Utah. All that appears is that plaintiff's customers resided outside this state and that his correspondence went beyond its boundaries. Plaintiff simply advised his customers and assisted in the sales. The inference is that, after being advised by plaintiff to accept the stock, his correspondents made some kind of communication with the copper company, indicating a desire to accept a certain amount of its stock. The company's office was here. *It would here determine whether to accept such application, so that the last act necessary to complete the contract would necessarily occur here.* This would make it a Utah contract. *United States Bond & Finance Corporation v. National Bldg. & Loan Ass'n*, 80 Utah, 62, 12 P. (2d) 758, 17 P. (2d) 238.

Such a transaction would not necessarily be one in interstate commerce. Plaintiff's solicitations and advisory letters formed no part of the sale contract. They were simply the procuring cause which induced the making of the contract and the consequent sale. For plaintiff to avoid the effect of the laws of this state under the theory that what he did and what was done between his customers and the copper company involved interstate commerce, it was his duty to allege sufficient facts to bring himself within the principles thus sought to be invoked. There are no such allegations in the complaint now before us, even assuming that corporate stock is an article subject to interstate commerce, a question not herein decided. There are no allegations as to when or where delivery of the stock was made or that the sales necessarily involved the use of interstate commerce to complete the same. It is therefore not necessary to discuss further this phase of the case. It is my opinion that the trial court committed no error in sustaining defendants' demurrer to plaintiff's complaint and in dismissing such complaint upon plaintiff's failure to further plead. The judgment of the trial court, therefore, should be sustained.

Addendum.

ELIAS HANSEN, Chief Justice.

The view is expressed in the dissenting opinion of Mr. Justice Ephraim Hanson that the complaint is fatally defective in that it affirmatively appears that the alleged transaction relied upon by plaintiff for recovery contravenes the provisions of article 12, § 5, of the Constitution of Utah, and certain statutory provisions calculated to give effect to such constitutional provisions. The argument is made that the Rio Tinto Copper Company was, as a matter of law, precluded from giving away any of its treasury stock. That such is the law generally may readily be conceded. It is, however, an easy matter to conceive of exceptions to the general rule. An illustration will serve to make clear what we have in mind. Thus, if owners of mining property desire to create a corporation for the purpose of developing their property, and, instead of having issued to themselves shares of capital stock of the corporation in payment for mining claims conveyed to the corporation, they conclude, and so provide in the articles of incorporation, that some of the stocks shall be held by the corporation and later given away as directed by the incorporators, such an arrangement may not be said to offend against the provisions of the Constitution or the laws referred to in the dissenting opinion. In such case neither the corporation nor the creditors thereof would have any just cause to complain because the stock was transferred to the donees rather than to the incorporators. Plaintiff, in the absence of a showing to the contrary, had a right to assume that the defendant Rio Tinto Copper Company had authority to perform its alleged contract. The complaint here brought in question is silent as to what was or what was not contained in the articles of incorporation of the defendant Rio Tinto Copper Company at the time complained of. Courts do not take judicial notice of such matters. If the defendants, or either of them, desire to interpose the defense that the defendant Rio Tinto Copper Company was without authority to enter into the alleged contract here sued upon, they may do so by answer. The complaint does not affirmatively show that such a defense is available to defendants.

Moreover, this action was brought against the personal defendants Ogden C. Chase and S. F. Hunt as well as the corporation

defendants. It is alleged in the complaint that the contract sued upon was made with the Rio Tinto Copper Company, Ogden C. Chase, and S. F. Hunt. The mere fact that the defendant Rio Tinto Copper Company may be precluded from giving away its stock would not preclude plaintiff from recovering, from the personal defendants, compensation for services lawfully rendered pursuant to the contract of employment. Even though the defense of ultra vires is available to the defendant company, it is difficult to perceive how such a defense is available to the individual defendants. The contract declared on is for services alleged to have been rendered and not for the enforcement of a promise to make a gift. No provision of law would be broken and no public policy would be infringed by the individual defendants paying plaintiff for lawful services. If, therefore, the purposes sought to be accomplished by the contract of employment were lawful, the individual defendants would not be relieved from liability merely because the defendant company may have exceeded its authority in entering into the alleged contract. In this connection it may be noted that the defendants do not attack the complaint either by their demurrer or in their briefs upon the ground that the complaint shows on its face that the defendant Rio Tinto Copper Company exceeded its authority in entering into the alleged contract of employment.

The position is also taken in the dissenting opinion that the allegations in the complaint do not affirmatively show that no consideration was to be paid for the stock other than, and in addition to, the allegations with respect to the levy of future assessments. Apparently counsel for the respondents do not so construe the allegations of the complaint. The cause was argued on the theory that the transaction set out in the complaint constituted a gift unless the allegations with respect to the understanding as to future assessments made it otherwise. Counsel for the parties having so construed the complaint and having based their argument on such construction, we should dispose of the question presented for review upon such theory, unless the language of the complaint demands a different construction. Moreover, plaintiff was not required to negative the possibility that the contract sued upon is

beyond any attack that may be urged against it upon the ground that it is illegal. Where a contract is shown to have been entered into, it will be presumed to be binding upon the parties unless it affirmatively appears otherwise.

"Where the language of an instrument in writing or the facts of a transaction are of a character to leave in some doubt what the party thereto intended should be the precise nature of the legal effect thereof, the contract is not to be so construed as to render it invalid if it is reasonably susceptible of construction that will render it valid. If reasonably possible the contract will be so construed as to make it lawful. It will not be presumed that the parties intended to violate the law." 2 Elliott on Contracts, p. 796, § 1520.

So, also, the general rule is that: "The law does not presume that parties to a contract intend by it to accomplish an illegal object, but it rather presumes that they intend to accomplish a legal purpose."

The complaint does not show upon its face that the transfer of the stock to the transferees was a sale within the meaning of the act.



LOWE v. INDUSTRIAL COMMISSION et al.
No. 5645.

Supreme Court of Utah.
Oct. 7, 1935.

1. Master and servant ☞398

Employee's failure to file application for compensation with Industrial Commission within one year from date of accident and injury *held* to bar his claim for compensation unless failure was otherwise excused (Rev. St. 1933, 42-1-1 et seq.; 104-2-26).¹

2. Master and servant ☞417(7)

Findings of Industrial Commission based upon conflicting evidence that employer was not estopped to rely upon employee's failure to file application for compensation within period of limitation, and that employee had not been mentally incompetent during year following accident and injury, so as to excuse failure, *held* binding upon the Supreme Court.

☞For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

¹Rodrigues v. Industrial Commission (Utah) 43 P.(2d) 189.