

# Sales in Bulk

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Bulk Sales regulation, after getting off to a rocky start in Ohio,<sup>1</sup> settled down some years ago<sup>2</sup> and, except for a change in 1945 when the General Assembly made certain that local and state taxes were to be protected,<sup>3</sup> has not been the subject of much comment, judicial or otherwise,<sup>4</sup> until the advent of the proposed Uniform Commercial Code.

Whether this quiet on the judicial front is due to the perfect understanding on the part of the members of the bar of the existing Ohio law or whether it is because of our times of plenty cannot be determined by statistics. It is a good hunch that the latter rather than the former accounts for the lack of litigation under the present Ohio act. While many of the ambiguities of the present law have been worked out, many yet remain. It is not, however, the present purpose to examine the unsolved questions under the existing law. Rather, the present purpose is to compare sections 1313.53 to 1313.55 of the Ohio Revised Code as judicially interpreted in Ohio with their counterpart in the Uniform Commercial Code, viz. "Article 6—Bulk Transfers."

At common law it was not a fraud on creditors for a merchant to sell all of his stock out of the ordinary course of trade and pocket the money.<sup>5</sup> If the sale were made for less than the goods were worth and fraud was involved, the transfer was in fraud of creditors and would be set aside.<sup>6</sup> The Bulk Sales Laws were enacted, and Article 6 is designed, to cover the former and to leave

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<sup>1</sup> The Bulk Sales Act of April 4, 1902 (95 OHIO LAWS 96) was declared unconstitutional in *Miller v. Crawford*, 70 Ohio St. 207 (1904); the Bulk Sales Act of April 30, 1908 (99 OHIO LAWS 241) was declared unconstitutional in *The Williams and Thomas Company v. Preslo*, 84 Ohio St. 328 (1911).

<sup>2</sup> The act of April 18, 1913 (103 OHIO LAWS 462) was held constitutional in *The Steele, Hopkins and Meredith Co. v. Miller*, 92 Ohio St. 115 (1915). It took an amendment in the form of Section 2, Article XIII to the Ohio Constitution to bring the Supreme Court to this view. That Act is now our present Bulk Sales Law and is found in Sections 1313.53, 1313.54 and 1313.55 of the Ohio Revised Code (Formerly Sections 11102, 11103 and 11103-1 of the Ohio General Code).

<sup>3</sup> Amendment. OHIO GENERAL CODE § 11102, now OHIO REV. CODE § 1313.54 (121 OHIO LAWS 139).

<sup>4</sup> There has apparently been only one reported case dealing with the Ohio Bulk Sales Act since 1934 and that one case was in 1944.

<sup>5</sup> *Rodgers, Smith and Company v. Kinsey*, 8 Oh. Dec. Rep. 308 (1832).

<sup>6</sup> Sections 1313.56 (11104) to 1313.59 (11109) of the Ohio Revised Code deal with such fraudulent conveyances.

the latter situation alone.<sup>7</sup>

Under existing Ohio law "The sale, transfer or assignment, in bulk, of any part or the whole of a stock of merchandise, or merchandise and the fixtures pertaining to the conducting of said business, or the sale, transfer or assignment in bulk of the fixtures otherwise than in the ordinary course of trade and in the regular and usual prosecution of the business of the seller, . . ." is a bulk sale.<sup>8</sup>

Section 6-102 of the Uniform Commercial Code states that a bulk transfer "... is any transfer in bulk and not in the ordinary course of the transferor's business of a major part of the materials, supplies, merchandise or other inventory (Section 9-109) of an enterprise subject to this Article, or of so much thereof that what remains, together with the transferor's other assets exclusive of the consideration received for the transfer, is inadequate to enable the transferor to meet his debts as they mature."

Basically the definitions are alike. The Ohio Act, however, is likely to cover more situations where the whole of the merchandise is not sold. It states that it covers the transfer of "any part" of a stock of merchandise. The definition in Article 6 covers the transfer of less than the major part of the stock only when the stock that remains together with the seller's other assets will not enable him to meet his maturing debts. This could be a significant change.<sup>9</sup>

The major change in the definition of bulk transfer involves the taking of security, such as a chattel mortgage, for a pre-existing debt on merchandise and fixtures which are subject to the act. While it was arguable that the Ohio act applied to such a situation since it uses the word "transfer," nevertheless it has been judicially determined that the Ohio Bulk Sales Act does not apply to such a transfer. *Winters National Bank and Trust Co. v. Midland Acceptance Corporation*, 47 Ohio App. 324, 191 N.E. 889 (1934).<sup>10</sup> Sec-

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<sup>7</sup> In *United States Promotion Co. v. Anderson*, 100 Ohio St. 58 (1919), the court made it clear that the Bulk Sales Act contained in these sections, 11102, 11103 and 11103-1 of the Ohio General Code, is an entirely different law and covers a different situation than those covered by the Sections 11104 *et seq.* of the Ohio General Code. OHIO REV. CODE §§ 1313.56 to 1313.59 *supra*, note 6.

<sup>8</sup> OHIO REV. CODE § 1313.54.

<sup>9</sup> Though not directly in point, it is significant that in *Block v. New Era Cafe, Inc.*, 1 Ohio Supp. 93, 7 Ohio Op. 507, 23 Ohio L. Abs. (1932), the court held what was apparently an insignificant part of the seller's business to be subject to the act. The court held that restaurant fixtures were not in any way subject to the act but stated that the cigar, cigarette and candy merchandise and fixtures pertaining thereto were subject to the act. Of course, in one way of looking at the court's ruling, it was the "whole" of the merchandise subject to the act that was involved in the sale.

<sup>10</sup> Note, 1 OHIO ST. L.J. 289 (1935).

tions 6-106 (2), 6-103 (1), 6-105 of the proposed Commercial Code make it abundantly clear that the new code would include such a transfer within its coverage of bulk transfers.

Neither the Ohio law, if the reasoning of the case just cited is followed, nor the Commercial Code by specific provision,<sup>11</sup> applies to a mortgage or other security taken on articles which are otherwise covered if new value is given for the security interest. But both present and proposed laws cover situations in which a person to whom a pre-existing debt is owed actually takes the stock of merchandise in payment, part or whole, of the debt.<sup>12</sup>

In yet another respect the Ohio act, which specifically states that it applies to transfer "in bulk of the fixtures," as judicially interpreted, and the proposed law, are alike. Neither applies to bulk transfers of fixtures only.<sup>13</sup> The Commercial Code clearly applies to manufacturers who sell their merchandise from stock.<sup>14</sup> There are no Ohio cases on this point although it would seem that the Ohio act could well apply to such a situation. Again, the proposed law applies to auction sales<sup>15</sup> and again there are no Ohio decisions.

#### EXEMPT SALES

In addition to exemptions arising by way of definition or explanation of the term "bulk transfer," both present and proposed laws specifically exempt some sales that otherwise would be within the broad definitional coverage. Both exempt sales by executors, administrators, receivers, trustees in bankruptcy or by any public officer under judicial process.<sup>16</sup> Ohio also exempts sales by guardians;<sup>17</sup> the Uniform Commercial Code does not.

The Commercial Code in Section 6-103 also exempts six other classes of sales, none of which are mentioned in the Ohio Act. These are general assignments for the benefit of all the creditors of the transferors;<sup>18</sup> sales in foreclosure of a lien or other security inter-

<sup>11</sup> Sec. 6-103 (1).

<sup>12</sup> Ohio Law: Commercial and Savings Bank Co. v. B. F. Goodrich Rubber Co., 124 Ohio St. 369, 178 N. E. 838 (1931), Noted, 6 CLEVELAND BAR JOURNAL, No. 7, p. 11; Commercial Code, Sec. 6-102.

<sup>13</sup> Ohio Law: Oberlin v. Herokopas, 44 Ohio App. 111, 184 N. E. 257 (1932) (hotel); Block v. New Era Cafe, Inc., 7 Ohio Op. 507, 23 Ohio L. Abs. 131 (1932) — (restaurant), appeal denied as not filed in time, Fountain Square Bldg., Inc. v. New Era Cafe, Inc., 45 Ohio App. 479, 187 N. E. 364 (1933); *Contra* Schaine v. Schaeffer, 15 Ohio N. P. (N. S.) 599. (1914) (restaurant, point not discussed). Commercial Code: Sec. 6-102 (3).

<sup>14</sup> Sec. 6-102 (4).

<sup>15</sup> Sec. 6-108.

<sup>16</sup> Ohio Law: OHIO REV. CODE § 1313.53. Commercial Code, Sec. 6-103 (4).

<sup>17</sup> OHIO REV. CODE § 1313.53.

<sup>18</sup> See Harper and Kirschter Shoe Co. v. The S. & B. Shoe Co., 16 Ohio App. 387 (1922).

est; sales made in the course of proceedings for the dissolution of a corporation and of which the creditors of the corporation receive advance notice substantially equivalent to the notice provided in Article 6; transfers to a person maintaining a known place of business in this State who becomes bound to pay the debts of the transferor in full and gives public notice of that fact and who is solvent after becoming so bound; a transfer to a new business, if public notice of the transaction is given and the new enterprise assumes the debts of the transferor and he receives nothing from the transaction except an interest in the new enterprise junior to the claims of creditors; and transfers of property which is exempt from execution.<sup>19</sup> All these exemptions from the operation of a bulk sales law seem sound. For the most part they permit people to effectuate bulk transfers without going through the detailed requirements in situations where creditors are pretty obviously protected or where they couldn't reach the assets anyway.

#### THE LIST AND SCHEDULE

It is in the requirements of what a purchaser at a bulk sale must do that the proposed law becomes more rigorous than the existing Ohio law. Section 1313.54 of the Ohio Act requires that the transferee obtain from the transferor a written list of names and addresses of the creditors of the seller with the amount of indebtedness due or owing to such creditors and certified by the seller under oath to be a full, accurate and complete list of his creditors and of his indebtedness. Section 6-104 of the Commercial Code is similar. It makes it clear that claims ought to be listed even though disputed. But then the Commercial Code goes on in the same section to require that the parties prepare a schedule of the property to be transferred and requires the transferor to hold both the list and schedule for six months after the transfer and permit inspection and copying of both. Under the Commercial Code responsibility, in the absence of actual knowledge on the part of the transferee, for the accuracy of the list rests upon the seller. This is the result judicially reached in Ohio.<sup>20</sup>

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<sup>19</sup> *Grossman v. Endicott-Johnson Corporation*, 15 Ohio L. Abs. 51 (1931), held that property exempt from execution was not subject to the bulk sales act of Ohio. An earlier case had held under one of the acts declared unconstitutional by the Supreme Court of Ohio that the act applied to property sold even though it would have been exempt from execution by the seller's creditors. *The Canton Electric Company v. Gurlinger et al.*, 18 Ohio C. C. (N. S.) 112 (1910). There was no attempt in this latter case to have the goods set off as exempt as there was in the case first cited. There is nothing in the two acts, unconstitutional and constitutional, to justify the difference.

<sup>20</sup> See *The Mollen, Thompson and James Company v. Klein*, 19 Ohio N.P. (N.S.) 415 (1917). If the seller says there are no creditors, the purchaser must secure a written affidavit to that effect to be protected under the case cited.

### THE NOTICE

Section 1313.54 of Ohio Revised Code provides that five days before taking possession of the goods or paying therefor the purchaser must notify personally or by registered mail every creditor whose name and address appears in said list or of which he has knowledge of the proposed sale and of the price, terms, and conditions thereof. The proposed act in Section 6-105 makes the time ten days and the event the time the goods are moved, the transferor takes possession, or the interest of the transferor passes to the transferee whichever happens first. By the terms of Section 6-107, the transferor must give notice of the names and business addresses of buyer and seller and other business names and addresses used by the seller during the previous three years to the extent known to the buyer and whether the debts of the seller are to be paid by the buyer and, if so, where the creditors are to send their bills. If the buyer is not to assume the debts, then the notice must also contain the location and general description of the property to be transferred; an estimated total of the transferor's debts; the address where the list and schedule may be inspected; whether the transaction is to secure or pay existing debts and if so the amount thereof and to whom the debts are owed; and whether the transaction is for new consideration and if so the amount thereof and the time and place of payments. The same people are to be notified as are required to be notified under the present Ohio Act and in the same manner.

If the transfer is one to secure a pre-existing debt, the new act does not require notice at any particular time but merely provides that the transfer is ineffective until the notice as required is given.<sup>21</sup> Section 6-105 (2) further provides that notice with respect to auction sales is to be given as required by Section 6-108 and not in accordance with Section 6-107.

### CREDITORS AND THEIR REMEDIES

The Commercial Code, like the present Ohio law, would apply to all existing creditors whether merchandise creditors or otherwise.<sup>22</sup> Moreover both exclude subsequent creditors.<sup>23</sup> But the Commercial Code will, if enacted in its present form, apply to creditors having unliquidated claims as well as those with fixed claims.<sup>24</sup> The

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<sup>21</sup> Sec. 6-105 (1).

<sup>22</sup> Ohio Law: *Reed v. Walker*, 4 Ohio L. Abs. 734 (1926) affirming decision but reversing holding on this point of same case in the Court of Common Pleas of Montgomery County, *Reed v. Walker*, 4 Ohio L. Abs. 458 (1926); *Romeo and Co., Inc. v. Nassif*, 7 Ohio App. 382 (1917). Comm. Code: Sec. 6-104 and 6-105 state that transfer in violation of the act is ineffective against any creditor.

<sup>23</sup> Ohio Law: *The Mollen, Thompson and James Comany v. Klein*, *supra*, note 20; Sec. 6-109.

Ohio statute has not been interpreted on this point and the cases nation-wide are not in accord.<sup>25</sup>

The Ohio Act was amended in 1945<sup>26</sup> to provide that a bulk sale otherwise covered by the Ohio Act was subject under the provisions of the act to taxes of the transferor unless a certificate is obtained from the county treasurer that all taxes have been paid. The amendment was probably made on the theory that tax officials are not creditors. The proposed Commercial Code contains no similar provision with respect to taxes. It states that the transfers in violation of its terms are ineffective as to any creditor<sup>27</sup> but does not specifically define "creditor" to include government officials.<sup>28</sup> It does state that all claims must be listed<sup>29</sup> which might be some indication that taxes are to be listed, except that here again it is claims of "persons" and "person" again does not specifically include government officials.<sup>30</sup>

The most radical change that would be effected if the Uniform Commercial Code Bulk Transfer provisions were to be enacted into law is in the area of creditors' remedies. Under existing Ohio law creditors of the transferor cannot levy on the property which was transferred. They are confined to the remedy of applying for the appointment of a receiver of the property transferred.<sup>31</sup> Nor, is it sufficient to give the purchaser notice that he will be held as trustee.<sup>32</sup> The proposed Commercial Code does not provide for the appointment of a receiver but relies on making the transfers ineffective as to creditors and thus allowing creditors to execute against the property transferred or under other provisions of local law request the appointment of a receiver.<sup>33</sup> Whether only the creditors who applied for a receiver or intervene in the proceeding within the statutory period would benefit by such a receivership as is now the Ohio law insofar as bulk transfers are concerned is extremely doubtful.<sup>34</sup> Under a general receivership it would seem all creditors would be protected. Of course, if a creditor succeeded in levying execution upon the transferred property before it was exhausted,

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<sup>25</sup> 84 A. L.R. 1406; 102 A. L. R. 65.

<sup>26</sup> 121 OHIO LAWS 139.

<sup>27</sup> Sec. 6-104 and 6-105.

<sup>28</sup> Sec. 1-201 (12).

<sup>29</sup> Sec. 6-104 (2).

<sup>30</sup> Sec. 1-201 (30).

<sup>31</sup> *Fayes v. Kieffer, Constable*, 14 Ohio App. 92 (1921); *Ford v. Anderson*, 28 Ohio App. 387, 162 N.E. 708 (1927). Ohio is not in accord with the weight of authority which apparently permits execution on transferred property by creditors of the transferor. See 155 A. L. R. 1061.

<sup>32</sup> *The Slifer Parking Co. v. Elcook*, 10 Ohio App. 45 (1917); *Harper and Kirscher Shoe Co. v. The S. & B. Shoe Co. et al.*, *supra*, note 18.

<sup>33</sup> See Comment 2 to Sec. 6-104.

<sup>34</sup> *United States Promotion Co. v. Anderson*, 100 Ohio St. 58 (1919).

he would be able to avoid pro rata sharing with other creditors. Presumably, as under Ohio law, any creditor, whether on the list prepared by the transferor or not, would be entitled to the remedies of the proposed new law if the law is not followed by the parties to the transfer.<sup>35</sup>

Even a greater departure from existing Ohio law in the realm of bulk transfer remedies would be the enactment of Section 6-106. This Section and its related subsections found in 6-107 (2) (e), 6-108 (3) (c) and 6-109 (2) require that, whenever new consideration is given in connection with a bulk transfer, such consideration be retained by the transferee and applied insofar as necessary to pay the debts of the transferor. Similar provisions have been part of bulk transfer laws in a number of states. Nevertheless the compilers of the Uniform Commercial Code were not unanimous in their views concerning the desirability of such a provision. They therefore have suggested that the inclusion of this provision is not necessary to the interest of uniformity. It is left up to each enacting state to determine the desirability of the provisions.

#### MISCELLANEOUS

There are three items which should be mentioned which have not been otherwise classified herein.

First, the statute of limitations of the new law is more than double the present Ohio law. The present Ohio law is ninety days.<sup>36</sup> The Commercial Code proposes six months.<sup>37</sup>

Second, the Commercial Code has special provisions to accommodate auction sales.<sup>38</sup> There is nothing to indicate whether the existing Ohio law applies to auction sales or not. No language specifically exempts them but the application of the existing law to auction sales would be difficult.

Third, Section 6-110 of the new Commercial Code provides that a purchaser for value without knowledge or notice of non-compliance with the law on the part of his seller takes property previously transferred in violation of the law free of such defect.

In conclusion, it is the author's view that Article 6 of the proposed Uniform Commercial Code is an improvement over existing Ohio law. Many transactions are specifically exempted under the proposed law which are either covered by the present Ohio law or else future judicial interpretation will have to read the transaction out of the Ohio Act. These transactions need not be subject to the red tape of bulk transfer regulation. Yet in those transactions which are clearly dangerous to creditors, creditors

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<sup>35</sup> The Mollen, Thompson and James Company v. Klein *supra*, note 20.

<sup>36</sup> OHIO REV. CODE § 1313.55.

<sup>37</sup> Sec. 6-111.

<sup>38</sup> Sec. 6-108.

under the proposed act are better protected than under present Ohio law. They receive more time in which to look after their interest and they obtain knowledge of more things that are important to them. On the other hand the transferee is better protected since the things he must do are detailed and not encompassed in the generality that he give notice "of the proposed sale and of the price, terms and conditions thereof" required by Section 1313.54 of the Ohio Revised Code. In short, the proposed law is the result of experience under many bulk sales acts and as such is more precise and more easily understood than the existing Ohio law enacted many years ago.