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BULK SALES ACT—NONCOMPLIANCE IN GOOD FAITH

A vendor contracted to sell his entire business to the defendant. At the time of the sale the defendant was unaware that the vendor was indebted to the plaintiff for part of the assets transferred. Partial payment was made by the defendant without first complying with the Florida Bulk Sales Act.¹ The plaintiff sued the defendant on the debt owed by the vendor, and the trial court entered judgment for the defendant. On appeal, *held*, affirmed: failure to comply strictly with the Florida Bulk Sales Act creates a presumption of fraud which is rebuttable, and, absent any other showing, does not give a general creditor of the seller a right to recover a personal judgment at law against the purchaser. *Wasserburg v. Coastal Aluminum Prod. Constr. Co.*, 167 So.2d 889 (Fla. 2d Dist. 1964).

Bulk sales legislation is a relatively modern development affording creditors statutory remedies. At common law creditors were not granted substantial protection from fraudulent conveyances.² Typically, a debtor would sell his entire retail business and stock of goods in a single stroke, usually at a price far below market. This would be done secretly and quickly, without notice or settlement with creditors who had supplied the goods. By the time the creditors had knowledge of the transfer, the goods were often in the hands of a good faith purchaser for value. Meanwhile, the calculating seller had absconded with the proceeds of the sale, and the unsecured creditors were left with no recourse against the innocent buyer.

This practice became so prevalent during the 1890's that the first president of the National Association of Credit Men dubbed it "a favorite indoor sport."³ The increase in litigation resulting from transfers of one's entire stock in bulk,⁴ coupled with judicial overtures denouncing the practice⁵ and pressures by certain lobbying bodies for protection of

1. FLA. STAT. § 726.04 (1963). Pursuant to this statute a seller of goods in bulk must furnish his purchaser an affidavit listing creditors before demand for the purchase price is made. The buyer must in turn notify the listed creditors of the sale at least five days before completion of the payment, or the sale "shall as to any and all creditors of the vendor, be presumed to be fraudulent."

2. See generally Weintraub & Levin, *Bulk Sales Law and Adequate Protection of Creditors*, 65 HARV. L. REV. 418 (1952).

3. This opinion was stated by J. Harry Tregoe who served as executive manager of the National Association of Credit Men from 1912 to 1927. 29 CREDIT MONTHLY 11, 12 (1927).

4. *E.g.*, Billig, *Bulk Sales Law: A Study in Economic Adjustment*, 77 U. PA. L. REV. 72, 76 (1928). See also Billig, *Article 6—Order Out of Chaos; A Bulk Transfer Emerges*, 1952 WIS. L. REV. 312.

5. *E.g.*, *Carter & Co. v. Richardson & Co.*, 22 Ky. L. Rep. 1204, 60 S.W. 397 (1901); *Manwaring v. O'Brien*, 75 Minn. 542, 78 N.W. 1 (1899); *Beels v. Flynn*, 28 Neb. 575, 44 N.W. 732 (1890); *Escale v. Mark*, 43 Nev. 172, 183 Pac. 387 (1919); *Wright v. Hart*, 182 N.Y. 330, 75 N.E. 404 (1905).

creditors,⁶ spurred legislative initiative in the form of bulk sales statutes. Starting with a penal statute passed by the Louisiana legislature in 1894,⁷ over a dozen states enacted so-called "bulk bills" to protect the hapless creditor by the turn of the century.⁸

Today, virtually all states have statutes commonly known as "bulk sales acts" relating to the transfer or sale in bulk of a stock in trade out of the ordinary course of trade.⁹ The statutes are generally "notice" acts and are sufficiently similar in form to warrant broad generalizations. Their basic purpose is not to prevent a merchant from selling his stock of goods *in toto*,¹⁰ but, rather, to give an unsecured creditor advance notice of any sale of goods by his debtor and the opportunity to protect his interest prior to a sale to a third party.

If the seller complies with the act, the creditor's remedy is provided under the act, namely, to foreclose on the goods *prior* to the transfer.¹¹ But if the seller either fails to comply with the act's provisions, or makes an ineffective attempt to comply, the rights of the seller's creditors vary. Of course, the problem only arises when the seller is either insolvent or unreachable; otherwise, the creditor could proceed directly against his debtor.

If the sale is intentionally fraudulent as defined by a fraudulent conveyance act effective in the jurisdiction, the creditor has certain statutory remedies against the buyer.¹² However, where the transfer

6. The prime moving force at this time was the National Association of Credit Men. See Billig, *Bulk Sales Laws: A Study in Economic Adjustment*, 77 U. PA. L. REV. 72, 81 (1928).

In an address delivered on October 14, 1902, Alexis C. Foster, retiring president of the Denver Association of Credit Men, debased the unscrupulous retail seller:

I do not believe that it is possible to legislate a thief into an honest man, but I do believe that it is possible to frame a law that will place almost insurmountable barriers in the way of that damnable class of pirates who swoop down upon a peaceful and confiding community and levant between two suns. And what is more they take with them a clear title to their ill-gotten gains, leaving behind a broken faith in the honesty of mankind, and sometimes there is also left behind one of those creatures who sleeps in the ecstatic security of always having his fingers crossed—that rare individual, the conceited credit man. BULL. NAT'L A. CREDIT MEN (Nov. 5, 1902) (cited in Billig, *Bulk Sales Law: A Study in Economic Adjustment*, 77 U. PA. L. 72, 75 & n.17 (1925)).

7. Acts of La. 1894, No. 204. However, in 1896, this act was superseded by the La. Bulk Sales Act. Acts of La. 1896, p. 137. This latter act emerged as the landmark bulk sales act in America with both civil and criminal provisions.

8. See Billig, *Bulk Sales Laws: A Study in Economic Adjustment*, 77 U. PA. L. REV. 72 (1928).

9. See Miller, *Bulk Sales Laws: Businesses Included*, 1954 WASH. U.L.Q. 1, 2, n.6.

10. See, e.g., CREDIT MANUAL OF COMMERCIAL LAWS 390 (1957).

11. See, e.g., Billig and Branch, *The Problem of Transfers Under Bulk Sales Laws: A Study of Absolute Transfers and Liquidating Trusts*, 35 MICH. L. REV. 732 (1937).

12. E.g., UNIFORM FRAUDULENT CONVEYANCE ACT §§ 4-8. Section 9 provides for a suit to set aside the transfer, or to levy on the property. A further problem may arise, however, when bankruptcy proceedings are commenced against the seller or buyer within four months of the transfer. MacLachlan, *Application of the Uniform Fraudulent Conveyance Act*, 46 HARV. L. REV. 404 (1933). See also FLA. STAT. § 726.01 (1963) (Florida has not adopted the UNIFORM FRAUDULENT CONVEYANCE ACT).

is for a valid consideration and the buyer acts in good faith the courts have split over the effect of failure to comply with the bulk sales act. Some bulk sales acts, known as the New York type, provide that sales made without compliance with the statutory requirements are absolutely "void"¹³ as to the creditors of the vendor. Others, categorized as the Montana type,¹⁴ declare that such sales are "fraudulent and void." But the largest number of states with bulk sales acts have adopted acts of the Pennsylvania type, which provide that a sale, transfer, or assignment in bulk of any part or the whole of a stock of merchandise and fixtures made outside the ordinary course of trade or business "shall be presumed to be fraudulent and void," as against creditors of the seller.¹⁵

The majority of such "Pennsylvania" type jurisdictions provides that a violation of statutory requirements creates a conclusive presumption of fraud.¹⁶ The act creates a substantive rule of law,¹⁷ which enables a creditor to recover against his debtor's vendee to the extent of the goods transferred, without the necessity of establishing fraud even though the property has already been dissipated, comingled, or otherwise disposed of by the vendee.¹⁸ No evidence of good faith in the vendee is sufficient to overturn this conclusive presumption.¹⁹ In short, the vendee stands in the shoes of the debtor for the amount of the transfer, as if the transfer were never made.

The minority of jurisdictions with statutory presumptions of fraud provides that noncompliance with the bulk sales acts creates a rebuttable presumption.²⁰ By creating only a prima facie presumption of fraud,²¹

13. *E.g.*, COLO. STAT. ANN. ch. 27, § 11 (1935); IOWA CODE ANN. tit. 64, § 702 (1949); LA. REV. STAT. §§ 9:2961-9:2968 (1950); MD. ANN. CODE GEN. LAWS, art. 83, § 98 (1939); N.Y. PERS. PROP. LAW § 44; N.D. REV. CODE 152-02 (1943); OHIO GEN. CODE ANN. § 11102 (1938).

14. *E.g.*, ILL. ANN. STAT. c. 121½, § 78 (1936), as amended by Ill. Laws 1947, p. 1516; MONT. REV. CODES ANN. § 18-201 (1947).

15. *E.g.*, PA. STAT. ANN. tit. 69 § 521 (1931).

16. *Splain v. B. F. Goodrich Rubber Co.*, 53 App. D.C. 300, 290 Fed. 275 (1923); *Shelley v. Byers*, 73 Cal. App. 44, 238 Pac. 177 (1925); *Keedy v. Sterling*, 13 De. Ch. 66, 115 N.H. 359 (1921); *Jaques & Tinsley Co. v. Carstarphen Warehouse Co.*, 131 Ga. 1, 62 S.E. 82 (1908); *Boise Ass'n of Creditmen v. Ellis*, 26 Idaho 438, 144 Pac. 6 (1914); *Kline v. Sims*, 149 Miss. 154, 114 So. 871 (1927); *Pennell v. Robinson*, 164 N.C. 257, 80 S.E. 417 (1913); *Galbraith v. Okla. St. Bank*, 36 Okla. 807, 130 Pac. 541 (1912); *Coach v. Gage*, 70 Ore. 182, 138 Pac. 847 (1914); *Wilson v. Edwards*, 32 Pa. Super. 295 (Super. Ct. 1907); *National City Bank v. Huey & Martin Drug Co.*, 113 S.C. 333, 102 S.E. 516 (1920); *Cantrell v. Ring*, 125 Tenn. 472, 145 S.W. 166 (1912); *Roundy, Peckham & Dexter Co. v. Hetzel*, 198 Wis. 492, 224 N.W. 475 (1929).

17. *E.g.*, *Jaques & Tinsley Co. v. Carstarphen Warehouse Co.*, 131 Ga. 1, 16, 62 S.E. 82, 88, (1908): "This [act] is a declaration of substantive law, and not the enactment of a conclusion rule of evidence for the ascertainment of fraud in such sales."

18. Annot., 41 A.L.R. 1466 (1922).

19. See, *e.g.*, *Galbraith v. Okla. St. Bank*, *supra* note 16.

20. *Ward & McGowan Grocery Co. v. Franklin*, 18 Ala. 619, 93 So. 205 (Ct. App. 1922); *Thorpe v. Pennock Mercantile Co.*, 99 Minn. 22, 108 N.W. 940 (1906); *Wyman, Partridge & Co. v. Tierney*, 42 Wyo. 321, 294 Pac. 781 (1930).

21. See, *e.g.*, *Ward & McGowan Grocery Co. v. Franklin*, 18 Ala. 619, 93 So. 205 (Ct. App. 1922).

the act prescribes a rule of evidence rather than a substantive rule of law. It places upon the transferee buyer the burden of proving that the sale was in good faith, not fraudulent and void,²² nor with the intent to hinder, delay or defraud creditors of the seller.²³ If the transferee can successfully overcome this presumption, the burden then shifts back to the creditor who must prove the transfer was fraudulent. If he fails to prove this fraud, the creditor's only recourse is against his original debtor.²⁴

In the instant case the court followed the reasoning of the minority in holding that the Florida Bulk Sales Act creates a rebuttable presumption of fraud.²⁵ This question was first decided in Florida in *Goldstein v. Maloney*,²⁶ in which the court held that, as to any creditors of the vendor, noncompliance with the statute created a prima facie presumption only, which could be rebutted by due procedure under the law.²⁷ The effect of this presumption is merely to invert the order of proof which must be sustained by the parties prior to recovery, by shifting the burden of proof initially to the defendant.²⁸ To rebut the presumption of fraud in the instant case the defendant introduced evidence showing good faith on his part; the presumption was destroyed and the burden of proof shifted to the plaintiff-creditor.²⁹

The cornerstone of bulk sales legislation has been the desire to prevent merchants from circumventing creditors by selling their stock of goods in bulk.³⁰ It appears inconsistent with this policy of protection of creditors that a buyer can fail to comply with the established statutory regulations and still succeed in destroying the presumption of fraud by introducing evidence showing good faith. To interpret the presumption as rebuttable is nothing more than to restate the common law position

22. *E.g.*, *Johnston Bros. Co. v. Washburn*, 16 Ala. 311, 77 So. 461 (Ct. App. 1917).

23. *E.g.*, *Terry v. McCall Co.*, 203 Ala. 141, 82 So. 171 (1919).

24. For the results of the constitutional attacks on this type statute, see Annot., *Constitutionality of Statutes or Ordinances Making One Fact Presumptive or Prima Facie Evidence of Another*, 51 A.L.R. 1139 (1927).

25. *Wasserburg v. Coastal Aluminum Prod. Constr. Co.*, 167 So.2d 889, 891 (Fla. 2d Dist. 1964).

26. 62 Fla. 198, 57 So. 342 (1911) [interpreting FLA. STAT. ch. 5679 (1907), now FLA. STAT. ch. 726 (1963)].

27. *Id.* at 200, 57 So. at 344.

28. See *Greyhound Corp. v. Ford*, 157 So.2d 427, 430 (Fla. 2d Dist. 1963): "[A] presumption simply changes the order of proof to the extent that one upon whom it bears must meet or explain it away, and when such explanation is made, the duty is upon the plaintiff to take up the burden which the law has cast upon him and sustain the issue by a preponderance of the evidence." *Cf. Annot.*, 51 A.L.R. 1139 (1927); 75 A.L.R. 675 (1931).

Since the defendant in the instant case failed to obtain an affidavit listing his vendor's creditors prior to his making partial payment, this failure to comply with the Florida Bulk Sales Act, pursuant to FLA. STAT. § 726.04 (1963), created a prima facie fraudulent transfer.

29. *Wasserburg v. Coastal Aluminum Prod. Constr. Co.*, 167 So.2d 889, 892 (Fla. 2d Dist. 1964). Once the presumption was destroyed the plaintiff then failed to establish his issue by a preponderance of the evidence.

30. See note 10 *supra*.

that a sale of goods in bulk out of the ordinary course of trade is, in itself, a badge of fraud even without the aid of any statute.³¹ In effect, the rights of the creditor have been relegated to the common law remedies which are available only in cases when collusion between buyer and seller can be shown or when fraud on the part of the seller is proven. In addition to these common law remedies, if the creditor can prove successfully that the transfer was made with an actual intent to defraud creditors, the transfer can be set aside under Florida's fraudulent conveyance act.³²

The instant case has resulted in an overlapping of two Florida statutes. By superimposing the fraudulent conveyance act³³ upon the bulk sales act,³⁴ the court has destroyed any independent effect that the latter may have had—an extension which would protect creditors against transferees in good faith, who buy in bulk out of the ordinary course of trade. In short, it is submitted that construing the presumption of fraud as rebuttable places in jeopardy the very heart of Florida's bulk sales act.

The most inclusive reforms in this area will arise as a result of the Florida legislature's recent adoption of the Uniform Commercial Code, now in force in the majority of American jurisdictions.³⁵ Three basic revisions are codified in the Code:

(1) If a transfer is made without complying with the provisions of the bulk sales act, the transfer is considered "ineffective" against any creditors of the seller.³⁶ The term ineffective is not specifically defined, but the official comments on the Code appear to declare a rule of substantive law, rather than a presumption, since the creditor can disregard the transfer and levy on the goods as if still belonging to the transferor.³⁷

31. See *Walbrun v. Babbitt*, 83 U.S. (16 Wall.) 577 (1872); *Dokken v. Page*, 147 Fed. 438 (8th Cir. 1906).

32. FLA. STAT. § 726.01 (1963).

33. FLA. STAT. § 726.01 (1963).

34. FLA. STAT. § 726.04 (1963).

35. The following twenty-nine states and the District of Columbia have adopted the UNIFORM COMMERCIAL CODE: Alaska, Arkansas, California, Connecticut, Georgia, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Virginia, West Virginia, Wisconsin, Wyoming.

As a word of caution, however, the effective dates of enactment of the Code should be checked prior to the reliance thereon in any of these states listed. For a most complete list of effective dates, see 1 ANDERSON, UNIFORM COMMERCIAL CODE, vii (1964):

In 1965 Florida became the thirtieth state to adopt the Uniform Commercial Code. Senate Bill 474 set forth that the code would comprise chapters 671-680 of the Florida Statutes 1965, and repealed all laws and parts of laws inconsistent with the adoption. JOURNAL OF THE SENATE 228 (April 29, 1965).

36. UNIFORM COMMERCIAL CODE § 6-104(1).

37. Comments, UNIFORM COMMERCIAL CODE § 6-104:1(2). By specific provision under the UNIFORM COMMERCIAL CODE, the provisions of the UNIFORM FRAUDULENT CONVEYANCE ACT remain unchanged. Comments, UNIFORM COMMERCIAL CODE 6:101:1(3).

Since the term "ineffective" is not specifically defined as either a conclusive presumption of fraud or a rebuttable presumption, the Code comments may be helpful in showing the legislative intention to make it a rule of substantive law. Total reliance should

(2) An error or omission from the list of creditors will not render the transaction ineffective, unless the transferee has knowledge thereof.³⁸ The responsibility for the accuracy and completeness of the list rests upon the transferor, not the transferee.³⁹ Thus, a good faith attempt to comply with the provisions by the transferee will validate the transfer, even though the transferor has defrauded both his creditors and the buyer.

(3) The problem of subsequent transfers is dealt with separately under the Uniform Commercial Code. If the transferee resells the property to a sub-purchaser for value, in good faith and without notice of noncompliance, the sub-purchaser takes free from any defects and claims of creditors of the transferor.⁴⁰ Thus, since a sale to a bona fide purchaser from the transferee can cut off the rights of the creditor, the transaction is initially *voidable* between the creditor and the transferee.

What then is the future of Florida's Bulk Sales Act? If its purpose is merely to favor the good faith transferee over the creditor, then the problem of pulling the security rug from under the creditor is still alive in Florida, with greater dimensions than at the common law. A contrary policy has been reached as a result of the recent enactment of the Uniform Commercial Code in Florida.⁴¹ The Code has the effect of rendering conclusively void a transfer made without compliance with the requirements of Florida's bulk sales legislation.⁴² Though such statutory relief does not become effective in Florida until January 1, 1967,⁴³ it is submitted that the policy of the Uniform Commercial Code should take effect immediately, and permeate any future questions related to Florida's Bulk Sales Act.

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not be placed on the comments, however, without also consulting the state law existing prior to the enactment of the UNIFORM COMMERCIAL CODE. Notes 16 and 20, *supra*, pertaining to prior state law may be helpful in this regard.

38. Comments, UNIFORM COMMERCIAL CODE § 6-104:6.

39. UNIFORM COMMERCIAL CODE § 6-104:3. This was the prevailing view prior to the enactment of the UNIFORM COMMERCIAL CODE, even in those jurisdictions which made noncompliance a presumption of fraud. See, e.g., *Coach v. Gage*, 70 Ore. 182, 138 Pac. 847 (1914). The policy underlying this position is that the legislature cannot arbitrarily declare an act innocent in itself to be fraudulent.

Contra Kline v. Sims, 114 So.2d 871 (Miss. 1927). A buyer purchases at his peril if the true list of creditors is not disclosed; good faith on the part of the buyer has no effect if he fails to procure a list of creditors as required by statute. See Annot., 83 A.L.R. 1140 (1932).

40. UNIFORM COMMERCIAL CODE § 6-110. But problems exist at present in states under the UNIFORM COMMERCIAL CODE, as to whether the creditors of the seller can prevail over existing creditors of the transferee. E.g., *Schwartz v. A. J. Armstrong Co.*, 179 F.2d 766 (2d Cir. 1950).

Prior to the enactment of the UNIFORM COMMERCIAL CODE, those states classifying a noncomplying transfer as "void" or "conclusively presumed to be fraudulent," likewise interpreted these words as "voidable." See discussion in Weintraub & Levin, *Bulk Sales Law and Adequate Protection of Creditors*, 65 HARV. L. REV. 418, 428 (1952). See also *Mach v. Baum*, 98 Misc. 607 (N.Y. Sup. Ct. 1917).

41. See note 35 *supra*.

42. See note 37 *supra*.

43. JOURNAL OF THE SENATE 228 (April 29, 1965).