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## BULK SALES: TEXAS LAW AND THE UNIFORM COMMERCIAL CODE

*Lennart V. Larson\**

IN 1951 the Fifty-second Legislature of the State of Texas, by concurrent resolution,<sup>1</sup> recognized the massive undertaking represented by the Uniform Commercial Code and the desirability of studying whether or not it should be adopted as the law of the State. Accordingly, the Legislature requested the Texas Legislative Council to make a study of the Code and to report findings and recommendations. At the present time interested attorneys and law teachers throughout the State are engaged in an examination and analysis of the various Articles making up the Code.

The Uniform Commercial Code is the joint product of The American Law Institute and the National Conference of Commissioners on Uniform State Laws, both bodies having Texas attorneys among their members. The Code consists of ten Articles, among them Article 6, entitled "Bulk Transfers." Eleven Sections are found in Article 6, and the rules and procedures set out are more detailed and complicated than are those declared in the bulk sales laws enacted in the various states of the Union.

Some 90 decisions have been handed down dealing with the Texas Bulk Sales Act. These decisions make possible a meaningful comparison between Texas law as it is now and what it would be under the Bulk Transfers Article of the Uniform Commercial Code.

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<sup>1</sup> S. Con. Res. 46.

## THE TEXAS BULK SALES LAW

Bulk sales laws are of relatively recent origin. The first was enacted in 1896, and by 1910 all states had passed such laws.<sup>2</sup> The principal promoters of the legislation were the National Association of Credit Men and associated bodies throughout the land. All too frequently it would happen that a merchant or retailer of goods would sell out his stock at a reduced price and take off with the proceeds to parts unknown. Sometimes a merchant would build up his stock of goods by purchases on credit with a fraudulent view to making a quick sale and absconding. In other instances the onset of economic depression might cause a merchant to sell out under circumstances which would cause some creditors to be paid in full and others not at all. The bulk sales acts were intended to place an obstacle in the way of sales of large lots of goods not in the ordinary course of business. The obstacle could be surmounted if certain conditions, safeguarding creditors, were met. Jobbers, wholesalers and manufacturers were deeply interested in preserving the merchant's stock of goods as a fund to which creditors might have recourse.

The Texas Bulk Sales Act was passed in 1909 and was amended in 1915.<sup>3</sup> In its present form the first section reads as follows:

The sale or transfer in bulk of any part or the whole of a stock of merchandise, or merchandise and fixtures pertaining to the conducting of said business otherwise than in the ordinary course of trade, and in the regular prosecution of the business of the seller or transferor, shall be void as against the creditors of the seller or transferor, unless the purchaser or transferee demand and receive from the transferor a written list of names and addresses of the creditors of the seller or transferor with the amount of the indebtedness due or owing to each and certified by the seller or transferor under oath to be a full, accurate and

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<sup>2</sup> The economic background and operation of the bulk sales acts is extensively discussed in Billig, *Bulk Sales Laws: A Study in Economic Adjustment*, 77 U. Pa. L. Rev. 72 (1928); Billig and Smith, *Bulk Sales Laws: A Study in Statutory Interpretation*, 38 W. Va. L. Q. 309 (1932); Billig and Smith, *Bulk Sales Laws: Transactions Covered by These Statutes*, 39 W. Va. L. Q. 323 (1933). See also VOLD, *SALES* (1931) 404-416; 3 WILLISTON, *SALES* (Rev. ed 1948) §§ 643-643d.

<sup>3</sup> Acts 1909, c. 27, amended, Acts 1915, c. 114; TEX. REV. CIV. STAT. (Vernon, 1948) arts. 4001-4003.

complete list of his creditors, and of his indebtedness; and unless the purchaser or transferee shall at least ten days before taking possession of such merchandise or merchandise and fixtures, or paying therefor, notify personally or by registered mail each creditor whose name and address is stated in said list, or of which he has knowledge, of the proposed sale and of the price, terms and conditions thereof. Any purchaser or transferee who shall not conform to the provisions of this law shall, upon application of any of the creditors of the seller or transferor become a receiver, and be held accountable to such creditors for all goods, wares, merchandise and fixtures that have come into his possession by virtue of such sale or transfer.

The second section declares that any transferee who conforms to the Act will not be held accountable to any creditor of the transferor for any of the goods or fixtures transferred. The third section makes the Act inapplicable to sales by executors, administrators, receivers or any public officer conducting a sale in his official capacity or to a transfer of merchandise and fixtures for the payment of bona fide debts where all creditors share in proportion to their claims and without preference.

The various state bulk sales laws have been classified into four types.<sup>4</sup> Around three-fourths of the states have followed the New York form of statute, and Texas is among this number. Omitted from the Texas law is a provision, commonly found elsewhere, requiring the seller and buyer to prepare an inventory of all goods and fixtures sold, showing original cost and the selling price of each item, and requiring the buyer to include in his notice to creditors the aggregate value of the property as disclosed by the inventory.

Constitutional objections were raised soon after the bulk sales laws were passed on the grounds that the legislation took property without due process and violated the right to equal protection of the laws. It was argued that a man's right to dispose of his property and to contract with respect to it was unduly curtailed and that a special class of property owner was singled out for regulation in a discriminatory way. These arguments prevailed in several jurisdictions but were rejected elsewhere. In Texas the Bulk Sales

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<sup>4</sup> See Weintraub and Levin, *Bulk Sales Law and Adequate Protection of Creditors*, 65 Harv. L. Rev. 418 (1952); 3 WILLISTON, SALES (Rev. ed. 1948) § 643.

Act was held constitutional as a reasonable exercise of police power operating in an area and on a class which had shown a need for regulation in order that fraud be prevented.<sup>5</sup> There is every reason to believe that the Bulk Transfers Article of the Uniform Commercial Code would meet all constitutional tests if enacted in Texas.

#### APPLICATION OF THE TEXAS ACT

The Texas Bulk Sales Law treats of sales and transfers in bulk of "a stock of merchandise, or merchandise and fixtures pertaining to the conducting of . . . [a] business." This language was held to preclude the contention that the statute applied only to persons who bought commodities and sold them in small quantities for profit.<sup>6</sup> In other words, wholesalers, as well as retailers, are subject to the Law.

Goods which are not merchandise or fixtures are not within the legislation, and it is up to the complaining creditor to allege and prove that a transfer or sale of goods within the statutory terms has occurred.<sup>7</sup> Accounts receivable, prepaid insurance and unexpired automobile licenses are clearly not within the terms of the Bulk Sales Law.<sup>8</sup> The same conclusion has been reached with respect to personal clothing, office furniture, a typewriter and trucks used in connection with an undertaker's business.<sup>9</sup> Whether or not an

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<sup>5</sup> *Owosso Carriage & Sleigh Co. v. McIntosh & Warren*, 107 Tex. 307, 179 S. W. 257 (1915), *rev'd* 146 S. W. 239 (Tex. Civ. App. 1912); *Nash Hardware Co. v. Morris*, 105 Tex. 217, 146 S. W. 874 (1912).

<sup>6</sup> *Butler Bros. v. Sinkin*, 129 Tex. 331, 104 S.W. 2d 14 (1937); *Nash Hardware Co. v. Morris*, 105 Tex. 217, 146 S. W. 874 (1912). *Cf. Axtell Co. v. Word*, 29 S. W. 2d 421 (Tex. Civ. App. 1930) ("stock of goods" means "goods, wares or chattels which a merchant holds for sale at retail for a profit, and which are constantly going out of the store in more or less small quantities, and being replaced by other goods without any appreciable change of character by the labor or mechanical skill of purchaser").

<sup>7</sup> *Yeager v. Dallas Coffin Co.*, 46 S.W. 2d 1016 (Tex. Civ. App. 1932), *later proceedings*, 69 S. W. 2d 493 (Tex. Civ. App. 1934) *er. dism.*

<sup>8</sup> *Fischer v. Rio Tire Co.*, 65 S. W. 2d 751 (Tex. Comm. App. 1933).

<sup>9</sup> *Yeager v. Dallas Coffin Co.*, cited *supra* note 7.

A conveyance of lands is obviously not within the terms of the Bulk Sales Act, even where liens have been paid off with the proceeds of a stock of merchandise which was conveyed at the same time in violation of the Act. *Hall v. Conine*, 230 S. W. 823 (Tex. Civ. App. 1921).

article is "merchandise" within the statute depends upon whether or not the sale of it and other items of personal property is a principal part of the seller's business. No Texas case has had to give precise meaning to the word "fixtures." Presumably it refers to trade fixtures and other articles which are annexed in such a way as to become a part of the realty occupied by the seller.

As originally passed, the Texas Bulk Sales Act did not mention the sale or transfer of fixtures. It merely referred to sales or transfers "of any portion of a stock of merchandise." The amendment of 1915 added the expression, "or merchandise and fixtures pertaining to . . . [a] business." Several decisions have established that a sale or transfer of fixtures alone does not fall within the operation of the Act.<sup>10</sup> The sale or transfer must be of merchandise as well as of fixtures for the Act to apply. The Texas Supreme Court has explained:

The terms of the provisions do not reasonably apply to fixtures except in conjunction with merchandise, for otherwise the provision excluding sales and transfers made in the ordinary course of trade and in the regular prosecution of the business of the seller would involve a contradiction of terms; for the business of the seller could not be the selling of fixtures where he is not engaged in such business, and he could not make a sale of fixtures in the regular prosecution of such business. It is only in cases involving a sale of merchandise, by one engaged in that business, that the provision respecting fixtures can have any application at all.<sup>11</sup>

It seems desirable that no statutory obstacle be placed in the way of a seller who wants to replace his old fixtures with new.

The central criterion of whether a seller is subject to the Texas Act is whether or not a principal part of his business is the selling of goods. If his business is primarily one of performing a service and the sale of goods is only incidental, the Act has no application. The business of an undertaker has been held subject to the statute,

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<sup>10</sup> *In re Gary*, 281 Fed. 218, 220 (S.D. Tex. 1922); *In re Martin*, 283 Fed. 833, 836 (E.D. Tex. 1921); *M System Stores, Inc. v. Johnston*, 124 Tex. 238, 76 S. W. 2d 503 (1934), *rev'g* 48 S. W. 2d 800 (Tex. Civ. App. 1932); *Hobart Mfg. Co. v. Joyce & Mitchell*, 4 S.W. 2d 185, 188 (Tex. Civ. App. 1928). A contrary assumption has been made without discussion of the point in *In re Griffen Drug Co.*, 289 Fed. 140 (N.D. Tex. 1923), and *Brecht Co. v. Robinowitz*, 275 S. W. 213 (Tex. Civ. App. 1925) *er. ref.*

<sup>11</sup> *M System Stores, Inc. v. Johnston*, 124 Tex. at 243, 76 S. W. 2d at 505.

since the sale of caskets and accessories was a principal object along with the performance of service.<sup>12</sup> On the other hand, a plumbing contractor was held not within the Act because the stock of goods on hand was "merely incidental" and the "chief business" was the "exercise of labor and mechanical skill."<sup>13</sup>

In *Hobart Mfg. Company v. Joyce & Mitchell*<sup>14</sup> a sale of a bakery, including equipment, fixtures and ingredients for baking bread, was held not to come within the purview of the Bulk Sales Law. The reason was that "materials and ingredients used by a baker in the manufacture of his wares do not constitute 'merchandise' as used in the Bulk Sales Law."<sup>15</sup> In the course of its opinion the court indicated that the same result would be reached with respect to a sale of leather by a dealer in saddles and harnesses or, less to the point, a sale of hay or corn on hand by a livery stablekeeper or agistor. A similar conclusion was reached in *Daggett v. Wolff*<sup>16</sup> in which a cafe business was sold. Another ground which might have been advanced for the judgment was that a restaurant, in legal theory, performs services ("uttering food") rather than sells wares.<sup>17</sup>

The broader principle to be derived from the *Hobart Mfg. Company* and *Daggett* decisions is that a sale by a manufacturer of the raw materials on which he works is not a sale of merchandise within the Bulk Sales Act. Several cases may be cited for this proposition.<sup>18</sup> Some of these cases go further and state that the manu-

<sup>12</sup> *Yeager v. Dallas Coffin Co.*, cited *supra* note 7. A clearer case for the application of the Act is that of a monument dealer. *Teich v. McAuley*, 212 S. W. 979 (Tex. Civ. App. 1919) *er. dism.*

<sup>13</sup> *Axtell Co. v. Word*, 29 S. W. 2d 421 (Tex. Civ. App. 1930).

<sup>14</sup> 4 S. W. 2d 185 (Tex. Civ. App. 1928).

<sup>15</sup> *Id.* at 188.

<sup>16</sup> 44 S. W. 2d 1063 (Tex. Civ. App. 1931).

<sup>17</sup> VOLD, SALES (1931) 477; 1 WILLISTON, SALES (Rev. ed. 1948) § 242b.

<sup>18</sup> *American Surety Co. of New York v. M-B Ise Cream Co.*, 65 S. W. 2d 287 (Tex. Comm. App. 1933), *aff'g* 38 S. W. 2d 118 (Tex. Civ. App. 1931) (ice cream factory); *Tomforde v. Mitchell Construction Co.*, 91 S. W. 2d 1137 (Tex. Civ. App. 1936) (brick and tile manufacturer); *Grimes v. Huntsville State Bank*, 12 S.W. 2d 1087 (Tex. Civ. App. 1928) *er. ref.* (lumber mill); see *Sinkin v. Butler Bros.*, 77 S. W. 2d 298, 299 (Tex. Civ. App. 1934), *rev'd*, 129 Tex. 331, 104 S. W. 2d 14 (1937); *Industrial Acceptance Corporation v. Corey*, 19 S. W. 2d 365, 367 (Tex. Civ. App. 1929), *aff'd*, 29 S. W. 2d 978 (Tex. Comm. App. 1930).

factured product may be sold or transferred without compliance with the Act.<sup>19</sup> It is believed that these expressions are unwise. Nothing in the Texas Act warrants the interpretation that merchandise exposed for sale is not "merchandise" within the statute if the seller has had a hand in manufacturing it. Selling the manufactured product is certainly a principal part of the manufacturer's business. The evils sought to be suppressed by the legislation would seem to be of equal degree whether the seller manufactured his merchandise from raw materials purchased from others or bought the merchandise directly from others.

Ordinarily, the "merchandise" of which the Bulk Sales Act speaks is goods exposed to sale.<sup>20</sup> Contention has been made that if a business closes up for a substantial period, voluntarily or involuntarily, the goods are no longer exposed to sale and the Act has no application. The Texas courts have rejected this argument in at least two cases.<sup>21</sup> To allow the argument to prevail would subvert the purposes of the statute. The creditors of the business should be able to assert their rights under the Act until their claims are barred by the statute of limitations, and the courts should not have to decide whether a business has been closed down for such a period that the goods can be said no longer to be "merchandise . . . pertaining to the conducting of said business." Perhaps after a lapse in time laches or estoppel may prevent a creditor from asserting that a sale or transfer was void.

In *Krower v. Martin*<sup>22</sup> the debtor was a jewelry merchant who

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<sup>19</sup> *Tomforde v. Mitchell Const. Co.*, 91 S. W. 2d 1137, 1138 (Tex. Civ. App. 1936) ("... that law has no application to the sale, directly by the manufacturer, of the products made by such manufacturer"); *Sinkin v. Butler Bros.*, 77 S. W. 2d 298, 299 (Tex. Civ. App. 1934) (for Act to apply the goods "must be in . . . [their] original character, unchanged by the labor or mechanical skill of the dealer").

<sup>20</sup> *Krower v. Martin*, 184 S. W. 511 (Tex. Civ. App. 1916); *Yeager v. Dallas Coffin Co.*, 46 S. W. 2d 1016, 1017 (Tex. Civ. App. 1932), *later proceedings*, 69 S. W. 2d 493 (Tex. Civ. App. 1934) *er. disp.*; see *Hall v. Conine*, 230 S. W. 823, 825 (Tex. Civ. App. 1921).

<sup>21</sup> *Butler Bros. v. Sinkin*, 129 Tex. 331, 104 S. W. 2d 14 (1937), *rev'g* 77 S. W. 2d 298 (Tex. Civ. App. 1934) (stock of goods reconditioned and sold four months after fire closed store down); *Teich v. McAuley*, 212 S. W. 979 (Tex. Civ. App. 1919) *er. disp.* (monument business voluntarily closed down for four months).

<sup>22</sup> 184 S. W. 511 (Tex. Civ. App. 1916).



sold out his business in March, 1915. Excepted from the sale was a stock of jewelry which had previously been mortgaged and placed in the possession of the mortgagee. Six months later the debtor entered into an agreement by which defendant bought the jewelry and paid off the mortgage and both parties were to share in the proceeds of resale after defendant was reimbursed for his payment. Plaintiff sued the debtor on a note executed in 1914 and applied for garnishment against defendant, since the latter had not complied with the Bulk Sales Law. The court held that the Law had no application "because it has reference to sales made out of a stock of merchandise exposed to sale. These goods were placed to secure debts . . . and . . . they ceased to be a part of the stock of merchandise, because they were segregated."<sup>23</sup> If one accepts the assumption that the mortgage was valid under the statute, the judgment seems correct. If goods never become a stock of merchandise exposed to sale, or if they are effectively withdrawn from "the conducting of said business," they cannot be said to be relied upon by creditors and are not within the terms or spirit of the Law.

A bulk transfer falls within the statute whether the transferee is a third party purchasing for value or is a creditor of the transferor. Occasionally a transferee has attempted to avoid the statute by asserting that the transferor agreed to apply what money he received to his debts and that the third section of the Texas Act authorized such an arrangement. But the holdings have been that the section requires that transferor and transferee agree that the latter shall distribute the stock of merchandise transferred, or its proceeds, among the creditors proportionately.<sup>24</sup> It is not sufficient that the transferee pay the transferor on his agreement that he will pay his creditors in proportion to their claims.

Is a mortgage a "sale or transfer in bulk of any part or the whole of a stock of merchandise?" Several federal decisions

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<sup>23</sup> *Id.* at 513.

<sup>24</sup> *Butler Bros. v. Sinkin*, 129 Tex. 331, 334, 104 S. W. 2d 14, 15 (1937), *rev'g* 77 S. W. 2d 298 (Tex. Civ. App. 1934); *Kell Milling Co. v. H. O. Wooten Grocery Co.*, 195 S. W. 342 (Tex. Civ. App. 1917).

have answered in the negative where a trustee in bankruptcy has raised the question in behalf of unsecured creditors of the mortgagor.<sup>25</sup> This position is based on a close analysis of the statute. If the Texas Legislature had intended to include mortgages within the scope of the Act, the word "mortgage" could easily have been inserted. Surely mortgage transactions had come to mind and were discussed when the statute was passed. Earlier legislation had declared fraudulent and void mortgages on merchandise daily exposed to sale, and, thus, creditors were already protected from such transactions.<sup>26</sup> It is improbable that the Bulk Sales Law was intended to cover the same ground. The word "transfer" is a broad term, but in the context of the Texas Bulk Sales Law it has a narrow meaning. The first section requires a purchaser or transferee, "before taking possession of such merchandise or merchandise and fixtures, or paying therefor," to take certain steps to advise creditors "of the proposed sale and of the price, terms and conditions thereof." A mortgagee does not usually take possession of the goods when he first receives the mortgage, and it is inaccurate to say that he "pays" a "price" for them. The language of the Act seems to contemplate transactions in which full title and possession will pass, and not just a security interest, if the prescribed procedures are followed.

Texas cases are to the contrary.<sup>27</sup> The use of the term "transfer" is relied on, as well as the broad policy of the Act. It is argued that if conditions are imposed on the passing of title and possession, they are also imposed on the passing of a lien which may result, through foreclosure, in transfer of title and possession. Assertion is made that one of the purposes of the Act is to prevent

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<sup>25</sup> *In re Griffen Drug Store Co.*, 289 Fed. 140 (N. D. Tex. 1923); *In re Gary*, 281 Fed. 218 (S. D. Tex. 1922); *In re Martin*, 283 Fed. 833, 836 (E. D. Tex. 1921).

<sup>26</sup> Tex. Acts 1879, c. 53, § 17, amended, Tex. Acts 1935, c. 115; TEX. REV. CIV. STAT. (Vernon, 1948) art. 4000.

<sup>27</sup> *Beene v. National Liquor Co.*, 198 S.W. 596, 597, 598 (Tex. Civ. App. 1917), is the leading case. *Accord*, *Texas Bank & Trust Co. v. Teich*, 283 S. W. 552, 554 (Tex. Civ. App. 1926) (in effect, a tripartite trust receipt transaction); see *Trice v. American Trust & Savings Bank*, 259 S.W. 993, 995 (Tex. Civ. App. 1924) *er. ref.* But in *Krower v. Martin*, 184 S. W. 511, 513 (Tex. Civ. App. 1916), the assumption seems to be that a mortgage coupled with possession by the mortgagee does not offend the Act.

preference among creditors. The position of the Texas courts has good policy behind it, but it is submitted that the federal courts have the better of the argument in ascertaining the legislative intent.

Where goods are sent to a merchant subject to a reservation of title or security interest, the decisions indicate that repossession of the goods pursuant to the reservation is not a bulk transfer within the Texas Act. For instance, if the merchant is a mere agent to sell certain goods, his principal may repossess the goods without regard to the bulk sales legislation.<sup>28</sup> Both conditional sellers and purchase money mortgagees have been allowed to repossess goods from merchants who were in the business of selling those very goods.<sup>29</sup> Related to these situations is the case in which a merchant obtains goods from a wholesaler by fraudulent representations. Repossession of the goods by the wholesaler pursuant to his right to rescind is not a bulk transfer within the Texas statute.<sup>30</sup> It is safe to say that the legislation was not intended to bar or modify the right to rescind a sale induced by fraudulent conduct on the part of the merchant.

A miscellany of cases bearing on the application of the Act should be mentioned. A transfer of merchandise in satisfaction of a claim for rent was held not a violation of the law where its value was considerably less than the amount of rental for which the land-

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<sup>28</sup> *Grimes v. Huntsville State Bank*, 12 S. W. 2d 1087, 1092 (Tex. Civ. App. 1928) *er. ref.*

<sup>29</sup> *Tyler State Bank & Trust Co. v. Bullington*, 179 F. 2d 755 (5th Cir. 1950) ("conditional sale," tripartite trust receipt transaction); *Southwestern Drug Corp. v. Webster*, 246 S. W. 2d 241 (Tex. Civ. App. 1951) (mortgage); *International Harvester Co. v. Smith*, 91 S. W. 2d 827 (Tex. Civ. App. 1936) *er. disp.* (conditional sale); *Mayfield Co. v. Harlan & Harlan*, 184 S. W. 313 (Tex. Civ. App. 1916) (mortgage). *Contra*: *Texas Bank & Trust Co. v. Teich*, 283 S. W. 552 (Tex. Civ. App. 1926) *er. ref.* (purchase money mortgage or tripartite trust receipt transaction; TEX. REV. CIV. STAT. (Vernon, 1948) art. 4000, dealing with mortgages on goods exposed to sale, also held violated).

<sup>30</sup> *John T. Barbee & Co. v. American Brewing Assn.*, 207 S. W. 334, 335 (Tex. Civ. App. 1918) ("Such statutes would not have prevented appellant from procuring a judgment for its goods under the facts proven, and it necessarily follows that they would not render appellant liable by reason of the fact that the return of the goods was procured without the aid of a court, pursuant to a rescission of the contract.")

lord could assert a lien.<sup>31</sup> It seems clear that the Law did not amend the statute providing for the landlord's lien. A purchase of one-half interest as partner in a grocery business has been held within the terms of the Texas Bulk Sales Act.<sup>32</sup> But a dissolution of a partnership in which a partner took over one of two stores has been held not within the Act.<sup>33</sup> The court said that the rights of the creditors "were not at all affected by the transaction" and that all the partners and partnership assets "continued bound for the debts of the old partnership."<sup>34</sup>

*Uniform Commercial Code.* Section 6-102 of the Code<sup>35</sup> defines a "bulk transfer" as

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 of an enterprise subject to . . . [the] 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.

Another provision of the same Section declares that enterprises subject to the Article "are all those whose principal business is the sale of merchandise from stock, including those who manufacture what they sell."

The Bulk Transfers Article is of broader scope than the Texas Act. The word "fixtures" does not appear, but the expression "materials, supplies, merchandise or other inventory" certainly covers just about everything used in a business. Accounts receivable are not within the Section. Manufacturers are expressly made subject to the Article. However, a Comment to the Section says that enterprises in which the principal business is the sale of services

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<sup>31</sup> C. G. Settegast v. Second National Bank, 126 Tex. 330, 87 S. W. 2d 1070 (1935), *rev'g* 52 S. W. 2d 533 (Tex. Civ. App. 1932).

<sup>32</sup> S. H. Twaddell v. H. O. Wooten Grocer Co., 130 Tex. 42, 106 S. W. 2d 266 (1937), *reforming* 68 S. W. 2d 285 (Tex. Civ. App. 1934).

<sup>33</sup> Quicksilver v. Haynes, 56 F. 2d 59 (5th Cir. 1932), *cert. denied*, 287 U. S. 602 (1932).

<sup>34</sup> *Id.* at 61.

<sup>35</sup> References are to the UNIFORM COMMERCIAL CODE (Official Draft, Text & Comments ed. 1952).

(*e.g.*, barber shops, hotels, restaurants, trades and professions) are not covered.

A transfer of a substantial part of the equipment of a business "is a bulk transfer if it is made in connection with a bulk transfer of inventory, but not otherwise."<sup>36</sup> This provision is in harmony with Texas holdings that a sale of fixtures alone does not come within the terms of the Bulk Sales Act. It seems desirable that business men should be able to sell and replace either fixtures or equipment without having to comply with a bulk transfer statute.

"Transfer," under the Bulk Transfers Article, "includes the voluntary creation of a security interest."<sup>37</sup> Thus, enactment of the Article would confirm the view taken by the Texas courts and reject that of the federal courts. It does not appear that the language of the Article would compel a change in the holdings that repossession of goods by a conditional seller or purchase money mortgagee is not within the scope of bulk transfer legislation.<sup>38</sup>

Section 6-103 enumerates transfers not subject to the Article. Among them are general assignments "for the benefit of all creditors of the transferor, and subsequent transfers by the assignee;" sales in foreclosure of security interests; sales by executors, administrators, receivers, trustees in bankruptcy, or public officers under judicial process; and sales made in the course of dissolution of a corporation where creditors receive advance notice equivalent to that required under the Article. These exceptions from the Article are substantially the same as those set forth in the Texas Act. A new exception, which is obvious enough, is "[t]ransfers of property which is exempt from execution."

Three other exceptions in Section 6-103 should be mentioned.

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<sup>36</sup> § 6-102(3).

<sup>37</sup> § 6-102(2). Section 6-105(1) states that a bulk transfer to secure an existing debt is ineffective unless the requirements of the Article are satisfied.

<sup>38</sup> § 6-103(3) seems to contemplate that valid liens and security interests may exist in goods subject to the Bulk Transfers Article.

Transfers for the sole purpose of securing repayment of new value extended to the transferor are excluded from the operation of the Article. Such transfers are covered by Article 9 (Secured Transactions) of the Code. Also excepted are transfers to a person maintaining a known place of business who becomes bound to pay the debts of the transferor in full, gives public notice of that fact, and who is solvent. Still another exception is a transfer to a new business enterprise organized to take over the transferor's business, if public notice of the transaction is given, the new enterprise assumes the debts, and the transferor receives nothing but an interest in the new enterprise junior to the claims of creditors. The latter two exceptions are transactions in which there is no impairment of the creditors' position.

#### COMPLIANCE WITH TEXAS ACT

A bulk sale or transfer in Texas is valid and effective (1) if the purchaser or transferee demands and receives "a written list of names and addresses of the creditors of the seller or transferor with the amount of the indebtedness due or owing to each and certified by the seller or transferor under oath to be a full, accurate and complete list of his creditors, and of his indebtedness;" and (2) if the purchaser or transferee "at least ten days before taking possession of . . . [the] merchandise and fixtures, or paying therefor" notifies "personally or by registered mail" each creditor on the list, or of whom he has knowledge, "of the proposed sale and of the price, terms and conditions thereof." It has been held that the burden of proof on the issue of compliance with the Bulk Sales Law is on the purchaser or transferee.<sup>39</sup>

The Act of 1909 required that the notice to creditors be given ten days "before the sale or transfer". The amendment of 1915 is clear that the notice may be given ten days before the purchaser or transferee takes possession or ten days before paying for the

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<sup>39</sup> Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co., 189 S. W. 784, 791 (Tex. Civ. App. 1916) *er. ref.*

goods and fixtures. This interpretation has been adopted by the courts.<sup>40</sup>

If a purchaser or transferee complies with the Act, he obtains good title to the merchandise and fixtures even though creditors have been omitted, inadvertently or otherwise, from the list prepared and certified by the seller or transferor.<sup>41</sup> The list may enumerate creditors, or it may be an affidavit that the seller or transferor owes no indebtedness. The purchaser or transferee is under no duty to see to it that the list of creditors is correct and complete. If he complies with the Act in good faith, he has the assurance that his title and possession are valid.

If, however, the transferee "has knowledge" of creditors who are not listed, the terms of the Act require that he give them notice. *Fischer v. Rio Tire Co.*<sup>42</sup> extends this duty in an important way. The court held that a buyer of goods in bulk "must take notice of taxes due, whether listed or not." Under this rule an independent

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<sup>40</sup> *San Antonio Machine & Supply Co. v. McCarthy*, 71 S. W. 2d 611 (Tex. Civ. App. 1934) *er. dism.*; *Brecht Co. v. Robinowitz*, 275 S. W. 213, 214 (Tex. Civ. App. 1925) *er. ref.*, approved in *Recent Cases*, 4 Tex. L. Rev. 260 (1926). In the latter decision the court said:

It further seems clear to us that when, in 1915 (Laws 1915, c. 114) the Legislature came to amend this statute and for the first time inserted in it the disjunctive provision, "and unless the purchaser or transferee shall at least 10 days before taking possession of such merchandise or merchandise and fixtures, or paying therefor, notify," etc., it meant to say that the required notice before paying for the property would be sufficient, irrespective of when the possession might be taken, and vice versa.

<sup>41</sup> *Fischer v. Rio Tire Co.*, 65 S. W. 2d 751, 756 (Tex. Comm. App. 1933), *rev'g* 48 S. W. 2d 367 (Tex. Civ. App. 1932) (affidavit that seller had no creditors and owed no debts); *Weidlick Pen Mfg. Co. v. Palace Drug Co.*, 283 S. W. 574 (Tex. Civ. App. 1926); *Brecht Co. v. Robinowitz*, 275 S. W. 213 (Tex. Civ. App. 1925) *er. ref.* In the *Fischer* case the Commission of Appeals stated:

We think a fair and reasonable construction of the statute to be that a purchaser, who in good faith demands and receives an affidavit showing a list of his creditors, or that he has none, should not be held liable to creditors, unless known to him, when the transferor has either by fraud or inadvertence omitted the name of a creditor or stated that he has none. Of course, if the purchaser knew of any claim not listed, that rule would not apply as to the claim not listed known to the purchaser, or if it appears that the purchaser obtains knowledge or information of such facts, which are sufficient to put a prudent man upon inquiry, and which are of such a nature that the inquiry, if pursued with reasonable diligence, would lead to a discovery of the claim.

<sup>42</sup> 65 S. W. 2d 751, 757 (Tex. Comm. App. 1933), *rev'g* 48 S. W. 2d 367, 370 (Tex. Civ. App. 1932).

school district and the City of Wichita Falls were permitted to assert rights under the Bulk Sales Act even though the buyer had no actual notice of tax claims and the sworn statement of his seller did not list them.

In *Weidlick Pen Mfg. Co. v. Palace Drug Co.*<sup>43</sup> a purchaser of the entire stock of goods of a retail drug business received from his seller a certified list of creditors. No notice was sent to the creditors, but the purchaser took possession of the goods and deposited \$5,000 in a bank, which was used to pay all creditors listed as well as some who were not listed. Thereafter plaintiff, a creditor who was not on the list, sought to hold the purchaser on the ground of non-compliance with the Bulk Sales Act. In denying relief the court said that the Act did not "require the doing of something unnecessary." Notice did not have to be sent to the listed creditors where arrangement was made to pay them off in full and such payment was made. The purchaser had a right to rely upon the correctness of the seller's list. A question can be raised about the decision. If the statutory notice had been given and delay had occurred in passing of possession or payment for the goods, it is possible that the news of the sale might have reached plaintiff's ears.

A more dubious case is *San Antonio Machine & Supply Co. v. McCarthy*.<sup>44</sup> There a purchaser of a portion of a stock of goods of a mercantile business did not demand or receive a certified list of creditors. He did, however, give sufficient personal notice to plaintiff creditor that he was in the process of buying the goods. A week after he took possession, the purchaser advised plaintiff of the sale. Subsequently, plaintiff sought to reach the goods, alleging violation of the Bulk Sales Law. Relief was denied because plaintiff creditor could not "complain of the failure of McCarthy [purchaser] to secure such verified list when McCarthy knew of this debt independent of any list of verified creditors." This reasoning is specious

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<sup>43</sup> 283 S. W. 574 (Tex. Civ. App. 1926).

<sup>44</sup> 71 S. W. 2d 611, 612 (Tex. Civ. App. 1934) *er. disp.*



because a main safeguard of the statute is getting the seller's sworn statement concerning his debts and creditors. A seller's sworn certification is more likely to be accurate and complete than his unsworn oral statement, and the affidavit is the primary source of names and addresses of creditors who should be notified. Possibly the case can be justified if plaintiff was seller's only creditor, a very doubtful assumption. It is submitted that the court should have held that the Act was violated. Creditors other than the plaintiff may never have received notice because of the purchaser's failure to insist on a certified list. The facts of the case do not indicate any ground for estopping plaintiff from asserting rights against the goods in behalf of himself and other creditors.

*Uniform Commercial Code.* The Code is similar to the Texas Bulk Sales Act in requiring certain steps to be taken by a transferee as a condition to his gaining good title. Section 6-104 states that a bulk transfer is ineffective unless (a) the transferee requires the transferor to prepare a list of his existing creditors, (b) the parties prepare a schedule of the property transferred sufficient to identify it, and (c) the transferee preserves the list and schedule for six months following the transfer and permits inspection or copying of either at reasonable hours by any creditor of the transferor. An alternative to (c) is afforded in filing the list and schedule in some public office. The list of creditors must be signed and sworn to by the transferor, and their names and business addresses must be set out along with the amounts of the debts if known. Persons who assert claims which are disputed must be listed. "Responsibility for the completeness and accuracy of the list of creditors rests on the transferor, and the transfer is not rendered ineffective by errors or omissions therein unless the transferee is shown to have had knowledge."<sup>45</sup> This statement is in accord with Texas cases.

Under Section 6-105 a bulk sale is ineffective "unless at least ten days before the goods are moved or the transferee takes possession of them or the interest of the transferor passes to the transferee,

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<sup>45</sup> § 6-104(3).

whichever happens first, the transferee gives notice of the transfer" to the creditors. This provision would change Texas law, since the Texas Act requires that the notice be given ten days before possession is taken or before payment is made for the merchandise and fixtures. It is not entirely clear that the Texas provision is inferior to the Code provision, but the latter does have the desirable feature of allowing time for the creditors to act before either title or possession passes.

The notice to creditors must be delivered personally or sent by registered mail to all persons on the list prepared by the transferor and to all other persons known by the transferee to assert claims.<sup>46</sup> The notice must contain (a) a statement that a bulk transfer is about to be made (or, in the case of a security transfer, has been made), (b) the names and business addresses of the transferor and transferee, and all business names and addresses used by the transferor within the preceding three years, and (c) a statement as to whether all the debts of the transferor are to be paid in full as they come due as a result of the transaction, and, if so, the address to which creditors should send their bills.<sup>47</sup> If the debts are not to be paid in full as they mature or if the transferee is in doubt on the point, the notice must contain a further statement of (a) the location and general description of the property to be transferred and the estimated total of the debts, (b) the address where the schedule of property and list of creditors may be inspected, (c) whether the transfer is to secure or pay existing debts and, if so, the amount of the debts and the names of the creditors, and (d) whether the transfer is for new consideration and, if so, the amount and time and place of payment.<sup>48</sup> These specifications for the notice are obviously more detailed than those of the Texas statute. It is to be noted that a short form of notice is provided for if the debts of the transferor are to be paid in full.

Section 6-108 makes sales by auction subject to the Bulk Trans-

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<sup>46</sup> § 6-107(3).

<sup>47</sup> § 6-107(1).

<sup>48</sup> § 6-107(2).

fers Article. The transferor must furnish a list of creditors and assist in the preparation of a schedule of the property to be sold. The list and schedule are received by the persons (collectively called "auctioneer") who have the control and responsibility for the auction. The schedule must be retained for inspection and copying for six months after the auction, and notice must be given to creditors ten days before the auction occurs. Failure of the auctioneer to perform any of his duties does not affect the validity of the sale, but he is made liable for the claims of the transferor's creditors, not exceeding the net proceeds of the auction. This Section would be new to Texas law. No Texas case has dealt with a bulk sale by auction.

Under most of the present-day bulk sales statutes, including that of Texas, no duty is imposed upon a transferee to see to it that the consideration he pays will be used by the transferor to pay his debts. Once he has obtained from the transferor a sworn list of creditors and has given them proper notice, he is in a position to take valid title and possession, and he is not concerned with what the transferor does thereafter. Within the period of the notice the creditors must investigate and decide whether they should persuade the transferor to liquidate his debts or should take legal action.

Section 6-106 imposes a duty on the transferee who pays a new consideration "to assure that such consideration is applied . . . to pay those debts . . . which are either shown on the list furnished by the transferor or filed in writing in the place stated in the notice within thirty days after the mailing of such notice." The duty may be enforced by any creditor for the benefit of all creditors. If some debts are in dispute, the necessary sum may be withheld until the claims are settled or adjudicated. If the consideration is insufficient to pay all debts in full, the distribution is made pro rata. A Comment to the Section suggests ways whereby the transferor may assure that the consideration is used to pay debts. He may hold the consideration himself, or deposit it in an account subject to

checks bearing his counter-signature, or he may deposit it in escrow.

Section 6-106 is "bracketed" to show a division of opinion as to whether it is desirable legislation. A Note to the Section states that the provision is one on which states may differ "without serious damage to the principle of uniformity."

#### NON-COMPLIANCE: RIGHTS OF CREDITORS

Non-compliance with the Texas Act makes a bulk sale or transfer "void as against the creditors of the seller or transferor." Of course, failure to comply is not excused on a showing that the purchaser or transferee was ignorant of the Act and acted innocently and with the best of motives.<sup>49</sup> Where a purchaser obtains the seller's affidavit but knows of creditors not listed and fails to give them notice, it has been held that such creditors only may claim rights under the Act.<sup>50</sup> Criticism may be offered of this rule in that it may lead to unfair preference of creditors and in that Act appears to make a transfer void and to allow relief to "any of the creditors" where the statutory requirements are not fulfilled. Notified creditors have a vital interest in the preparation of a complete list of creditors and notice to all of whom the purchaser knows.

The "creditors" protected are persons who have that status at the time of the transfer, and subsequent creditors cannot claim the benefits of the Act.<sup>51</sup> In *McWade Tube Co. v. Newnam*<sup>52</sup> plaintiff sued for a commission due for arranging a sale of inner tubes.

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<sup>49</sup> *H. O. Wooten Grocery Co. v. Coleman*, 32 S. W. 2d 279 (Tex. Civ. App. 1930); *Dallas Coffin Co. v. Yeager*, 19 S. W. 2d 156 (Tex. Civ. App. 1929) *er. dism., later proceedings*, 46 S. W. 2d 1016 (Tex. Civ. App. 1932), 69 S. W. 2d 493 (Tex. Civ. App. 1934) *er. dism.*; *C. J. Gerlach & Bro., Inc. v. Texas Bldg. Material Co.*, 245 S. W. 716, 718 (Tex. Civ. App. 1922); *Williams v. J. W. Crowdus Drug Co.*, 167 S. W. 187, 188 (Tex. Civ. App. 1914).

<sup>50</sup> *Fischer v. Rio Tire Co.*, 65 S. W. 2d 751, 757, 758 (Tex. Comm. App. 1933), *rev'g* 48 S. W. 2d 367 (Tex. Civ. App. 1932).

<sup>51</sup> *Trice v. American Trust & Savings Bank*, 259 S. W. 993 (Tex. Civ. App. 1924) *er. ref.*

A trustee in bankruptcy succeeds to whatever rights the creditors have under the Bulk Sales Law. *Gross v. Grossman*, 2 F. 2d 458 (5th Cir. 1924); *Trice v. American Trust & Savings Bank*, *supra*.

<sup>52</sup> 258 S. W. 560, 561 (Tex. Civ. App. 1924) *er. dism.*

He claimed the status of a creditor and sought relief against defendant purchaser of the debtor's entire stock of goods. Plaintiff was successful in his action on a finding that through his efforts "the sale had been fully made and executed at the time the bulk sale was made" and "while . . . [plaintiff's] claim was not actually due, it had fully accrued." The language and policy of the Act clearly warrant an interpretation of the word "creditor" to cover a person who may eventually have a claim under an existing contract.

It has been stated that a creditor is protected by the statute whether the debt owed was incurred in the course of seller's business or in some other connection.<sup>53</sup> But in *M System Stores, Inc. v. Johnston*<sup>54</sup> a creditor was denied the right to reach the subject matter of a bulk sale by a partnership of which his debtor was a member. The court said:

The creditors with whom the statute deals are, in the terms of the statute, those of the "seller." While it is true that a partnership is not a legal entity, like a corporation, nevertheless the assets and liabilities of the partnership are commonly treated as possessing distinct characteristics.<sup>55</sup>

It was recognized that creditors of the partnership have a special claim to have partnership assets applied to debts owed them and not debts owed to creditors of individual partners.

A sale or transfer in violation of the Bulk Sales Law is "void" as against creditors and no other class of persons.<sup>56</sup> It is probably more accurate to say that such sale or transfer is voidable, rather

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<sup>53</sup> *Fischer v. Rio Tire Co.*, 65 S. W. 2d 751, 756 (Tex. Comm. App. 1933), *rev'g* 48 S. W. 2d 367 (Tex. Civ. App. 1932); *Gardner v. Goodner Wholesale Grocery Co.*, 247 S. W. 291, 292 (Tex. Civ. App. 1922), *certified questions answered*, 113 Tex. 423, 256 S. W. 911 (1923).

<sup>54</sup> 124 Tex. 238, 76 S. W. 2d 503 (1934), *rev'g* 48 S. W. 2d 800 (Tex. Civ. App. 1932).

<sup>55</sup> *Id.* at 242, 76 S. W. 2d at 504.

<sup>56</sup> *Smith-Calhoun Rubber Co. v. McGhee Rubber Co.*, 235 S. W. 321, 323 (Tex. Civ. App. 1921); *Hall v. Conine*, 230 S. W. 823, 825 (Tex. Civ. App. 1921).

than void, if a creditor chooses to take action.<sup>57</sup> In a number of cases a buyer of goods in bulk has defended a suit for breach of contract on the ground that the seller would not or did not furnish him with a sworn list of creditors. Texas decisions seem to have established that if the contract between the seller and buyer makes no reference to the Bulk Sales Law, then the buyer cannot insist on the seller's compliance with its terms.<sup>58</sup> The reason is that the Law is purely for the protection of creditors.

A contrary result was reached in the recent case of *Ashton v. Leysen*<sup>59</sup> where plaintiff contracted to sell her gift shop "free and clear of encumbrances." Defendants refused to perform the contract unless plaintiff complied with the Bulk Sales Act. In sustaining the defense the court pointed out that if defendants did not insist on compliance with the statute, they would hold the stock of goods as "trustees for the creditors." Since defendants would not be receiving unencumbered ownership, they had a right not to perform. The observation should be made that the general rule is that a seller of goods makes implied warranties of title and freedom from encumbrances.<sup>60</sup> Hence the *Ashton* decision is noteworthy, since the holding has possibilities of extension. *Jackson v. Burton*<sup>61</sup> is a case in which a purchase contract was made subject to the Bulk Sales Act and to termination if any lien or encumbrance was placed upon the goods sold. The buyers had ample contractual ground for avoiding the contract when creditors of the seller took

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<sup>57</sup> "The provision that 'sales shall be void as against creditors,' etc., is to be construed to the effect that such sales shall be voidable at the instance of creditors. Keeping in mind the purpose sought to be achieved by the statute and also that Legislatures and others use the term 'void' and 'voidable' without regard to the strict legal distinction between them, we think the legislative intent reflected in the statute renders any other construction clearly erroneous." *Smith-Calhoun Rubber Co. v. McGhee Rubber Co.*, 235 S.W. 321, 323 (Tex. Civ. App. 1921). See also *Freedman & Mellinger v. Maier*, 238 S. W. 1013, 1014 (Tex. Civ. App. 1922) *er. disp.*

<sup>58</sup> *Collins-Decker Co. v. John P. Crumpler*, 114 Tex. 528, 272 S.W. 772 (1925); *Veselka v. Forres*, 283 S. W. 303, 307 (Tex. Civ. App. 1926); *Freedman & Mellinger v. Maier*, 238 S. W. 1013, 1014 (Tex. Civ. App. 1922) *er. disp.*; see *Smith-Calhoun Rubber Co. v. McGhee Rubber Co.*, 235 S. W. 321, 323 (Tex. Civ. App. 1921).

<sup>59</sup> 237 S. W. 2d 713 (Tex. Civ. App. 1951) *er. disp.*

<sup>60</sup> *VOLD, SALES* (1931) 448; *1 WILLISTON, SALES* (Rev. ed. 1948) § 218.

<sup>61</sup> 99 S. W. 2d 395 (Tex. Civ. App. 1936).

advantage of the statute and garnisheed the merchandise. In effect, said the court, the buyers were made "receivers" of the goods. In view of the earlier decisions, a purchaser of merchandise in bulk would do well to contract expressly for the seller's compliance with the Act.

The Act of 1909 specified no procedure or remedy to be used by creditors. It merely said that sales and transfers in violation of the Act were "void" and left the consequences to be worked out by the courts. One consequence was that the goods remained the property of the seller, and a creditor could attach the goods or levy execution even though they were in the possession of the purchaser.<sup>62</sup> A creditor who acted speedily could expect to be paid in full, since he had no duty to share with others.

Argument was made in several cases that a purchaser should be held directly and personally liable for the debts of his seller. This argument was rejected.<sup>63</sup> The courts said that the Act was not intended to hold a purchaser for more than the goods he received and that he was responsible only after a lien was acquired on the goods or proceeds by attachment, levy or garnishment. In other words, the procedure under the Act was only ancillary to the main action against the debtor-seller.

Use of the garnishment process was explained in *Owosso Carriage & Sleigh Co. v. McIntosh & Warren*.<sup>64</sup> Plaintiff sued for a debt and secured a writ of garnishment against the purchaser of the debtor's stock of goods. The court declared:

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<sup>62</sup> *Williams v. J. W. Crowds Drug Co.*, 167 S. W. 187 (Tex. Civ. App. 1914); *Terrell Grain & Mercantile Co. v. Young*, 152 S. W. 671 (Tex. Civ. App. 1912).

<sup>63</sup> *Owosso Carriage & Sleigh Co. v. McIntosh & Warren*, 107 Tex. 307, 179 S. W. 257 (1915), *rev'g* 146 S. W. 239 (Tex. Civ. App. 1912); *Barcus v. Parlin-Orendorff Implement Co.*, 184 S. W. 640, 643 (Tex. Civ. App. 1916), *later proceedings*, 207 S. W. 586 (Tex. Civ. App. 1918) *er. ref.*; *Eagle Drug Co. v. White*, 182 S. W. 378, 385 (Tex. Civ. App. 1915); *Bewley v. Sims*, 145 S. W. 1076 (Tex. Civ. App. 1912) *er. dismiss.*

<sup>64</sup> 107 Tex. 307, 179 S. W. 257 (1915), *rev'g* 146 S. W. 239 (Tex. Civ. App. 1912). *Accord*: *Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co.*, 189 S. W. 784 (Tex. Civ. App. 1916) *er. ref.* (value found to be equal to purchase price); *Barcus v. Parlin-Orendorff Implement Co.*, 184 S. W. 640 (Tex. Civ. App. 1916), *later proceedings*, 207 S. W. 586 (Tex. Civ. App. 1918) *er. ref.*

Defendants in error had not the power nor the right to acquire title to this property as against creditors, for the statute in cases of this kind impounds and holds the merchandise for the benefit of creditors of the seller. And since their act in attempting to purchase was void, it follows, as stated above, that the title to said property remained in Sweet, the seller, and did not pass to the defendants in error; and, when defendants in error sold said merchandise, the proceeds of said sale were subject to garnishment.

When the defendants in error sold the merchandise, the title to which remained by law in Sweet, they became indebted to Sweet for its value. Having sold and converted property which, in law, belonged to Sweet, it obviously follows that they owed him for its value.<sup>65</sup>

The conclusion was that the garnishment "fastened" on the fund received by the garnishees. It is to be noticed that the value of the goods may be different from the amount of the proceeds. In some cases the value might exceed the proceeds, although it is unlikely that the value would ever be less than the proceeds.

The Act of 1915 continued to make bulk sales and transfers "void as against the creditors of the seller or transferor" unless the stated requirements were met and added that a non-complying purchaser or transferee, "upon application of any of the creditors," should "become a receiver and be held accountable to such creditors for all goods, wares, merchandise and fixtures" coming into his possession. Uncertainty arose as to the extent of change intended by the Texas Legislature. One case held that the amendment made a purchaser who had disposed of the goods liable in a direct suit up to the value of the goods.<sup>66</sup> The purchaser was said to be a converter and personally liable for the entire debt if the goods had equal or greater value. Other cases took the more reasonable view that the new expression in the statute merely added a new procedure. Under this view a creditor could still levy on goods in the hands of the purchaser or could garnishee the purchaser for

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<sup>65</sup> *Id.* at 313, 179 S. W. at 259.

<sup>66</sup> *Hay v. Behrens Drug Co.*, 214 S. W. 940, 942 (Tex. Civ. App. 1919).



their value if they had been sold or consumed.<sup>67</sup>

In *Gardner v. Goodner Wholesale Grocery Co.*<sup>68</sup> the Texas Supreme Court undertook to clarify rights and procedures under the bulk sales statute. On proof of violation of the statute plaintiff creditor obtained a joint and several judgment against the debtor-seller and the purchaser. The court of civil appeals held that the petition was insufficient to sustain a personal judgment against the purchaser and indicated that plaintiff had the same remedies of attachment, levy and garnishment that existed under the original Act.<sup>69</sup> In addition, plaintiff could bring an action to hold the purchaser accountable as a receiver of the goods.

The supreme court said that the impression prevailed in the state that under the 1909 Act attachment, levy or garnishment was necessary. The court thought it unnecessary to say whether this impression was correct, "as we are of the opinion that it is not now required." The court continued:

As shown by the decisions in other states having a similar law, the statute as now written was not intended to do away with proceedings by garnishment or other process, but was intended to furnish an additional remedy, more direct, effective, and equitable to the various creditors, if more than one. If it has ever been necessary to resort to supplementary proceedings, we think such would not be necessary where the transferee claims ownership of the property in his own right. . . .

The liability of a purchaser of a stock of goods and fixtures in violation of the Bulk Sales Law is that of a receiver. Having taken the property subject to the rights of the creditors, he becomes bound in equity to see that the property or its value is appropriated to the satisfaction

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<sup>67</sup> *C. J. Gerlach & Bro., Inc. v. Texas Bldg. Material Co.*, 245 S. W. 716 (Tex. Civ. App. 1922); *Rachofsky v. Rachofsky*, 203 S. W. 1134 (Tex. Civ. App. 1918); *Kell Milling Co. v. H. O. Wooten Grocery Co.*, 195 S. W. 342 (Tex. Civ. App. 1917); but see *Hall v. Conine*, 230 S. W. 823, 825 (Tex. Civ. App. 1921) (purpose of statute "is to protect creditors against injurious discriminations by debtors;" right to defeat transfer, "by means of a writ of garnishment or in any other manner, is not given to enable the attacking creditor to secure an advantage in the distribution of assets").

<sup>68</sup> 113 Tex. 423, 256 S. W. 911 (1923), *rev'g* 247 S. W. 291 (Tex. Civ. App. 1922).

<sup>69</sup> 247 S. W. at 293, 294. "A purchaser's liability was that of a holder of a fund belonging in the eyes of the law to the seller, and we do not understand that under the old law this liability could be asserted except through some process that would create a lien on the property or fund."

of claims of the creditors of his seller. He becomes the trustee of an express trust, and is subject to the same duties and liabilities of such a trustee. We think the law was intended to charge him with liability, however, only to the extent of the value of the property received by him, and this liability is to all of the creditors pro rata.<sup>70</sup>

The court was of the opinion that a formal application must be made to hold the purchaser as a receiver. In such capacity he is under a duty to account:

If the property had been disposed of, such an accounting should necessarily include information as to its value at the time it was received, as well as the amount received by him for the property disposed of. While primarily he would be liable for the actual value of the property, yet there might be circumstances that would limit his liability to the amount actually received by him for the property, if less than its actual value. . . . If any property received by the purchaser by virtue of the transfer remained in his possession, the court would be authorized to order its sale.<sup>71</sup>

In the receivership proceeding creditors may be ordered to file their claims, which are paid on a pro rata basis, if not in full.

*Texas Bank & Trust Co. v. Teich*<sup>72</sup> is a well-considered case which offers further explanation of the *Gardner* decision. Plaintiff creditor sought to levy execution on an automobile which was subject of a bulk transfer from the debtor to defendant trust company. In reversing a judgment for plaintiff the court recognized that a material change in the Bulk Sales Law had been made in 1915. Previously an "attaching creditor was entitled to the full amount of his debt, if the property attached was of that value," but now the purchaser's liability is "pro rata to all creditors" in the amount of the "value of the property purchased."<sup>73</sup> The court went on to say:

Appellees confuse the two methods by which a creditor may, since the amendment, bring the purchaser violating the law into court, as fixing two separate and distinct methods of fixing liability, contending that, where a diligent creditor attaches the property, he should be permitted to recover the full amount of his debt, if the property is of

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<sup>70</sup> 113 Tex. at 425, 426, 256 S. W. at 912.

<sup>71</sup> *Id.* at 427, 256 S. W. at 913.

<sup>72</sup> 283 S. W. 552 (Tex. Civ. App. 1926) *er. ref.*

<sup>73</sup> *Id.* at 554, 555.

that value, and that, on the other hand, if the creditor sues for an accounting as authorized by the statute, he is entitled to recover only pro rata with other creditors. Appellees' petition . . . showed a sufficient compliance with both methods of obtaining jurisdiction over the purchaser, but the court failed to charge the purchaser *with the only liability which the statutes imposed upon it, that of accounting to all the creditors for the value of the property received pro rata*. The mode and manner of fixing the liability and of adjusting the rights of all creditors is clearly and well set forth in *Gardner v. Goodner*, supra.<sup>74</sup>

A third case making an authoritative declaration concerning procedures under the Act is *Southwestern Drug Corp. v. McKesson & Robbins, Inc.*<sup>75</sup> Plaintiff creditor secured judgment against its debtor and then sought to garnishee defendants who had purchased all of the debtor's stock of merchandise. The Texas Supreme Court declared:

The Bulk Sales Law as amended did not abolish garnishment proceedings to assist in enforcing rights arising under the statute, but permits such proceedings as an additional remedy, if necessary, to enforce rights arising under the statute.

The Bulk Sales Law was enacted for the benefit of all creditors, and it was not intended that any one creditor should derive a superior right by instituting garnishment proceedings. All creditors . . . should share pro rata in the goods, wares, and merchandise transferred in trust to the purchaser or purchasers thereof, or in their value.

Respondent should file in the trial court necessary pleadings disclosing the facts of this case, showing that the purchasers or garnishees in this case were liable as receivers of the goods received by them . . . under the Bulk Sales Law. The trial court should be furnished with pleadings and proof, if possible, showing who the creditors . . . are, and the amounts claimed by them.<sup>76</sup>

In summary, the following statements seem supported. The most appropriate remedy for violation of the statute is to apply to the proper court to have the purchaser or transferee declared a receiver. In the proceeding the transferee will be required to divulge

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<sup>74</sup> *Id.* at 555. Emphasis added.

<sup>75</sup> 141 Tex. 284, 172 S. W. 2d 485 (1943), *rev'g* 165 S. W. 2d 758 (Tex. Civ. App. 1942).

<sup>76</sup> *Id.* at 288, 289, 172 S. W. 2d at 487.

the nature and value of the property received, what disposition has been made of the property, and the proceeds thereof. All creditors will be permitted to file claims and will share pro rata in what is made available through the receivership. The property still in the transferee's possession may be sold under order of the court. If the transferee has disposed of all the property received (by sale, commingling or consumption), he is personally liable for its value. The creditors have recourse to this personal liability in proportion to their claims. A number of cases in direct holdings or by dicta recognize these principles.<sup>77</sup>

The writ of garnishment may properly be used to reach goods or their value in the hands of the purchaser. But the writ is merely a means whereby the goods or their value may be made available to all creditors.<sup>78</sup> In the period between the *Gardner* and *Southwestern Drug* decisions a few civil appeals cases allowed garnishment in favor of a single creditor for the amount of his claim.<sup>79</sup> Perhaps these cases may be explained in that plaintiff was the only creditor or in that the garnishee failed to plead or prove the existence of other creditors. Otherwise, they must be regarded as a carry-over from the law developed under the Act of 1909. Similar comment may be made concerning one or two cases in this period in which direct suit or levy of execution apparently was allowed against the purchaser.<sup>80</sup>

<sup>77</sup> *Fischer v. Rio Tire Co.*, 65 S. W. 2d 751 (Tex. Comm. App. 1933), *rev'g* 48 S. W. 2d 367 (Tex. Civ. App. 1932); *Phillips v. Cargill*, 131 S. W. 2d 775 (Tex. Civ. App. 1939); *H. O. Wooten Grocery Co. v. Coleman*, 32 S. W. 2d 279, 280 (Tex. Civ. App. 1930); *Cornish v. Nance Motor Co.*, 13 S. W. 2d 139 (Tex. Civ. App. 1928) *er. ref.*; *Lacey v. Dayton Rubber Mfg. Co.*, 270 S. W. 916 (Tex. Civ. App. 1925) *er. disp.*; see *Quicksilver v. Haynes*, 56 F. 2d 59, 61 (5th Cir. 1932), *cert. denied*, 287 U. S. 602 (1932); *Supervend Corporation v. Jones*, 235 S. W. 2d 707, 709 (Tex. Civ. App. 1950); *H. D. Lee Mercantile Co. v. Thompson*, 161 S. W. 2d 581, 582 (Tex. Civ. App. 1942); *Hobart Mfg. Co. v. Joyce & Mitchell*, 4 S. W. 2d 185 (Tex. Civ. App. 1928).

<sup>78</sup> *Midland Shoe Co. v. A. L. & K. Dry Goods Co.*, 281 S. W. 344 (Tex. Civ. App. 1926) *er. ref.*, *later proceedings*, 3 S. W. 2d 475 (Tex. Civ. App. 1927) *er. ref.*

<sup>79</sup> *White v. Monnig Dry Goods Co.*, 59 S. W. 2d 949 (Tex. Civ. App. 1933) *er. disp.*; *Dallas Coffin Co. v. Yeager*, 19 S. W. 2d 156 (Tex. Civ. App. 1929) *er. disp.*, *later proceedings*, 46 S. W. 2d 1016 (Tex. Civ. App. 1932), 69 S. W. 2d 493 (Tex. Civ. App. 1934) *er. disp.*

<sup>80</sup> *Morrison v. Sewell*, 4 S. W. 2d 1029, 1031 (Tex. Civ. App. 1927) *er. disp.*; *Mcwade Tube Co. v. Newnam*, 258 S. W. 560 (Tex. Civ. App. 1924) *er. disp.*; see *Renken v. J. M. Radford Grocery Co.*, 137 S. W. 2d 101 (Tex. Civ. App. 1940) *er. disp.*

From the standpoints of effectiveness of relief and fairness to all creditors the development of the receivership concept as the primary remedy under the Texas statute deserves approval. Attachment, levy of execution and garnishment have wisely been subordinated to the objective of allowing all creditors a share in the goods or proceeds in the hands of a purchaser. One cannot be sure that these writs will always be denied where a creditor seeks to use them for his exclusive benefit. But such use should be limited to instances where there are no other creditors who can assert rights under the Bulk Sales Act.<sup>81</sup>

Some problems of joinder and venue peculiar to bulk sales cases have reached the appellate courts. In a suit against a resident debtor-seller a non-resident purchaser is not a necessary party, and his plea of privilege has been sustained.<sup>82</sup> Suit to make a purchaser a receiver of goods may in some instances be brought without joinder of the debtor-seller, and then the proper venue is the residence of the purchaser.<sup>83</sup> One case, decided by a divided court and of doubtful authority, held that a purchase in violation of the Bulk Sales Act was a trespass placing the venue in the county where it was committed.<sup>84</sup>

Circumstances and conduct may prevent a creditor from asserting rights under the Act. Where a creditor received from the purchaser more than the latter obtained, it was held that "the equities of the transaction were more than satisfied" and the creditor had no right to further relief.<sup>85</sup> Creditors who learn of a bulk transfer

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<sup>81</sup> See *Phillips v. Cargill*, 131 S. W. 2d 775, 776 (Tex. Civ. App. 1939).

<sup>82</sup> *Reynolds v. Groce-Wearden Co.*, 250 S. W. 2d 749 (Tex. Civ. App. 1952); *Gulf Refining Co. v. Lipscomb*, 41 S. W. 2d 248 (Tex. Civ. App. 1931).

<sup>83</sup> *Texlite, Inc. v. Pecos Mercantile Co.*, 128 Tex. 57, 96 S. W. 2d 73 (1936), *aff'g* 65 S. W. 2d 811 (Tex. Civ. App. 1933); *Fischer v. Rio Tire Co.*, 65 S. W. 2d 751, 757 (Tex. Comm. App. 1933), *rev'g* 48 S. W. 2d 367 (Tex. Civ. App. 1932); see *H. D. Lee Mercantile Co. v. Thompson*, 161 S. W. 2d 581 (Tex. Civ. App. 1942) (suit against resident purchaser of goods; non-resident debtor-seller held necessary party, and plea of privilege overruled).

<sup>84</sup> *Bank of Carbon v. Cox Mercantile Co.*, 241 S. W. 602 (Tex. Civ. App. 1922) *er. dism.* The majority of the court relied on *Hay v. Behrens Drug Co.*, discussed at note 66 *supra*, which was based on an assumption which has been overruled.

<sup>85</sup> *S. H. Twaddell v. H. O. Wooten Grocer Co.*, 130 Tex. 42, 106 S. W. 2d 266 (1937), *reforming* 68 S. W. 2d 285 (Tex. Civ. App. 1934).

in which the buyer gives a note to be used in paying the seller's debts and who affirm the transaction will be estopped to claim rights under the statute.<sup>86</sup> The suggestion has been made that a creditor who is present at a bulk sale, hears the seller tell his buyer that he owes no debts, and remains silent will be estopped to reach the goods or their value.<sup>87</sup> A creditor who takes a bulk transfer in payment of or as security for his claim, or who is a party thereto, will be denied any right to share pro rata in the property when other creditors bring proceedings under the Bulk Sales Act.<sup>88</sup> The theory is that the transferee is a trustee who has made claims inconsistent with the rights of the beneficiaries (creditors), and he is estopped to assert the rights of a beneficiary.

Finally, attention should be given to the creditors' right to follow the goods from the first bulk transferee into the hands of subsequent bona fide purchasers for value without notice. The general rule is said to be that the goods may not be claimed by the creditors.<sup>89</sup> Texas cases seem to be to the contrary.<sup>90</sup> A literal construction of the statute would compel the conclusion that neither the first transferee nor any succeeding transferee gains title. This would be an unfortunate result, especially where the goods are sold in small lots to bona fide sub-purchasers. The general rule seems preferable in that creditors are encouraged to act promptly and the

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<sup>86</sup> Warren v. Parlin-Orendorff Implement Co., 207 S. W. 586 (Tex. Civ. App. 1918) *er. ref.*, *earlier proceedings*, 184 S. W. 640 (Tex. Civ. App. 1916).

<sup>87</sup> See Dallas Coffin Co. v. Yeager, 19 S. W. 2d 156, 158 (Tex. Civ. App. 1929) *er. dism.*, *later proceedings*, 46 S. W. 2d 1016, 1018 (Tex. Civ. App. 1932), 69 S. W. 2d 493 (Tex. Civ. App. 1934) *er. dism.*

<sup>88</sup> Cornish v. Nance Motor Co., 13 S. W. 2d 139, 140 (Tex. Civ. App. 1928) *er. ref.*; Midland Shoe Co. v. A. L. & K. Dry Goods Co., 3 S. W. 2d 475, 478 (Tex. Civ. App. 1927) *er. ref.*, *earlier proceedings*, 281 S. W. 344 (Tex. Civ. App. 1926) *er. ref.*; *see* Mayfield Co. v. Harlan & Harlan, 184 S.W. 313, 315 (Tex. Civ. App. 1916).

<sup>89</sup>VOLD, SALES (1931) 414; 3 WILLISTON, SALES (Rev. ed. 1948) §643d.

<sup>90</sup> Midland Shoe Co. v. A. L. & K. Dry Goods Co., 281 S. W. 344, 348 (Tex. Civ. App. 1926) *er. ref.*, *later proceedings*, 3 S. W. 2d 475 (Tex. Civ. App. 1927) *er. ref.*; *see* Mayfield Co. v. Harlan & Harlan, 184 S. W. 313, 315 (Tex. Civ. App. 1916); Terrell Grain & Mercantile Co. v. Young, 152 S. W. 671, 672 (Tex. Civ. App. 1912).

A creditor who is paid by a purchaser, pursuant to agreement with the debtor-seller, is not a transferee or purchaser subject to remedies under the Act. Monnig Dry Goods Co. v. Copley, 30 F. 2d 95 (5th Cir. 1929).

separation of title and possession is limited to one transfer transaction.

*Uniform Commercial Code.* Creditors protected under the Bulk Transfers Article are those "holding claims based on transactions or events occurring before the bulk transfer," and a Comment states that unliquidated claims are included.<sup>91</sup> A bulk transfer is "ineffective" if the Article is not complied with, but no provision is made for remedial procedures. The Article contemplates that whatever procedures the local law affords for violation of bulk sales legislation will continue.<sup>92</sup> Since Texas procedures have proved satisfactory, if the Bulk Transfers Article were enacted, it would be well to indicate that the remedies available to creditors remain the same. This might be done by adding the last sentence of the first section of the Texas Act to Section 6-104 or 6-109.

Section 6-111 declares that no action shall be brought under the Article more than six months after the date on which the transferee took possession of the goods. If the transfer was concealed, the action may be brought within six months after its discovery. Sound argument may be made for a short statute of limitations on actions based on bulk transfers.

Section 6-110 adopts the general view protecting a bona fide purchaser for value from a transferee who has failed to comply with the Article.

### CONCLUSION

In a broad sense, the Bulk Transfer Article would not change Texas law. The purpose of both the Article and the Texas Bulk Sales Act is to protect creditors from bulk transfers which work a preference or an outright fraud. In detailed rules and procedures the Article would, obviously, effect changes in Texas law. The Article is of somewhat broader scope than the Texas Act (*e.g.*, manufacturers are covered; "materials, supplies, merchandise or

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<sup>91</sup> § 6-109(1).

<sup>92</sup> See § 6-104, Comment.

other inventory" are subject to the Article). A change would be made in the requirement of notice to creditors before passing of possession or before paying for the goods. Bona fide sub-purchasers would obtain valid title, contrary to at least one Texas holding. The question whether mortgages are covered would be settled, and one must concede that such "transfers" are within the policy of bulk sales legislation. Many new provisions appear in the Article. Auctions would be dealt with, and a "bracketed" section would impose on a transferee the duty of assuring that creditors are paid. A time limitation on the bringing of suit would be declared.

The Article is by no means a final and complete answer to the problem of bulk transfers.<sup>93</sup> But its sections are carefully worked out and integrated, and the requirements and procedures are well calculated to safeguard creditors. No excessive burden is placed upon the transferor and transferee in view of the policy served by the Article. Even the "bracketed" section appears desirable, since no denial can be made that a man who sells his business ought somehow to be constrained to pay his creditors. Under the Article ample room still remains for the courts to interpret, to adjust the equities of the parties and to apply estoppel, waiver and other judicial doctrines. At the same time the principle of uniformity among the states is promoted. This writer expresses the opinion that the Bulk Transfers Article of the Uniform Commercial Code is a substantial improvement over the present statute and is worthy of enactment.

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<sup>93</sup> See critical analysis in Weintraub and Levin, *Bulk Sales Law and Adequate Protection of Creditors*, 65 Harv. L. Rev. 418 (1952).