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The Bulk Sales Act 1959¹

MEYER FELDMAN *

Generally speaking the changes made in the new Bulk Sales Act by the learned draftsman² were intended to overcome the inherent mischiefs of the former Act.³ The main portion of this article will be devoted to analyzing some of these changes to ascertain whether the intentions will in fact be realized. Has the Act been drafted clearly so that a court of law will be able to interpret it without difficulty? Two questions must be asked: how will a court of law interpret the changes made;⁴ are the changes adequate to remedy the former deficiencies? It is essential for an intelligent understanding of the questions raised in this article to keep in mind the fundamental purpose of The Bulk Sales Act. Any evaluation of the effectiveness of the procedural and substantive aspects of the Act must be made in the light of its underlying purpose.

It was stated by Mr. Justice Hodgins in *McLennan v. Fulton*⁵ that:

the aim of the [Bulk Sales] Act is to prevent a person, partnership or company disposing of his or its assets in bulk, and pocketing the money leaving creditors in the lurch.

The 1917 Act provided that a sale of stock or fixtures shall be void as against creditors⁶ of the vendor unless the buyer demands from the

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¹ 1959 (Ont.) c. 9.

² The writer wishes to acknowledge the assistance afforded him by Mr. Fred M. Catzman, Q.C., the draftsman of the new Act. For a more complete exposition on the Bulk Sales Act see the two articles written by Mr. Catzman in *The Canadian Bar Journal*: Can. B.J. 1:38, Apr. 1958, and Can. B.J. 3:28, Feb. 1960.

³ R.S.O. 1917, c. 33.

⁴ This involves the problem of statutory interpretation. Lord Simonds in *Magor and St. Mellons R.D.C. v. Newport Corporation*, [1952] A.C. 189 at 191 stated, "The duty of the court is to interpret the words that the legislature has used; these words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited: . . ." This indicates that a court of law will hew strictly to the words in a statute and will not take into account what the legislature intended to say. Dealing specifically with the Bulk Sales Act the cases of *McHugh v. Campbell* (1922), 22 O.W.N. 463, and *Bank of Montreal v. Ideal Knitting Mills Ltd.* (1924), 55 O.L.R. 410 have held that the Act is to be construed strictly. For a short but excellent article on statutory interpretation, see Willis, *Statute Interpretation in a Nutshell* (1938), 16 Can. Bar Rev. 1.

⁵ (1921), 50 O.L.R. 572, at p. 577.

⁶ It is submitted that the majority of affidavits sworn under the 1917 Act were, in strict theory, false. This submission is based on the wording of the former section 2 which stated, inter alia, that "the affidavit shall con-

seller a list of all his creditors, both secured and unsecured. Subsequent to this the buyer was obliged to notify the creditors of the impending sale. If the sale was to be attacked, the action had to be taken within sixty days of the date of the sale or of the date when the creditor attacking the sale first received notice thereof.⁷

The 1959 Act is basically the same in its aim and purpose. However, the following changes in procedure are noteworthy. The seller must place a notice of the impending sale in the Ontario Gazette five days before the completion of the sale. This notice gives the buyer's address and is intended to aid the trade creditors of the seller. The buyer is obliged, within five days after the completion of the sale, to file in the office of the clerk of the court the affidavits mentioned in section 12. If the Act is not complied with, the sale in bulk is voidable as against the creditors of the seller. The limitation period in which to attack a sale has been lengthened from sixty days to six months from the date of filing.

The following sections of the Act will be examined: section 1(d) (ii) dealing with the definition of stock; section 3 concerning judicial exemption; section 17 and other allied sections dealing with the problem of noncompliance with the Act and section 20 dealing with the limitation of actions. A possible amendment in connection with auction sales will be suggested. Some of the other important provisions of this Act will be considered in order to indicate how essential it was to have this new legislation.

Stock

In section 1(d) (ii) of the 1917 Act, stock was defined to include, inter alia, "The goods, wares, merchandise or chattels in which any person trades, or which he produces or which are outputs of, or of which he carries on any business, trade or occupation." It was held in *Bank of Montreal v. Ideal Knitting Mills Ltd.*⁸ that this section would not extend to include equipment that had never been used by the seller in his business. There were dicta in that case to the effect that the section would not cover equipment once used in the business but which has ceased to be used there now.⁹ To cover the situation of a seller ceasing to use the equipment and then selling it off subsequently, the definition of stock has been amended to read,¹⁰ inter

tain the names and addresses of all the creditors of the vendor." There is no distinction made as between trade creditors and ordinary creditors. The term "creditors" would therefore include not only trade creditors but also ordinary creditors of the vendor, such as a grocer, mortgagee on his home, dentist, and so on. Section 4(1) of the present Act now uses "trade creditors" where the former Act used the term "creditors." Section 1(b) of 1917 Act in defining creditor did not solve the problem. Creditor was defined to include, inter alia, "a person to whom the owner of any stock as defined by this Act is indebted."

⁷In this article, where the term "invalid sale" is used it refers only to invalidity due to nonconformity with the provisions of the Act. In other respects the sale is valid; that is, as between the buyer and seller there has been a proper offer and acceptance, and consideration has been given.

⁸ (1924), 55 O.L.R. 410.

⁹ *Supra*, footnote 8 at p. 412.

¹⁰ 1959 (Ont.) c. 9, s. 1(k) (iii).

alia, "the fixtures, goods and chattels with which a person carries on a trade or business." The entire change has been the replacement of the word "he" in the 1917 Act with the word "person". This change was intended to overcome the dicta in the *Bank of Montreal v. Ideal Knitting Mills Ltd.* case; now a seller who ceased to use the equipment would still be within the scope of the Act if *any other person in the trade or business* still used this type of equipment. However, it is submitted that this amendment does not overcome the difficulties of the former section in some fairly common fact situations. For example, the amendment would not cover the case of a unique piece of equipment not now in use by the seller being disposed of as scrap. Neither would it cover the situation of a piece of equipment now out of use by the industry being scrapped.¹¹ It is submitted that these shortcomings might be overcome by having the definition of "stock" include, inter alia, "the fixtures, goods and chattels with which a person carries on, or has carried on, a trade or business".

Judicial Exemption

Section 3 has attempted to lessen the rigour of the former Act by allowing a judge, upon application to him by the seller, the opportunity of exempting a sale in bulk from the application of this Act. Neither the former nor the present Act make a distinction between solvent and insolvent debtors.¹² Indeed it is from this very feature that the Act derives its validity.¹³ Had the Act been limited to insolvent debtors it might be ultra vires the province as dealing with bankruptcy and insolvency.¹⁴ Now, by giving a judge a discretion as to the exemption of debtors regardless of whether they are solvent or insolvent, the Act remains intra vires the province.

What is the rigour that this section was intended to overcome? An example would best illustrate this. Under the 1917 Act, when a large department store disposed of a certain line of merchandise in bulk, it was required to follow the formalities of the Act even though there was no doubt that it was financially able to meet the demands of its creditors. Section 3 has apparently removed any hardship on solvent debtors. The term "apparently" is used as the section is very general in its terms giving the judge only the barest of standards by which to be guided:

¹¹ As to the frequency of such an event occurring, see Easton and Newton, *Accounting and the Analysis of Financial Data* (Toronto, McGraw-Hill, 1958), at p. 126, where the authors state, "Many fixed assets are not discarded until they are scrapped, sold or traded at a time when they are still operating with little mechanical trouble. Why? Probably because they are obsolete. Something may have developed that will provide a more economical operating cost, or perhaps competition requires a change in product design that cannot be handled by existing equipment."

¹² *Re St. Thomas Cabinets Ltd.* (1921), 50 O.L.R. 492; *Morton v. Canadian Credit Men's Trust Association* (1928), 63 O.L.R. 334.

¹³ *Re St. Thomas Cabinets Ltd.*, *supra* footnote 12.

¹⁴ Section 91(21) of the British North America Act puts those fields within the exclusive jurisdiction of the Dominion Parliament.

section 3(1)—A seller may apply to a judge for an order exempting a sale in bulk from the application of this Act, and the judge, if he is satisfied on the affidavit of the seller and on any other evidence that the sale is advantageous to the seller, and will not impair his ability to pay his creditors in full, may make the order, and thereafter this Act, except for section 8,¹⁵ does not apply to the sale.

section 3(2)—The judge may require notice of the application for the order to be given to the creditors of the seller, or such of them as he directs, and he may in the order impose such terms and give such directions with respect to the disposition of the proceeds of the sale as he deems fit.

Section 3 gives the court two standards to use in exercising its discretion. These are: is the sale advantageous to the seller; will the sale impair the seller's ability to pay his creditors? Are these standards helpful? Will a judge using these standards arrive at a decision such as was intended by the legislature?

The first thing to note concerning section 3 is that this is an application brought by the seller. The buyer is not present. It is up to the seller to say whether the sale is advantageous or not. Further, we are not informed whether the phrase "does not impair his ability to pay his creditors in full" means payment immediately or only deferred payment, or either.¹⁶ Has it been left in the judge's discretion whether payment to the creditors must be made in full presently, or at a subsequent date in accordance with the credit agreements between the seller and his creditors? It is submitted that on a plain reading of section 3(1) this is not a matter to be dealt with by the judge. Therefore the Act does not clearly tell us what the phrase "will not impair his ability to pay his creditors" means. Further, even if the judge is satisfied, then it is still entirely within his discretion as to whether he will make the order, and there is no standard to guide him in the exercise of this discretion. It is submitted that this section was inserted to lessen the hardship on solvent sellers,¹⁷ but because of the generality of the wording may not be effective in reaching the desired end. Some substantial standard in the Act to aid the judge in exercising his discretion would eliminate this problem.

Limitation of Actions

Section 8 of the 1917 Act stated that an action to set aside a sale in bulk as void must be brought within sixty days from the date of sale or sixty days from the date when the creditor attacking the sale first received notice thereof. Section 20 of the present Act has extended the amount of time given to creditors to attack the validity

¹⁵ *Quaere* in connection with section 3(2), which states that in some cases notice need not be given to the creditors, as it is within the judge's discretion whether to give notice to the buyers, how the creditors will acquire knowledge of the sale to be able to take advantage of this exception.

¹⁶ Section 9(1)(c) states, "so long as the claims are paid in full *forthwith* after the completion of the sale." (The italics are mine).

¹⁷ Nor are we told whether the solvency of the seller has anything to do with how the judge is to exercise his discretion.

of a sale to six months from the date of filing by the buyer.¹⁸ This intended extension for the benefit of creditors may in certain factual situations give creditors less time to start an action than they would have had under the old Act. Under the 1917 Act the creditor had sixty days from "notice" of the sale to commence his action, while the present Act says "six months from the date of filing."¹⁹ Assuming that a creditor did not receive notice of the sale for six months, then under the 1917 Act he would still have sixty days in which to bring his action; the provisions of the present Act, which were intended to afford the creditor further time in which to start his action, would leave the creditor without remedy.²⁰ However, it is submitted that the present section is satisfactory. It has extended the time in which to commence the action, but at the same time has cut it off six months after filing²¹ with the result that there will be finality to the transaction.

Effect of Noncompliance

Sections 3 and 5 of the 1917 Act stated that if there was non-compliance with the Act the sale was deemed fraudulent and void. Section 17 of the present Act states that a sale in bulk is voidable if there is noncompliance. This change from "void" to "voidable" has only made explicit that which was implicit in the decided cases.²² The present section also has incorporated the decision of the *David Garson* case,²³ which decided that since such a sale is only voidable, as distinct from void, then the sale remains valid unless action is taken by the creditors of the seller to have it set aside. Therefore if there were a resale by the transferee to a bona fide purchaser before the creditors started proceedings, the sale would be valid and would pass good title to the new purchaser. The 1917 Act presumed fraud on the part of both the seller and buyer. Using this presumption the

¹⁸Section 12. Note also that most other provincial Bulk Sales Acts have a six month limitation period, starting from the date of the sale and not from the date of filing. See R.S.A. 1955, c. 33, s. 12; R.S.M. 1954, c. 30, s. 12; R.S.B.C. 1948, c. 35, s. 12.

¹⁹See my argument under *Effect of Noncompliance* as to whether filing is a necessary element on the buyer's part so as to satisfy the provisions of the Act

²⁰See *McLennan v. Fulton* (1921), 50 O.L.R. 572, 64 D.L.R. 558; *Goodyear Tire and Rubber Co. of Canada Ltd. v. Wooden* (1922), 52 O.L.R. 5, [1923] 2 D.L.R. 462, as two examples in which the court has refused to entertain an action brought by a creditor after sixty days, as required by section 8 of 1917 Act, had elapsed.

²¹*Quaere* whether it would not be wiser to follow the limitation sections used by many of the other provinces and use a six month period starting from the date of sale. See *supra*, footnote 18. It is submitted that this would resolve the question, raised in this article in *Effect of Noncompliance*, as to whether an improper filing can still be considered a sufficient filing within the Act so as to satisfy the limitation of action section. See also footnote 31. As the Act now stands it is not certain whether the six month period will commence to run after an improper filing.

²²See *David Garson v. Canadian Credit Men's Trust Association*, [1929] S.C.R. 282 per Lamont J. at p. 285, and *Allen v. Patterson* (1925), 57 O.L.R. 209, where it was held that void meant voidable at the instance of the creditors of the seller.

²³*Supra*, footnote 22.

creditors could resort to the various statutes dealing with fraudulent transfers.²⁴ Only by this indirect route were the creditors able to recover the proceeds of the sale from the transferee. Section 17 has simplified this procedure by stating that the transferee shall be personally liable to account to the creditors of the seller for the stock that he has received.

Since a sale in bulk is valid until attacked, this may leave a gap in time in which other secured creditors may get priority over the creditors of the seller. Let us take the case of an invalid sale where the goods have passed to a bona fide purchaser. The goods are now displayed in his business establishment and because of this display credit is extended to the purchaser. It is not logical to say that those creditors who have a floating charge on these goods should have priority on the value of these goods?

Section 17 of the 1959 Act commences with the words "Unless the Act is complied with a sale in bulk is voidable . . ." What interpretation will the courts give to these words?

In the 1917 Act there was no separate section, such as the present section 17, which stated that unless the Act was complied with the sale would be voidable.²⁵ Instead the 1917 Act stated after each operative section that the sale would be void as against the creditors of the seller. Section 3 stated that if the buyer did not demand and receive an affidavit from the seller as required by section 2, then the sale was deemed fraudulent and void. Section 5 stated that if the buyer, after having received the affidavit from the seller, did not then follow the requirements of section 4, then the sale was deemed fraudulent and void. Note that in the 1917 Act the sale could be deemed void only because of inaction by the buyer. The 1959 Act is different. It prescribes certain positive duties that must be performed by both the buyer and the seller. Briefly these duties are:

- (a) Section 4: The buyer must demand a statement of the seller's trade creditors and the seller must deliver this list to him.
- (b) Section 7(1): The seller must insert a notice of the impending sale in the Ontario Gazette.
- (c) Section 9(1) and (2): This section sets forth the conditions that must be satisfied before the buyer can pay the purchase price either to the seller or a trustee.
- (d) Section 11: This section outlines the formalities to be followed by the seller if the purchase price is to be paid to a trustee.
- (e) Section 12: This section imposes on the buyer the duty of filing certain enumerated documents.

Clearly under this Act both the buyer and seller have positive duties imposed upon them to perform. But unlike the 1917 Act it is not stated after each operative section that the sale will be voidable. There is one general section that says "Unless this Act is complied with the sale is voidable . . ." Will this section be interpreted as

²⁴In the *David Garson* case s. 21(1) of the Assignments Act, R.S.N.S. 1928, c. 200, was used.

²⁵See *supra*, footnote 22, to the effect that void and voidable were identical in meaning in the two Acts as interpreted.

meaning that it is necessary to have strict compliance by both the buyer and seller in order to have a valid sale. If this interpretation is accepted by the courts, then there is a great likelihood of injustice being done to the buyer.²⁶

Let us take the situation where the buyer has acted bona fide but the seller has not disclosed the names of all his creditors in his affidavit. What means has the Act provided to a creditor to aid him in finding out about the impending sale?

The first method is set out in section 7(1). This section imposes upon the seller the duty of placing a notice informing his creditors of the buyer's address in the Ontario Gazette. The seller must also give an affidavit to the buyer verifying this publication. However, it is submitted that in our commercial world this method of notice is ineffective; the majority of creditors are not aware of the publication of the Ontario Gazette. This submission is similarly shared by the draftsman of the Act who stated:

I entertain some doubt as to the value of this section in that it entails delay in completing a sale, and provides for notice in a manner which is not likely to come to the attention of the creditors generally.²⁷

Secondly, does the new section 8 aid the creditor in any way? It is submitted that it does not. Section 8 presupposes knowledge by the creditor of the sale. This is the very objective we are seeking to attain, and section 8 thus really begs the whole question.

Thirdly, there is section 12 dealing with filing the necessary documents by the seller after the completion of the sale.²⁸ It is submitted that this section will not be effective. Creditors in general do not make regular visits to the various registry offices to see whether any documents have been filed.²⁹ Further, a purchaser could omit filing according to section 12 and still have the sale considered valid within the meaning of the Act. Section 12 is the only section in the Act that explicitly states what the result will be for failing to comply with the section. This result is expressed by section 12(2) (a) and (b):

²⁶ It can be argued that sections 9(1)(a), 9(1)(b), and 9(1)(c), which all state "where the buyer has no notice of certain facts", indicate that if the buyer acts bona fide, he will not be penalized for the actions of a seller who may not have revealed all the names of his creditors. Yet it may also be argued that this section only sets out the requirements that the buyer must perform in order to act bona fide. There are also duties to be performed by the seller, and if the buyer and seller are each bona fide the Act will be complied with in accordance with section 17. It is submitted that it would be better to return to the explicit style of the former Act and state after each operative section that the sale will be voidable.

²⁷ From an address by Mr. Fred Catzman, Q.C., to the Canadian Bar Association in Vancouver in the fall of 1959.

²⁸ The first thing to be noted is that filing takes place after the completion of the sale. Therefore some injustice may have already taken place.

²⁹ See the section on *Limitation of Actions* in this article, where it is pointed out that a creditor may in certain factual situations have less time to bring an action or discover a sale than he would have had under the former Act.

section 12(2): If the buyer fails to comply with subsection 1, a judge may at any time,

- (a) upon the application of the trustee or any creditor, order the buyer to comply therewith; or
- (b) upon the application of the buyer, extend the time for compliance therewith.

Had section 12(2) (a) and (b) been omitted, it would have been fair to assume that if section 12 was not complied with, then the remedy for this noncompliance would be found in section 17—namely, it would be voidable at the instance of the creditors.³⁰ But since section 12(2) (a) and (b) have been inserted then it may be argued that section 17 is not applicable when section 12 is not followed.

Now if the buyer has acted bona fide in fulfilling all the requirements of the Act, except for section 12 dealing with filing, what will be the result? If a creditor of the seller does receive notice of the sale, he can use section 12(2) (a) and force the buyer to file the required affidavits. This will give the creditor six extra months in which to attack the sale, for the limitation period commences to run from the date of filing. However, it is submitted that this action taken by the seller is valueless, for even if the seller should use this extra time to sue the buyer, the sale will be held valid since the buyer has fulfilled all the other requirements of the Act. Therefore, if the buyer has followed all the procedures of the Act except filing, the sale is still valid within the Act. It may also be put forward with some certainty that a buyer who has acted consistently male fide will not file.³¹ If the above reasoning is sound, it may be questioned whether this section has any value at all,³² particularly in view of the fact that even if the documents are filed, creditors in most instances will not be aware of them.

³⁰ See the Nova Scotia Act, R.S.N.S. 1954, c. 27, s. 3, where failure to file the necessary affidavits does make the sale voidable.

³¹ *Quaere*, however, whether an invalid sale could be validated by the passage of six months from the date of filing. The question in effect becomes, is it possible to come within the ambit of the Act if you do not strictly follow the provisions of section 12? It is submitted that the requirements of section 12 are so exhaustive that it is virtually impossible to comply with this section unless you have complied with all of the essentials of the Act. In consequence, therefore, only if a buyer and seller have both acted bona fide can there be a proper filing in accordance with section 12. If this conclusion is valid, then the whole section becomes expendable. For what logical reason should a purchaser file the required documents? If he has acted bona fide, except for filing, then the lack of filing will not affect the validity of the transaction. (See the main portion of the article). On the other hand, if he has acted consistently male fide then the filing will be considered improper and of no value to him.

³² If the penalty attached to a section of a statute is any criterion by which one may judge the weight to be given to the section, then surely the remedy provided by section 12(2) (a) indicates the lack of faith the legislature had concerning this section. Note, however, the Nova Scotia Act (*supra*, footnote 30) where section 3 states that a lack of filing will result in making the sale voidable.

*Auction Sales*³³

Mr. Justice Orde³⁴ stated that the purpose of the Bulk Sales Act was:

to protect creditors against the effect of a secret though valid sale of their debtor's stock and the possible unfair distribution or dissipation of it.

This quotation indicates that a sale in public such as an auction sale would not fall within the ambit of this Act, and it has been so held in the case of *Scott v. Haycock and Nutt*.³⁵ In the same case Mr. Justice Meredith added another reason why an auction sale would not fall within the provisions of the Bulk Sales Act. The Chief Justice stated:³⁶

To make a sale there must be a buyer as well as a seller; and a sale by auction, or otherwise, to many purchasers in many lots, is not a bulk sale, but is the very opposite to a bulk sale.

It is submitted that the effect of an auction sale is equivalent in its results to a sale in bulk. Since the goods are offered to the public at a reduced rate, it can be expected that a large percentage of the seller's stock will be sold in a short period of time. Without expressing an opinion whether it would have been advisable to have legislated with regard to this type of action by the seller, I would refer to a proposal set forth by the Judicial Council of the State of New York³⁷ as to how legislation could be drafted to overcome this type of action:

. . . make the Act applicable to arrangements between the seller and auctioneer whereby merchandise in bulk or fixtures are to be disposed of through a sale at auction.³⁸

Other Highlights of the Act

Some of the other important changes embodied in the new legislation will now be set forth. No attempt will be made to comment on the effectiveness or desirability of these changes, but rather they will be outlined to indicate why new legislation was necessary in this area of the law.

- (1) Section 1(1) now brings a sale of bulk together with other property within the ambit of the Act. This eliminates the doctrine of severability in connection with bulk sales.³⁹ Prior to this, if in the one contract there was included an item besides the bulk sale and the

³³ For a more complete discussion on this topic, see 65 Harv. L. Rev. 418, at p. 421 ff.

³⁴ *Re St. Thomas Cabinets Ltd.* (1921), 50 O.L.R. 492, at p. 496.

³⁵ (1925), 58 O.L.R. 179.

³⁶ *Supra*, footnote 35, at p. 182.

³⁷ See the sixth *Annual Report and Studies of the Judicial Council of the State of New York* (1940), 374.

³⁸ In fact the State of New York has adopted a similar form of legislation to overcome this type of action by the seller. See the case of *Lowe v. Fairberg* 245 App. Div. 731; 280 N.Y.S. 615 (2nd Dept. 1935); app'd 270 N.Y. 590, 1 N.E. (2d) 344 (1936), where it was held that an auction sale was not within the ambit of the then existing Act.

³⁹ *Canadian Credit Men's Trust Association Ltd. v. Westergard et al.* (1951), 1 W.W.R. (N.S.) 822 (Alta.).

Bulk Sales Act was not complied with, then the sale was severable, and that part dealing with a sale of bulk would fail, while the remainder would be valid. Under the present Act severability is not possible. The entire transaction stands as a whole and if the sale of bulk is invalid the whole contract fails.

- (2) Section 1(f) now includes in the definition of "sale" a barter or exchange, which would otherwise be excluded as there would be no purchase money involved.
- (3) Section 6 has been one of the key changes in the Act as far as the commercial world is concerned. This section now allows the buyer to pay the seller a sum not exceeding 10% of the purchase price as a deposit. The former Act imposed a limit of \$50.00.⁴⁰ The increase in the deposit serves the dual purpose of showing the buyer's good faith and of being sufficient security by him for the completion of the contract. To safeguard the buyer if the seller is adjudged bankrupt or if the seller should repudiate the contract, the deposit is to be held by the seller in trust only.
- (4) Section 9(1) now allows the buyer, in certain situations, to pay the sale price to the seller and immediately acquire the property of the seller in the stock. For this section to be applicable, sections 4 and 7 must be complied with. This means the seller must give to the buyer the statutory statement of creditors and place a notice of the impending sale in the Ontario Gazette. If the statement submitted by the seller discloses that the claims of the secured and unsecured trade creditors do not exceed \$5,000.00, and the buyer has no notice to the contrary, then this section is applicable and the buyer may immediately acquire property in the stock.⁴¹
- (5) Section 9(2) states that the buyer can pay the proceeds of sale to a trustee and thereupon acquire the property of the seller in the stock if the seller receives the consent of at least 60% of his unsecured creditors, and the consent of any of his secured creditors is not needed now, as it was formerly. This change has been made on the theory that secured creditors will not be affected by an improvident sale.

Conclusion

This article does not presume to be an exhaustive critical analysis of the new Act, but only purports to highlight some of the defects that may be inherent in it. Whether the arguments put forth in this article are in fact legally sound is a matter that will only be known after the courts have tested them. But it is submitted that the revisions to the Act were in the main justified by commercial necessity. Therefore it is the hope of the writer that some further amendments be made very soon so that the commercial world may more fully benefit from the Act.

⁴⁰ Section 2.

⁴¹ *Quaere* whether this section means to exclude the application of section 17. Does this section intend to say that the buyer acquires property in the stock absolutely? Will he now be personally liable if the seller has acted male fide and in reality has trade creditors whose claims do exceed \$5,000.00?

EDITOR'S NOTE: The following is the body of a letter dated January 8, 1960, and sent by Mr. Fred M. Catzman, Q.C., who examined the first draft of the article, to Mr. Feldman:

"Re: The Bulk Sales Amendment Act.

I felt that you would be interested in receiving a copy of the proposed amendments to the Bulk Sales Act, more particularly since Section 4(1)

and 4(4) and Section 7 amending Section 17 were inspired by the questions raised in your paper."

The following are four provisions of the Bulk Sales Amendment Act, 1960. This Act is now being considered by the legislature of the Province of Ontario:

3. Section 7 of *The Bulk Sales Act*, 1959 is repealed.
4. (1) Subsection 1 of section 9 of *The Bulk Sales Act*, 1959 is amended by striking out "Where sections 4 and 7 have been complied with, the buyer" in the first and second lines and inserting in lieu thereof "Where the buyer has received the statement mentioned in section 4, he", so that the subsection, exclusive of the clauses, shall read as follows:
 - (1) Where the buyer has received the statement mentioned in section 4, he may pay or deliver the proceeds of the sale to the seller and thereupon acquire the property of the seller in the stock in bulk,
 - (4) Subsection 2 of the said section 9 is amended by striking out "Where sections 4 and 7 have been complied with, the buyer" in the first and second lines and inserting in lieu thereof "Where the buyer has received the statement mentioned in section 4, he", so that the subsection, exclusive of the clauses, shall read as follows:
 - (2) Where the buyer has received the statement mentioned in section 4, he may pay or deliver the proceeds of the sale to the trustee and thereupon acquire the property of the seller in the stock in bulk, if the seller delivers to the buyer,
5. (2) Subsection 2 of the said section 12 is amended by adding thereto the following clause:
 - (c) upon the application of the buyer after the lapse of one year from the date of the completion of the sale in bulk and upon being satisfied that the claims of all unsecured trade creditors and secured trade creditors of the seller existing at the time of the completion of the sale have been paid in full and that no action or proceeding is pending to set aside the sale or to have the sale declared void and that the application is made in good faith and not for any improper purpose, make an order dispensing with compliance therewith.
7. Section 17 of *The Bulk Sales Act*, 1959 is amended by striking out "Unless this Act is complied with" in the first line and inserting in lieu thereof "Unless the buyer has complied with this Act", so that the section shall read as follows:
 17. Unless the buyer has complied with this Act, a sale in bulk is voidable as against the creditors of the seller, and, if the buyer has received or taken possession of the stock in bulk, he is personally liable to account to the creditors of the seller for the value thereof, including all moneys, security or property realized or taken by him from, out of, or on account of, the sale or other disposition by him of the stock in bulk.