Buffalo Law Review

Volume 3 | Number 1 Article 14

12-1-1953

Business Associations—Bulk Sale—"ordinary course of trade"

Donald J. Holzman

they could surrender their stock and accept payment without prejudicing their right to appeal the valuation.

During their appeal to the Appellate Division, stockholders did surrender their stock and receive payment. The Appellate Division subsequently granted corporation's motion to dismiss the appeal on the ground that the stockholders' interest was now terminated.

The Court of Appeals reversed on the basis of the language of § 21 (6) of the Stock Corporation Law which states: "Any stockholder demanding payment for his stock shall have no right . . . with respect to such stock, except the right to receive payment for the *value* thereof."[italics added.] The majority of the court held the word "value" to mean the "proper value" and refused to allow the language of § 21 (7) ("upon receipt of such payment, the objecting stockholder shall cease to have any interest in the corporation or its assets by reason of his ownership of the stock so paid for . . .") to narrow its meaning. Such interpretation involves no inconsistency, the court maintained, because subdivision 7 refers to rights such as to notice, to attend meetings, and to vote and, therefore, it does not conflict with the right to receive "payment for the value thereof."

Bulk Sale—"ordinary course of trade"

To come within the scope of the Bulk Sales Act,[20] a bulk sale must be "otherwise than in the ordinary course of trade and in the regular prosecution of said business." "Whether or not a particular transfer in bulk is or is not within the ordinary course of trade depends on the facts of each case."[21]

Sternberg v. Rubenstein[22] presented an interesting fact situation in which plaintiff trustee in bankruptcy sought to hold Rubenstein, a dealer in leftover footwear, accountable for the value of a batch of "off season" shoes sold to him by the bankrupt.[23] It appears that in the business of shoe retailing the sale of "off season" merchandise, that rendered obsolete by the passage of time, is an established operating pattern.[24]

Special Term rendered judgment in favor of the view that such sale was in the ordinary course of bankrupt's business. The

20. PERS. PROP. LAW § 44.
21. WHITNEY, OUTLINE OF THE LAW OF SALES 87 (4th ed. 1947).
22. 305 N. Y. 235, 112 N. E. 2d 210 (1953).
23. The sale of 1,294 pairs of shoes represented approximately one-sixth of bankrupt's stock on hand in money value.
24. *Sternberg v. Rubenstein, supra* note 22 at 240, 241, 112 N. E. 2d at 212, 213.

Appellate Division, however, took the view that for retail shoe merchants, the ordinary course of trade "was selling shoes to those who came into the store to buy from the stock in trade for wear."[25] That court quoted from *Jubas v. Sampsell*[26] where it was said that "the 'regular and usual practice and method of business of the vendor' cannot be measured by a prevalent custom of merchants which the vendor followed."[27]

"Ordinarily the words 'not in the ordinary course of trade' refer to a winding up of the business."[28] The Court of Appeals impliedly took cognizance of this by stating that New York courts limit the reach of the Bulk Sales Act to cases involving the sale of substantially an entire inventory or business.

With two judges dissenting, the court rendered judgment in the belief that the facts indicated no deviation from the ordinary course of trade in the retail shoe business.

Business Covenant

Glucksterns', Inc. was a restaurant corporation owned and operated by Simon and Louis Gluckstern with the help of their respective sons, Samuel and Philip. When differences arose between the two brothers, Louis and Philip resigned their positions in the corporation and, in a written agreement, covenanted, among other things, not to engage in the restaurant business in a specified area for a period of five years. The agreement made it quite clear that the above restriction was to cease and terminate at the expiration of five years from the making. Other provisions relating to certain representations etc. were not time limited.

Approximately twelve years later, plaintiff, purchaser of Glucksterns', Inc. from Simon, sought to enjoin Philip Gluckstern from continuing to operate a restaurant recently opened in his name and located across the street from Glucksterns', Inc.

The Supreme Court, through a special referee, granted plaintiff a sweeping injunction which prohibited defendants from continuing to use their surname or a derivative thereof in connection with the restaurant business within twelve city blocks in every direction from plaintiffs' present restaurant. This geographical limitation was reduced to three city blocks by the Appellate Division.

25. 279 App. Div. 30, 31, 108 N. Y. S. 2d 218, 220 (4th Dep't 1951).
26. 185 F. 2d 333 (9th Cir. 1950).
27. *Id.* at 334.
28. See note 2 *supra.*