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THE EFFECTIVE CHANGES OF THE UNIFORM COMMERCIAL CODE AS INSTITUTED OF JULY 1, 1962 IN DEALING WITH THE INSTRUMENTS, DOCUMENTS AND NOTICE FILING—A.S.B. No. 5, 104th G.A., §§1309.41, R.C., 1309.39, R.C., 1309.40, R.C., 4123.76, R.C., 1.23 R.C., 1306.03, R.C.

SYLLABUS:

1. All instruments, documents and notices which were filed and effective under existing law as of July 1, 1962, will, if such existing law is affected by the provisions of Amended Senate Bill No. 5 of the 104 General Assembly, the Uniform Commercial Code, Chapters 1301. through 1309., Revised Code, be deemed to be filed as an instrument, document or notice under such Act, and will be effective as a filed instrument, document or notice for the period of time provided by said Act computed from the original date of filing.

2. On and after July 1, 1962, any continuation and termination of all instruments, documents and notices then on file with the county recorder must be accomplished as provided in Amended Senate Bill No. 5, *supra*, if the statute which authorized the filing of said papers is affected by said Act, and the fees to be charged by the county recorder and duties of the county recorder as to such filings are those provided in said Act, particularly those set forth in Sections 1309.38 *et seq.*, Revised Code, as effective July 1, 1962.

3. On and after July 1, 1962, the termination of an instrument which was filed prior thereto and which is then governed by the aforementioned Act, must be accomplished by the filing of a termination statement which meets the standards of the Act, particularly Section 1309.41, Revised Code; however, no particular form is required for a termination statement and, if the form now in use for cancelling instruments complies with the requirements of said Act for termination statements, such form may be used.

4. The county recorder is not required to determine whether financing statements presented to him for filing under Sections 1309.39 and 1309.40, Revised Code, as effective July 1, 1962, are legally sufficient in that they substantially comply with the requirements of said sections, and other provisions of the Act, but the county recorder may accept purported financing statements presented to him for filing if such instruments appear to be what they are purported to be.

5. Pursuant to the provisions of Section 1.23, Revised Code, on and after July 1, 1962, the provisions of Chapter 1309., Revised Code, dealing with filing and indexing financing statements, should govern the filing and indexing of the affidavits and certificates described in Sections 4123.76 and 4123.78, Revised Code.

6. There being no fee prescribed by statute for the filing of lists and schedules by a transferee under division (A) of Section 1306.03, Revised Code, as effective July 1, 1962, as of that date the county recorder may charge no fee for such service; and since there is no place designated by statute for the filing of such documents, the county recorder may keep them at his office in any place of his choosing which would make them accessible and safe in accordance with the customary practice of county recorders in filing similar instruments.

Columbus, Ohio, June 15, 1962

Hon. John T. Corrigan, Prosecuting Attorney
Cuyahoga County, Cleveland, Ohio

Hon. E. Raymond Morehart, Prosecuting Attorney
Fairfield County, Lancaster, Ohio

Gentlemen:

Your letters requesting my opinion were received at approximately the same time and deal with the same subject matter. I shall, therefore, treat them in one opinion. The letter from Cuyahoga County reads, in part, as follows:

"1. Under the Uniform Commercial Code General Provision Sec. 1301 to 1309 of the R.C. instruments on file at the

time the new law takes effect shall be deemed to be filed under section one of the act as of the date of original filing and may be continued or terminated as provided in section one of this act.

"Do the instruments now on file automatically gain an extension of time as to the duration of such filing without any further action by the mortgagee or secured party? Under the former law instruments on file were effective for 3 years without refiling, and under the U.C.C. this time was extended to 5 years.

"2. Under Sec. 1309.41 of the R.C. the termination fee is \$1.00. Does the recorder have the right to charge this fee for termination or cancellation of instruments filed prior to July 1, 1962? Under the old law no fee was charged for cancellation. It should also be kept in mind that under the U.C.C. the recorder is charged with the duty to send or deliver said instruments to the secured party.

"2a. If no fee is allowed for instruments filed prior to July 1, 1962 does the recorder have the duty to mail or deliver said papers to the mortgagee or secured party under par. C, Sec. 1309.41 R.C.?

"3. A party wants to cancel an instrument that was filed prior to July 1, 1962, does he use the old cancellation form or a termination form?

"4. Under Sec. 1309.39 of the R.C. the formal requisition of a financing statement are set out, will the Recorder be charged with the duty of checking each instrument to see that it substantially complies with the above section, bearing in mind that the recorder handles about 500 papers a day and the time consumed in checking and returning incomplete instruments would be an impossible task?

"5. Under Workmen's Compensation Sec. 4123.78 and 4123.76 of R.C. the recorder has the duty to record certain claims as liens on real estate and to file the same as chattel mortgages. Under the U.C.C. the sections regarding chattel mortgages have been repealed. Now what steps, if any, will the recorder take to carry out the intention of the sections on Workmen's Compensation?

"6. Under Par. (A) Sec. 1306.03 the transferee may file a list of creditors and schedule of property with the county recorder. The section is silent as to where the recorder will file such papers and as to what fee, if any, will be charged. Will you please advise as to what the Recorder is to do in this situation?"

The Fairfield County request reads, in part, as follows:

"1. Upon releasing after July 1, 1962 of a chattel mortgage filed within three years before July 1, 1962, should the

Recorder charge a fee of \$1.00 (as under the Uniform Commercial Code), or no fee (a 15¢ fee already having been collected out of the 50¢ filing fee)?

"2. In the case of a partial release of a chattel mortgage filed before July 1, 1962, will a 25¢ fee be charged as now, or will a \$1.00 fee be charged for a partial release under the Uniform Commercial Code?

"3. When a chattel mortgage, which was filed within three years before July 1, 1962, expires after July 1, 1962, and the chattel mortgagee wishes to refile it, should it be refiled on payment of a 50¢ fee as now, and treated as a chattel mortgage, or should a fee of \$1.00 be charged and the transaction treated as a continuation statement under the Uniform Commercial Code?"

The law generally styled the "Uniform Commercial Code" was enacted by the 104th General Assembly, to be effective July 1, 1962 (Amended Senate Bill No. 5, passed April 27, 1961). Section 1 of the Act contains all sections of law amended or enacted therein. Section 2 of the Act provides for the repeal of existing sections of law. Section 3 of the Act reads as follows:

"This act shall take effect on July 1, 1962.

"Transactions validly entered into before such date and the rights, duties and interests flowing from them remain valid thereafter and may be terminated, completed, consummated or enforced as required or permitted by any statute or other law amended or repealed by this Act as though such repeal or amendment had not occurred.

"Instruments, documents, or notices filed prior to July 1, 1962, in accordance with the law at the time of such filings shall be deemed to be filed under section one of this Act as of the original date of filing and may be continued or terminated as provided in section one of this act."

The new Ohio law follows in general a model Act which has been adopted in several of the states. The language in the second paragraph of Section 3, *supra*, is taken from Section 10-102, Article 10, of the model Act. (See Uniform Laws Annotated—Uniform Commercial Code.) Comparable language to that in the first paragraph of said Section 3 is found in Section 10-101, Article 10, of the model Act, however, such section in the model Act reads as follows:

“This Act shall become effective at midnight on December 31st following its enactment. It applies to transactions entered into and events occurring after that date.” (See Vol. 1, C.C.H., Installment Credit Guide, pg. 5901.)

Language equivalent to that found in the second sentence of Section 10-101 of the model Act is not found in Section 3 of the Ohio Act, *supra*, and I am unable to find any language in the text of the model Act which approximates that found in the third paragraph of Section 3 of the Act, *supra*.

In 1908, the Seventy-Seventh Ohio General Assembly passed House Bill No. 1049, 99, Ohio Laws, 230, which amended the then existing Section 4155, Revised Statutes, by providing that chattel mortgages filed of record were valid for three years rather than one year as theretofore. Said amendment took effect on April 28, 1908. The 1908 legislation did not contain any language similar to that found in Section 3, *supra*, of the Act in question here. In the case of *Harvey v. Ciosse, et al.*, 9 NP (NS) 126, affirmed in 14 CC (NS) 232, and affirmed without opinion in 87, Ohio St., 488, the court had a question as to whether a chattel mortgage filed on November 2, 1907, which was at the time of filing, effective for one year, was valid for three years without refileing under the new Act. The headnote of the lower court's decision, 9 NP (NS) 126, reads as follows:

“Chattel mortgages on file on April 28, 1908, the date of the taking effect of 98 O.L., 230, amending Section 4155 by changing the periods of refileing such mortgages from one to three years, are governed by the provisions of this amendment, and are not rendered invalid by failure to refile them within the one year period in force at the time they were executed.”

The headnote of the opinion of the Court of Appeals, 14 CC (NS) 232, reads as follows:

“Section 8565, General Code, as amended (99 O.L., 230), is not unconstitutional because an impairment of the obligation of contracts, nor retroactive as affecting the rights of creditors, but applies to chattel mortgages then on file, and the lien created thereby will be continued if the mortgage is refiled within thirty days next preceding the expiration of three years from the time the mortgage was originally filed.”

The ruling in the *Harvey* case, *supra*, was followed in the case of *Central Ohio Paper Co. v. Postal Printing Co.*, 10 NP (NS) 520; 25 OD 297.

While the provisions of the "Uniform Commercial Code" contained in Amended Senate Bill No. 5 of the 104th General Assembly, are much more complex than those found in House Bill No. 1049 of the 77th General Assembly, the initial question raised herein as to the extension of the life of a document on file is the same as that which was answered in the *Harvey* case, *supra*. Furthermore, the intention in the instant case to grant such an extension seems abundantly clear, for the legislature failed to enact the provision of the model Act which would have made the new legislation applicable only to transactions entered into and events occurring after its effective date. Further, the third paragraph of Section 3 of the Act, *supra*, clearly causes instruments on file prior to July 1, 1962, to be deemed to be filed under the new Act, since the entire provisions of said Act, as far as is of general concern, are found in Section 1 of the Act, and it is under Section 3 that such existing instruments are "deemed to be filed—as of the original date of filing."

Accordingly, I must conclude that all instruments, documents and notices which were filed and effective under existing law as of July 1, 1962, will, if such existing law is affected by the provisions of the Act (Amended Senate Bill No. 5 of the 104th General Assembly), be deemed to be then filed as an instrument, document or notice under such Act, and will be effective as a filed instrument, document or notice for the period of time provided by the Act computed from the original date of filing thereof. It should be pointed out, however, that the foregoing statement is not intended to determine which statutory law will govern any right or duty which arises out of an instrument, document, or notice filed prior to July 1, 1962, and said statement should not be so construed.

It may be noted that while the above conclusion is at variance with opinion No. 60-513, Opinions of the Attorney General of Kentucky for 1960, the Kentucky legislature followed the language of the model Act and did not add language similar to that found in the third paragraph of Section 3 of the Ohio Act.

Also on this point, a subcommittee of the Banking and Commercial Law Committee of the Ohio State Bar Association studied the problem

relating to the effect of Amended Senate Bill No. 5 on existing filings, and in its report, stated :

“A second problem area relates to the time limit within which a refiling of a pre-UCC filing must be made, the present law requiring refiling of factor’s liens, chattel mortgages, conditional sales contracts and assignments of accounts receivable within three years and trust receipts within one year; new Section 1309.40 (B) provides a five-year filing period. The second paragraph of Section 3 provides that pre-July 1, 1962 filings shall be deemed to be filed under Section 1 as of the original date of filing. If a chattel mortgage was filed December 1, 1959, refiling is clearly required under the existing law before November 1, 1962. Section 3, however, may be interpreted as meaning that this chattel mortgage is deemed to have been effectively filed for a five-year period commencing on the original filing date, so that refiling would not be required until November, 1964. It is our conclusion that, until an authoritative judicial interpretation is available on this point, all existing filings should be refiled under the new law within the period required for refiling under the old law.”

While I believe that the conclusion of the subcommittee represents good legal advice, I am here called upon to render a positive legal opinion. Based upon the reasoning and conclusions reached by the courts in the *Harvey* case, *supra*, and the language employed by the General Assembly in the second paragraph of Section 3 of the Act, I am of the opinion that the conclusion that I have stated above represents the correct legal interpretation and effect of the language in question, and should be followed.

Coming now to questions 2 and 2a of the Cuyahoga County Prosecuting Attorney’s request, and the questions of the Fairfield County Prosecuting Attorney’s request, attention is specifically directed to the final clause of Section 3 of the Act, which reads :

“* * * and may be continued or terminated as provided in section one of this act.”

(Section one of the Act, as stated earlier herein contains all of the general provisions of the Uniform Commercial Code.)

The answer to all questions dealing with the fee to be charged by the county recorder for acts performed by him after July 1, 1962, in connection with instruments, documents and notices which were on file prior to July 1, 1962, of necessity depends upon whether the last phrase of Section 3 of the Act, quoted above, was intended to impress the provisions

of the Act upon all such papers. As to this, I can see no other possible purpose for inserting such language in the Act. The fact that the word "may" is used in said phrase certainly cannot be construed as indicating a legislative intent that the provisions of Section 1 of the Act can be followed or disregarded at the option of each interested person and, if disregarded, the provisions of law theretofore governing, be applied. Such a construction would be absurd since it would be completely impractical of operation and, therefore, such construction must be avoided. 50 Ohio Jurisprudence 2d, 221, Statutes, Section 238.

The Act (generally, Section one of the Act) does not require that all existing instruments, documents and notices be continued, nor that they be terminated, and I believe that for such reason the word "may" was used in the last phrase of Section 3 of the Act. Furthermore, the word "may" need not be considered as permissive, but where the context requires it, may be considered as imposing an imperative obligation. 50 Ohio Jurisprudence 2d, 31, Statutes, Section 21. Accordingly, I am of the opinion that on and after July 1, 1962, the provisions of Section 1 of Amended Senate Bill No. 5, the Uniform Commercial Code, Chapters 1301. to 1309., Revised Code, will apply to the continuation and termination of all instruments, documents and notices then on file with a county recorder if the statute authorizing the filing of said papers is affected by said Act, and the fees to be charged and duties of the recorder will be those set forth in said statutes.

In connection with the third question of the Cuyahoga County request, dealing with the form to be used after July 1, 1962, to cancel an instrument filed prior to July 1, 1962, it is apparent from the foregoing that the form must comply with the provisions of the Act, the Uniform Commercial Code. Here, your attention is called to Section 1309.41, Revised Code, which, as effective July 1, 1962, reads, in part, as follows:

"(A) Whenever there is no outstanding secured obligation and no commitment to make advances, incur obligations, or otherwise give value, the secured party must on written demand by the debtor send the debtor a statement that he no longer claims a security interest under the financing statement, which shall be identified by file number. A termination statement signed by a person other than the secured party of record must include or be accompanied by the assignment or a statement by the secured party of record that he has assigned the security interest to the signer of the termination statement. The uniform fee for filing

and indexing such an assignment or statement thereof shall be one dollar. If the affected secured party fails to send such a termination statement within ten days after proper demand therefor he shall be liable to the debtor for one hundred dollars, and in addition for any loss caused to the debtor by such failure.

“(B) On presentation to the filing officer of such a termination statement he must note it in the index. The filing officer shall remove from the files, mark ‘terminated’ and send or deliver to the secured party the financing statement and any continuation statement, statement of assignment, or statement of release pertaining thereto.

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I find no prescribed or recommended form for a termination statement in the Uniform Commercial Code; accordingly, any document duly executed and numbered, setting forth that the secured party no longer claims a security interest under the financing transaction should suffice as a termination statement. (See Opinion No. 21, Opinions of the Attorney General of Wyoming, October 24, 1961, as reported in CCH Vol. 1, Installment Credit Guide, pg. 5623, which reached the same conclusion.) If the “old cancellation” form meets the statutory requirements, I know of no reason why it could not be used. However, regardless of the form used, any instrument terminating a filed document after July 1, 1962, must be filed under the Uniform Commercial Code with the applicable fee, and the recorder must send or deliver the documents in accordance with his duties under the Uniform Commercial Code as enacted.

As to the fourth question of the Cuyahoga County request, Section 1309.39, Revised Code, as effective July 1, 1962, reads, in part, as follows:

“(A) A financing statement is sufficient if it is signed by the debtor and the secured party, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral. A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. When the financing statement cover crops growing or to be grown or goods which are or are to become fixtures, the statement must also contain a description of the real estate concerned. A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by both parties.

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Section 1309.40, Revised Code, as effective July 1, 1962, reads, in part, as follows:

“(A) Presentation for filing of a financial statement and tender of the filing fee or acceptance of the statement by the filing officer constitutes filing under sections 1309.01 to 1309.50, inclusive, of the Revised Code.

“* * *

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There is no specific duty placed upon the county recorder by the above quoted language or by any other language of the Uniform Commercial Code that I have found which would require that he examine for legal sufficiency each instrument filed.

In the early case of *Samuel Ramsey v. Zachariah Riley, Recorder of Miami County*, 13 Ohio, 157 (1844) the Supreme Court had before it a question of whether a county recorder who, without corrupt intent, recorded a forged receipt, could be held liable to a person who relied upon such recorded instrument. The court said, beginning at page 166 of the *Riley* case, *supra*:

“* * * It is the duty of the recorder to enter of record all deeds, mortgages, and other instruments of writings, required by law to be recorded, and which are presented to him for that purpose. Swan’s Sta. 778. It is not his duty to determine the validity of such instruments as may be presented for record, or to ascertain whether they are genuine or forged. But even if it were, and he should act honestly and fairly, according to the best of his ability, he would not be responsible. Yet, undoubtedly, if regardless of his duty he should willfully and maliciously, with full knowledge, enter a false and forged instrument upon record, whereby some person was misled and injured, he would be responsible.”

Considering the above quoted statement of the court and the provisions of Section 1309.39 and 1309.40, *supra*, I am of the opinion that the county recorder is not required to determine whether financing statements presented to him for filing are legally sufficient in that they substantially comply with the Uniform Commercial Code, but the duty of the county recorder is to accept purported financing statements presented to him for filing if such instruments appear to be what they are purported to be.

The fifth question of the Cuyahoga County request deals with the procedure to be used by the county recorder after July 1, 1962, in meeting the provisions of Sections 4123.76 and 4123.78, Revised Code.

Section 4123.76, Revised Code, reads, in part, as follows :

“* * * The recorder shall accept and file such affidavits and record the same as a mortgage on real estate and shall file the same as a chattel mortgage. * * *”

Section 4123.78, Revised Code, contains the same provision as Section 4123.76, *supra*, except “certificate” is substituted for the word “affidavits.”

The noted provisions of Sections 4123.76 and 4123.78, Revised Code, put those statutes within the meaning of “reference statute.” In this regard, 50 Ohio Jurisprudence 2d, 40, Statutes, Section 32, reads, in part, as follows :

“Statutes which refer to other statutes and make them applicable to the subject of the legislation are called ‘reference statutes.’ Such statutes are within the power of the legislature, and it frequently exercises power by general and sweeping words of incorporation or reference.”

Section 1.23, Revised Code, dealing with the construction of reference statutes, reads, in part, as follows :

“(A) When reference is made to any section or group of sections of the Revised Code, such reference shall extend to and include any amendment of or supplement to the section or group of sections so referred to or any section or sections hereafter enacted in lieu thereof; and unless otherwise provided, whenever a reference to a section or group of sections is made in any amendment or supplement to any section of the Revised Code hereafter enacted, such reference shall be deemed to refer to the section or sections as the same shall then stand or as thereafter amended.

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There can be no doubt that, under the Uniform Commercial Code, the provisions for filing and indexing of financing statements replace and stand in lieu of those dealing with filing and indexing chattel mortgages. See Ohio Legislative Service Commission, Reprint Bulletin No. 1958-1, March, 1960, at page 8. Accordingly, as directed by Section 1.23, *supra*, the provisions of Chapter 1309., Revised Code, as effective July 1, 1962, dealing with filing and indexing financing statements should govern the filing and indexing of the “affidavits” and “certificate” described in Sections 4123.76 and 4123.78, Revised Code.

Coming now to the final question of the prosecuting attorney of Cuyahoga County, dealing with the fee to be charged, and place of filing of lists

or notice for the period of time provided by said Act computed from the original date of filing.

2. On and after July 1, 1962, any continuation and termination of all instruments, documents and notices then on file with the county recorder must be accomplished as provided in Amended Senate Bill No. 5, *supra*, if the statute which authorized the filing of said papers is affected by said Act, and the fees to be charged by the county recorder and duties of the county recorder as to such filings are those provided in said Act, particularly those set forth in Sections 1309.38 *et seq.*, Revised Code, as effective July 1, 1962.

3. On and after July 1, 1962, the termination of an instrument which was filed thereto and which is then governed by the aforementioned Act, must be accomplished by the filing of a termination statement which meets the standards of the Act, particularly Section 1309.41, Revised Code; however, no particular form is required for a termination statement and, if the form now in use for cancelling instruments complies with the requirements of said Act for termination statements, such form may be used.

4. The county recorder is not required to determine whether financing statements presented to him for filing under Sections 1309.39 and 1309.40, Revised Code, as effective July 1, 1962, are legally sufficient in that they substantially comply with the requirements of said sections, and other provisions of the Act, but the county recorder may accept purported financing statements presented to him for filing if such instruments appear to be what they are purported to be.

5. Pursuant to the provisions of Section 1.23, Revised Code, on and after July 1, 1962, the provisions of Chapter 1309., Revised Code, dealing with filing and indexing financing statements, should govern the filing and indexing of the affidavits and certificates described in Sections 4123.76 and 4123.78, Revised Code.

6. There being no fee prescribed by statute for the filing of lists and schedules by a transferee under division (A) of Section 1306.03, Revised Code, as effective July 1, 1962, as of that date the county recorder may charge no fee for such service; and since there is no place designated by statute for the filing of such documents, the county recorder may keep

them at his office in any place of his choosing which would make them accessible and safe in accordance with the customary practice of county recorders in filing similar instruments.

Respectfully,

MARK MCELROY

Attorney General