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Dorothy Propsom

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RECENT DECISIONS

Sales: Gift of Bulk Goods as a Fraudulent Conveyance Within the Purview of the Washington Bulk Sales Act—The Defendant, retail merchant had possession of property under an unrecorded conditional sales contract when he borrowed money from the plaintiff for use in his business. Subsequently the Defendant transferred the business without apparent consideration to his father. The father transferred the assets of the business to a partnership in which father was a co-partner. In neither transfer was an affidavit of creditors demanded, and hence not filed¹ as required by the Bulk Sales Act of Washington.² The Plaintiff, unable to obtain repayment of his loan, secured judgment thereon, and proceeded to enforce said judgment with a garnishment action against the Defendant and the subsequent transferees. The Trial Court gave judgment for the Plaintiff and the Defendants appealed. *Held*: Judgment modified and affirmed. The gratuitous transfer of goods in bulk is a transfer within the purview of the bulk sales act. The BonaFide Purchaser for Value from the gratuitous transferee, however, is not personally liable for the value of the property received. *Hull v. Minkler*, — Wash. — 319 P. 2d 815 (1958).

The Defendants maintained that compliance with the Bulk Sales Act was not necessary because the Plaintiff was not a creditor³ and the transfer was not within the purview of the Bulk Sales Law because there was no sale. The court examined the Washington Bulk Sales Statute in detail in order to determine the meaning of the word “transfer” therein. “Bulk sale”, under the Washington Statute, is defined as “any sale, exchange or transfer, or attempted sale, exchange, or transfer . . .”⁴ “Sale” denotes a passing of property from one to

¹ Three states follow the CONNECTICUT STATUTE §6705 (1949) requiring filing in addition to notice. They are California, CIV. CALIF. CODE §3440 (1955), Arizona, ARIZ. REV. STATUTES §44-1021 (1956), Washington, R. C. W. 63.08 (1956). Washington originally followed the Connecticut form but now requires the buyer to give the proceeds to creditors like the Pennsylvania form. However, the notice requirement remains in the Connecticut form.

² R. C. W. §63.08 (1956).

³ The Washington court, without discussion, said where the money was for use in his business, he was a creditor under the act. “As a general rule creditors are not limited to creditors for merchandise or fixtures or other property purchased by the merchant for the conduct of the business, or for money loaned for the purposes of carrying on the particular business but they include all creditors of the sellers regardless of how the debt arose, including general creditors in transactions other than those involving the business sold.” 37 C.J.S. *Fraudulent Conveyances* §479 (1943).

⁴ R. C. W. §63.08010. “Any sale, exchange or transfer, or attempted sale, exchange or transfer, of all or substantially all of a stock of goods, wares or merchandise, or all or substantially all of the fixtures and equipment used in and about the business of a vendor engaged in the business of buying and selling and dealing in goods, wares, or merchandise of any description, or in the business of operating a restaurant, cafe, beer parlor, tavern, hotel, club, or gasoline service station, made out of the usual and ordinary course of

another for a price or consideration. "Exchange" denotes a passing of property for other property. "Transfer" is any act by which property of one is vested in another, whether by sale, gift or otherwise. The court reasoned the word "transfer" was superfluous if the legislature intended to encompass only transfer for value. In such case "sale" and "exchange" would have been sufficient.⁵

The Washington court rejected the dicta in *Daniels v. Pacific Brewing Co.*⁶ in which the court stated that compliance was not necessary where no purchase money passed. In the Daniels case a person indebted to a brewing company under a chattel mortgage of his entire stock and fixtures executed a bill of sale for the property covered by the mortgage without complying with the act. The court held compliance was not necessary as there was no sale within the meaning of the act.

In the various states the following words are used to describe the transactions covered:⁷ sale,⁸ transfer,⁹ assignment, disposal, other disposition, delivery, mortgage, trade, and exchange.¹⁰ Sale and mortgage are more definite in their legal connotation than assignment, trade, and exchange.¹¹ Transfer, disposal, deliver and other disposition are more vague than the foregoing and refer to some type of alienation of property interest. Where the statute employs words which have no established legal consent, the court has greater freedom in interpretation. The question then becomes, as in the principal case, whether

business of the vendor, or the sale, exchange, or transfer or attempted sale, exchange or transfer of substantially the entire business of buying, selling and dealing in goods, wares, or merchandise, or of operating a restaurant, cafe, beer parlor, tavern, hotel, club or gasoline service station conducted by the vendor, or the sale, exchange, or transfer or attempted sale, exchange or transfer, of the interest of the vendor in any business, shall be deemed a sale and transfer in bulk in contemplation of this chapter."

⁵ To support this reasoning the court cited *Plass v. Morgan*, 436 Wash. 160, 78 P. 784 (1904). The Plass case enunciated a liberal construction of the statute in order to protect the creditor. The court therefore would not limit the effect which was intended by the legislature and therefore imposed liability on the defendant.

⁶ 86 Wash. 416, 150 P. 609 (1915).

⁷ States using "Sale, Transfer, or Assignment" are Illinois, SMITH-HURD STATS. Ch. 121½ §78 (1936), Virginia, §55-83 (1956), Wisconsin, §241.18 (1955), Indiana, INDIANA STATS. §33-201 (1954), Michigan, §442.1 (1948). Another combination of words, "Sale or Transfer" is used by Texas, CIV. STATS. §4001 (1954); Georgia, CODE §23-203 (1957), uses "any sale or Transfer"; Iowa, IOWA CODE §555.1 (1954), "Sales, Assignments, or Deliveries"; Missouri, REVISED STATS. §427.020 (1953) and Nebraska, REVISED STATS. REISSUE, §36-502 (1957), "Sale, Trade or other Disposition"; Kansas, GENERAL STATS. §58-101 (1949), "Sale or Disposal"; Oklahoma, STATS. 24 §71 (1956) "Transfers."

⁸ *Talty v. Schoenholz*, 224 Ill. App. 158, 154 N.E. 139 (1926).

⁹ *Tipsworth v. Doss*, 273 Ill. App. (1933), A "Transfer" as used in the Bulk Sales Act is the act by which the owner of a thing delivers it to another person with the intent of passing the right which he has in it to the latter.

¹⁰ *Hartung v. Rushing*, 93 Ore.6, 182 P. 177, (1919).

¹¹ *Billing and Branch, Problem of Transfer under Bulk Sales Law: A Study of Absolute Transfers*, 35 MICH. L. REV. 732 (1937).

there is a sufficient alienation of property in a manner and for a purpose within the purview of the statute. In statutes where "transfer" is included, legal consideration seems unimportant. It appears therefore such statutes impliedly embrace gifts.¹² No other cases have been found which hold formalities of the bulk sales law must be complied with where there is a bulk gift.¹³

The principal case defines transfer as "any act by which property of one is vested in another by sale, gift, or otherwise", yet many bulk sale acts do not apply to every transfer of goods or merchandise in bulk. Mortgages are not automatically held to be within that meaning.¹⁴ It is only when there is no express statute covering mortgages that it is left to the court to decide the issue of whether it is within the statute or not. *Talty v. Schoenholz*,¹⁵ applying the Illinois Bulk Sales statute, laid down the principle that sale, transfer and assignment are to be used in their well known legal signification. They do not mean a pledge or security for a debt. In Michigan, a "lien theory" state, a chattel mortgage must transfer the entire title with the right to immediate possession vesting in the vendee to come within the meaning of the statute. *Hannahs v. Richter Brewing Co.*¹⁶ held that where the chattel mortgage was merely to secure a debt it was not a sale, transfer, or assignment of a stock of goods in bulk within the meaning of the Michigan Bulk Sales Law. In many states whether a mortgage is included or not depends on whether title passed or not.¹⁷ In other words, where a mortgage is given in a "lien theory" state it is held title doesn't pass and therefore the act does not apply while in a "title theory" state it is held title does pass and therefore the act applies to the transaction.¹⁸ However, there are states which ignore the property concept theory where it appears the spirit and purpose of the act are violated. For example Texas, a "lien state", has held a mortgage void¹⁹ if notice is not given because, if not, a debtor could give preference to a creditor and evade the purpose of the act. The Texas court would

¹² *Id.* at 737.

¹³ *Day v. Grayson County State Bank*, 153 S.W.2d 599 (Tex. Civ. App. 1941). A Chattel Mortgage given to secure a valid and subsisting debt without a renewal or extension of the debt may be gratuitous in contemplation of law.

¹⁴ Note 6 *supra*; *McAvoy v. Jennings*, 44 Wash. 79, 87 P. 53 (1906). "The decided weight of authority is to the effect that giving of a chattel mortgage on stock of goods for a bona fide debt does not constitute a sale, transfer or assignment in bulk in violation of statutes forbidding such a sale or transfer in bulk of a stock in trade otherwise than in the ordinary course of business without certain preliminary proceedings." 9 A.L.R. 473 (1920), 14 A.L.R. 753 (1921), 57 A.L.R. 1049 (1928).

¹⁵ Note 8, *supra*.

¹⁶ 149 Mich. 220, 112 N.W. 713 (1907).

¹⁷ *Billig and Smith, Bulk Sales Law: Transactions Covered by the Statute*, 39 W.Va. L. Q. 323 (1933).

¹⁸ *Norton Jewelry Co. v. Maddock*, 115 Kan. 108, 222 P. 113 (1924), *aff'd on reargument* in 115 Kan. 574, 223 P. 816 (1924).

¹⁹ *Beene v. National Liquor Co.*, 198 S.W. 596, (Tex. Civ. App. 1917).

not allow an attempt by a dishonest debtor to defeat the purpose of the bulk sales act by giving a chattel mortgage instead of a bill of sale. The court also gave general creditors protection in Kansas,²⁰ where it held a chattel mortgage when accompanied by a transfer of possession to be a "sale or disposal" within the Kansas statute. An opposite view was taken in Rhode Island, a "title" state, when the court held a mortgage is not covered though the title passes because the transfer is not absolute and unconditional.²¹

Historically, the demand for regulation of bulk transfers arose because of fraudulent transfers wherein the unsuspecting creditor was without recourse against the subject matter in the hands of a bonafide purchaser for value or against the proceeds in the hands of a debtor who had absconded.²² The primary purpose was to give the creditor notice so that he could act. Legislatures recognized the acute predicament of creditors and passed the bulk sales acts. Clearly it was a protection against a bulk sale, and in the writer's opinion it is not difficult to rationalize that the acts should also apply to bulk gifts where the word "transfer" is used. What the results would be nationally depends on the courts' construction of the statute in the light of the intent of the legislature arrived at by looking at the particular words in the statute²³ and the policy being followed.²⁴

It is conceivable that had this case been decided under the Fraudulent Transfer Act,²⁵ the Washington court would have arrived at the same decision. In *Schaffer v. Stever*,²⁶ the debtor made a gift of furnishings and furniture of a hotel. The court held the transfer of property as a gift was not good as against existing creditors. However, in determining if there is a fraudulent conveyance where a gift has been given the Plaintiff has the burden of proving intent to defraud²⁷ which is unnecessary under the Bulk Sales Act. The issue is

²⁰ Linn County Bank v. Davis, 103 Kan. 672, 175 P. 972 (1918).

²¹ Aristo Hosiery Co. v. Ramsbottom, 46 R.I. 505, 129 A. 503 (1925).

²² Billig, *Bulk Sales Laws: A Study in Econ. Adjustment*, 77 U. Pa. L. Rev. 72 (1928).

²³ VOLD, SALES, at page 408 (1931). "On behalf of the seller's creditors in novel doubtful cases are constantly invoked the arguments in favor of a liberal interpretation of such statutes, to carry out to the fullest their remedial provisions designed to protect the seller's creditors by suppressing fraudulent bulk sales in the marketing system, similarly in such new doubtful cases there is constantly invoked on behalf of the buyer the arguments calling for strict construction of statutes in derogation of the common law in order to preserve for the buyer so far as possible in his common law security of acquisitions.

"It is by no means settled how far a liberal interpretation of such statutes will in novel doubtful situations be adopted. Examples of strict and of liberal interpretation of such statutes under variant acts may be found in the same jurisdiction."

²⁴ Note 17, *supra*.

²⁵ R. C. W. §19.40010 (1956).

²⁶ 153 Wash. 116, 279 P. 390 (1929).

²⁷ Workman v. Bryce, — Wash. —, 310 P.2d 228 (1957).

raised whether the court should classify gift cases under the Fraudulent Conveyancing Act or under the Bulk Sales Act. Clearly, a Plaintiff would use the latter where possible.

As a matter of policy, it is the writer's opinion the court has arrived at a sound conclusion, and in as much as the Wisconsin Bulk Sale Statute²⁸ contains the word "transfer", the Wisconsin Court should follow the principal case and include gratuitous transfers in its statutory construction.

DOROTHY PROPSOM

Federal Income Taxation—Nonrecognition of Gain on Sale of Residence—Petitioner, a specialist in foreign economics, was sent to Europe by the U.S. State Department. While there he rented his house in Maryland. He returned to this country and took a job in Washington. He tried to evict the tenant but was forestalled by Federal rent regulations. Being in need of housing, he sold the house, subject to the lease, and bought another house, which cost more than the proceeds from the sale of the old one. The purchaser of the old house was not able to obtain possession for six months. Petitioner did not declare the gain on the sale as income, believing this sale fell under Section 112(n) of the Internal Revenue Code of 1939. The Commissioner assessed a deficiency on the ground that the old house was not petitioner's residence, since it was rented out at the time of the sale. *Held*: Judgment for petitioner; the statute was designed to aid cases such as this and does not require actual occupation of the house at the time of the sale. The decision is limited strictly to the facts of the case. *Ralph L. Trisko*, 29 T.C. No. 59 (1957).

Pervading many of the nonrecognition sections of the Code is the idea that where there is an exchange of property of a like kind, the taxpayer's holdings have not substantially changed and he should not be taxed on any gain from the exchange because his economic situation has not been changed.¹ While most of the nonrecognition sections apply to exchanges only, Section 112(n) of the 1939 Code (renum-

²⁸ WIS. STAT. §241.18 (1955). "The sale, transfer, or assignment, in bulk, otherwise than in the ordinary course of trade, and in the regular prosecution of the business of the seller, transferor or assignor, of any part, or the whole, of any stock of goods, wares and merchandise, or of the fixtures pertaining to the same, or of such goods, wares and merchandise and fixtures, including such sales, transfers and assignments made in consideration of an existing indebtedness, shall be conclusively presumed to be fraudulent and void. . . ."

¹ Thus in *Century Electric Co. v. Commissioner*, 192 F.2d 155, 159 (8th Cir. 1951), in discussing section 112, the general nonrecognition section in the 1939 Code, the Court stated:

"Subsection 112(b)(1) and 112(e) indicate the controlling policy and purpose of the section, that is, the nonrecognition of gain or loss in transactions where neither is readily measured in terms of money, where in theory the taxpayer may have realized gain or loss but where in fact his economic situation is the same after as it was before the transaction."