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CONFLICTING INTERESTS AND BULK SALES STATUTES

THE NEED FOR BULK SALES LEGISLATION

The protection to creditors of a fraudulent seller which is afforded by the ordinary common law rules regarding fraudulent conveyances broadly takes the form of a power in the creditor to follow the goods and subject them to his claims as if no sale had occurred so long as they have not reached the hands of a purchaser for value without notice.¹ To the extent that this power is available, therefore, the security of acquisitions for the transferee is sacrificed. Where the transferee has participated in the fraud or taken with notice of it, or taken as a donee, this sacrifice of security of acquisitions at his expense in order to promote security of contracts for the creditors of the transferor has seemed eminently just. This is especially the case where the creditor's claim is for the purchase price of the identical goods previously supplied by him on credit which the fraudulent seller in the instance has transferred to others with the intention to put them out of reach of his creditors.

Within the last few decades certain fraudulent practices in connection with selling out at a stroke the entire business and stock of goods in the case of retail stores without paying the wholesalers and others who had in the instance supplied the stock of goods on credit became conspicuous.² The common law of fraudulent conveyances was found relatively inadequate to afford such creditors substantial protection since by the time they found out what had

¹ See the topic "Fraudulent conveyances" in any work on Sales or in any standard legal encyclopedia.

² Billig, *Bulk Sales Laws, A Study in Economic Adjustment*, 77 U. OF P. LAW REV., 72, at pp. 75-78.

happened the goods were often in the hands of purchasers for value without notice while the fraudulent seller had disappeared with the proceeds.

ENACTMENT OF BULK SALES STATUTES

Accordingly the National Association of Credit Men, acting largely in the interest of wholesalers and jobbers, the type of creditor who suffers most directly from such frauds, carried on a well organized legislative campaign for greater protection to unpaid creditors in such cases.³ Thus originated the numerous statutes of well defined types known by the generic term of bulk sales laws, some form of which is now in force in every one of the forty-eight states.⁴

Speaking in the most general terms, and disregarding for the moment the variations between the several types, these statutes in substance provide that the sales denounced therein shall be void as against the seller's creditors unless such creditors are notified of the details of the deal a specified number of days in advance. If the statutory requirements are complied with the creditors are thus afforded the opportunity to take such steps for their own protection, by attachment or otherwise, while the goods are still available and within the reach of legal process, as may seem to them expedient. If the sale is carried through without complying with the statutory requirements the transaction is operative between the immediate parties to it.⁵ The seller's creditors, however, are given the power to follow the goods, by attachment or execution or other suitable process, as if no sale had occurred, even though the purchaser is innocent of any participation in any fraudulent intention and is admittedly a purchaser for value without notice.⁶

³ Billig, *supra* note 2, at pp. 81-88.

⁴ Billig, *supra* note 2, at pp. 2-3, note; MONTGOMERY, CREDIT MANUAL OF COMMERCIAL LAWS (1929) pp. 10-12.

⁵ Escalle v. Mark, 43 Nevada 172, 183 Pac. 387, 5 A. L. R. 1512 (1919); Newman v. Garfield, 104 Atl. 881, 5 A. L. R. 1507 (Vt. 1918).

⁶ See especially note 50 below.

CONFLICTING INTERESTS INVOLVED

It is apparent, therefore, that bulk sales statutes go far beyond the common law of fraudulent conveyances in sacrificing the security of acquisitions for transferees in order more effectually to promote security of contracts for the creditors of the original seller. In favor of this new policy in cases of this type can be adduced its wholesome tendency to suppress a well defined type of fraudulent practices which was causing large losses in the current marketing of goods, the burden of which had to be carried as overhead expense in the marketing system. The suppression of such fraudulent sales in bulk which these statutes have to a considerable degree achieved is in effect accomplished by putting the burden on the buyer to see to it that the prescribed steps are properly followed, at the peril in case of failure of having the goods taken under appropriate process by the seller's creditors as if no sale had occurred. To what extent it is wise thus to put the burden on the buyer, sacrificing his security of acquisitions even though he is a purchaser for value without notice, for the sake of promoting greater security of contracts for the seller's creditors and its resulting incidental economy in the marketing system, is a broad question of policy. Any conclusion reached thereon necessarily involves a determination for the instance of the relative value or importance of conflicting interests, the bearing of which on the general welfare is a matter on which opinions may be sharply divided. It is not surprising, therefore, to find that different views have prevailed at different times and places with respect to the desirable range, the constitutionality, and the liberality of interpretation of bulk sales laws.

VARYING TYPES OF BULK SALES STATUTES

The variations of type among the bulk sales statutes themselves readily indicate the presence of divergent opinions regarding the extent to which it is advisable to promote

security of contracts for the seller's creditors at the expense of security of acquisitions for the buyer. Thus the New York form of statute, which is at the present time in force in by far the largest number of states,⁷ in brief requires the buyer to inform the seller's creditors at least five days in advance of taking possession of the goods, and makes him accountable for the goods to the seller's creditors if the statute is not complied with. The Connecticut form of statute, in force in but a few states, does not go so far.⁸ The Pennsylvania form of statute goes even farther in protecting the interests of the unpaid creditors by requiring the buyer to see to it that the proceeds are applied to the payment of the creditors' claims and by making the seller criminally liable for furnishing a false statement to the buyer.⁹ The Montana form of statute embraces most of the other features of the Pennsylvania statute, but does not require that notice be given to the seller's creditors.¹⁰ The Pennsylvania type of statute is said to give the seller's creditors a larger degree of protection than the others, and recent amendments to such statutes secured in their interest in certain other states have embodied most of the features of the Pennsylvania statute. The Pennsylvania form of statute, granting to creditors the greatest degree of protection, naturally is the form most favored at the present time by the outstanding proponents of bulk sales legislation.¹¹

CONFLICTING INTERESTS AFFECTING CONSTITUTIONALITY
OF THE STATUTES

The decisions on the constitutionality of bulk sales legislation also conspicuously reveals the background of divergent views respecting the advisability of promoting security

⁷ Billig, *supra* note 2, at pp. 72-73.

⁸ Billig, *supra* note 2, at p. 74, giving summary of details.

⁹ Billig, *supra* note 2, at pp. 73-74.

¹⁰ Billig, *supra* note 2, at p. 74.

¹¹ Billig, *supra* note 2, at p. 73, citing Montgomery, *The Bulk Sales Law as It Was Intended to Be and as It Is* (1923) 25 CREDIT MONTHLY 8.

of contracts for the seller's creditors at the expense of security of acquisitions for the buyer. Among the earlier cases, while the statutes were new and their operation and effects seemed novel and unfamiliar, are some outstanding decisions which held such statutes void because of their alleged arbitrary and prohibited interference with liberty of contract,¹² or deprivation of property,¹³ or deprivation of the equal protection of the laws.¹⁴ Some of the earlier statutes were somewhat amended to remove such objections. As such legislation has become more familiar, however, and its operation and effects have been more clearly perceived, the constitutionality of such legislation as a valid exercise of the police power for the suppression of fraudulent marketing practices harmful to the public has been generally conceded.¹⁵

CONFLICTING INTERESTS REFLECTED IN STRICT OR LIBERAL
INTERPRETATION OF THE STATUTES

The fundamental difference of opinion regarding the advisability of promoting security of contracts for the seller's creditors by the corresponding sacrifice of security of acquisitions for the buyer is constantly reflected in the controversies that currently arise over the interpretation and application of the bulk sales statutes with regard to the effect of non-compliance. 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,

¹² *Wright v. Hart*, 182 N. Y. 330, 75 N. E. 404, 2 L. R. A. (N. S.) 338 (1905).

¹³ *Block v. Schwartz*, 27 Utah 387, 76 Pac. 22, 65 L. R. A. 308 (1904).

¹⁴ *Block v. Schwartz*, *supra* note 13.

¹⁵ *Lemieux v. Young*, 211 U. S. 489, 53 L. Ed. 295, 29 S. C. 174 (1909); *Boise Ass'n of Credit Men v. Ellis*, 26 Idaho 438, 144 Pac. 6, L. R. A. 1915 E, 917 (1914); *Appel Mercantile Co. v. Barker*, 92 Neb. 669, 138 N. W. 1133 (1912); *Kett v. Masker*, 86 N. J. L. 97, 90 Atl. 243 (1914); *Klein v. Maravelas*, 219 N. Y. 383, 114 N. E. 809 (1916); *R. C. Williams v. Fourth National Bank*, 15 Okl. 477, 82 Pac. 496, 2 L. R. A. (N. S.) 334 (1905); *Wilson v. Edwards*, 32 Pa. Super. Ct. 295 (1907); *William Tackaberry Co. v. German State Bk.*, 39 S. D. 185, 163 N. W. 709 (1917); *Marlow v. Ringer*, 79 W. Va. 568, 91 S. E. 386, L. R. A. 1917 D, 619 (1917).

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 his common law security of acquisitions. Strict interpretation seems to have been more common¹⁶ than liberal interpretation. As the familiarity of bulk sales statute has increased, however, and their operation and effects have been more clearly perceived, liberality of interpretation to carry out their object of suppressing a certain type of fraud in the marketing system has been gaining ground somewhat.¹⁷ It is by no means settled,

¹⁶ The following cases expressly avow a strict interpretation of bulk sales statutes: *McKelvey v. John Schaap & Sons Drug Co.*, 143 Ark. 477, 220 S. W. 827 (1920); *Swafford v. Ketchum*, 9 S. W. (2d) 806 (Ark. 1928); *Cooney, Eckstein & Co. v. Sweat*, 133 Ga. 511, 66 S. E. 257, 25 L. R. A. (N. S.) 758 (1909); *Bowen v. Quigley*, 165 Mich. 337, 130 N. W. 690 (1911); *Balter v. Crum*, 199 Mo. App. 380, 203 S. W. 566 (1918); *Markarian v. Whitmarsh*, 78 N. H. 1, 95 Atl. 788 (1915); *Blanchard Co. v. Ward & LeMay*, 124 Wash. 204, 213 Pac. 929, 33 A. L. R. 59 (1923); *Lewis, Hubbard & Co. v. Loughran*, 85 W. Va. 235, 101 S. E. 465 (1919); *Prokopovitz v. Chimka*, 170 Wis. 190, 174 N. W. 448 (1919). In the following cases a strict interpretation is exemplified without much direct discussion of the point: *Farrow v. Farrow*, 136 Ark. 140, 206 S. W. 134 (1918); *D. C. Goff Co. v. First State Bank of DeQueen*, 175 Ark. 158, 298 S. W. 884 (1927); *Wasserman v. McDonnell*, 190 Mass. 326, 76 N. E. 959 (1906); *Kelly-Buckley Co. v. Cohen*, 195 Mass. 585, 81 N. E. 297 (1907); *Freeman v. Collard*, 163 N. E. 166 (Mass. 1928); *Hannah & Hogg v. Richter Brewing Co.*, 149 Mich. 220, 112 N. W. 713, 12 L. R. A. (N. S.) 178 (1907); *Ferrat v. Adamson*, 53 Mont. 172, 163 Pac. 112 (1917); *Appel Mercantile Co. v. Kirtland*, 105 Neb. 494, 181 N. W. 151 (1920); *Johnson v. Kelly*, 32 N. D. 116, 155 N. W. 683 (1915); *R. C. Williams v. Fourth National Bank*, 15 Okla. 477, 82 Pac. 496, 2 L. R. A. (N. S.) 334 (1905); *Mayfield Co. v. Harlan & Harlan*, 184 S. W. 313 (Tex. Civ. App. 1916); *Peterson v. Doak*, 43 Wash. 251, 86 Pac. 663 (1906); *Kasper v. Spokane Merchants' Ass'n.*, 87 Wash. 447, 151 Pac. 800 (1915); *Maskell v. Alexander*, 100 Wash. 16, 170 Pac. 350, L. R. A. 1918 C, 929 (1918).

¹⁷ Liberality of interpretation was avowed in the following cases: *Linn County Bank v. Davis*, 103 Kan. 672, 175 Pac. 972, 9 A. L. R. 468 (1918); *Mutz v. Sanderson*, 94 Neb. 293, 143 N. W. 302 (1913); *Bailen v. Badger Import Co.*, 99 Neb. 24, 154 N. W. 850 (1915); *Escalle v. Mark*, 43 Nevada 172, 183 Pac. 387, 5 A. L. R. 1512 (1919); *Douglas Fir Lumber Co. v. Star Lumber Co.*, 27 N. M. 403, 201 Pac. 867, 41 A. L. R. 1474 (1921); *Pennell v. Robinson*, 164 N. C. 257, 80 S. E. 417 (1913); *Beene v. National Liquor Co.*, 198 S. W. 596 (Tex. Civ. App. 1917). Liberality of interpretation, at least with regard to certain items, was exemplified without much direct discussion on the point in

however, how far a liberal interpretation of such statutes will in novel doubtful situations be adopted. The arguments for strict or for liberal interpretation may on occasion appeal to the court with greater force in one type of case than it does in another, and examples of strict and of liberal interpretation of such statutes under variant facts may readily be found in the same jurisdiction.¹⁸

While the application of the bulk sales law in any given jurisdiction necessarily requires careful study of the local statute in the light of its local precedents, the current trends of interpretation of such statutes may be briefly set forth in the groupings of fact situations that are set out below. In the controversy over strict or liberal interpretation of the statute as applied to each group type of facts thus set out is readily observed the constantly recurring conflict of interests as between security of contracts for the seller's creditors and security of acquisitions for the buyer.

THE SAME—TRANSACTIONS COVERED

The language of the various bulk sales statutes at times varies a little regarding what transactions are included within their scope, but the most common terms employed on this point are "sale, transfer, or assignment," or "sale, trade, or other disposition" of a stock of merchandise in bulk. What range of transactions falls within the scope of these terms has naturally been a fertile source of litigation in doubtful cases on the borderline in instances where the statute has not been complied with. Thus it has often been held, construing the statute strictly, that it does not apply to the

the following cases: *Gallus v. Elmer*, 193 Mass. 106, 78 N. E. 772 (1906); *Ballen v. Badger Import Co.*, 99 Neb. 24, 154 N. W. 850 (1915); *Midland Shoe Co. v. A. L. & K. Dry Goods Co.*, 281 S. W. 344 (Tex. Civ. App. 1926); *Marlow v. Ringer*, 79 W. Va. 568, 91 S. E. 386, L. R. A. 1917 D, 619 (1917).

¹⁸ See instances of the same jurisdiction furnishing cases listed in each of the two foregoing notes.

giving of a chattel mortgage on the stock of merchandise.¹⁹ Some of the more recent cases, construing the statute more liberally, have held that it applies to such cases.²⁰ Occasionally it is held that the statute does not apply to the giving of a chattel mortgage but applies to the foreclosure proceedings thereunder.²¹ Where the form of a chattel mortgage with its defeasance is employed collusively to accomplish the effect of a sale the court will look through the form to the substance and hold the statute applicable.²² Where the transaction is not a sale to an outside purchaser but a transfer to one of several creditors, who thus obtains a preference, a similar conflict of authority has arisen. Given a strict construction the statute has been held not applicable, the goods in such cases not being withdrawn from the reach of creditors but disposed of in paying creditors.²³ Construed more liberally, however, the statute has been held applicable to such transfers, impairing as they do the property available for attachment by other creditors.²⁴ Construed strictly on the point the statute has been held inapplicable to a sale by one partner to the other of his interest in the busi-

¹⁹ *Farrow v. Farrow*, 136 Ark. 140, 206 S. W. 134 (1918); *Wasserman v. McDonnell*, 190 Mass. 326, 76 N. E. 959 (1906); *Mills v. Sullivan*, 222 Mass. 587, 111 N. E. 605 (1916); *Hannah & Hogg v. Richter Brewing Co.*, 149 Mich. 220, 112 N. W. 713, 12 L. R. A. (N. S.) 178 (1907); *Appel Mercantile Co. v. Kirtland*, 105 Neb. 494, 181 N. W. 151 (1920); *Waldrep v. Exchange State Bank*, 197 Pac. 509, 14 A. L. R. 747 (Okla. 1921).

²⁰ *Linn County Bank v. Davis*, 103 Kan. 672, 175 Pac. 972, 9 A. L. R. 468 (1918); *Beene v. National Liquor Co.*, 198 S. W. 596 (Tex. Civ. App. 1917).

²¹ *Olean Milling Co. v. Tyler*, 208 Mo. App. 430, 235 S. W. 186 (1921). Of course the statute has no application, however, to a foreclosure sale under a previous valid chattel mortgage. *Faeth Co. v. Bressie*, 125 Kan. 425, 264 Pac. 1077, 57 A. L. R. 1046 (1928).

²² *Schwartz v. King Realty & Investment Co.*, 94 N. J. L. 134, 109 Atl. 567, 9 A. L. R. 471 (1920); *Waldrep v. Exchange State Bank*, 197 Pac. 509, 14 A. L. R. 747 (Okla. 1921).

²³ *Peterson v. Doak*, 43 Wash. 251, 86 Pac. 663 (1906); *Kasper v. Spokane Merchants' Ass'n.*, 87 Wash. 447, 151 Pac. 800 (1915) (assignment for benefit of a named list of preferred creditors).

²⁴ *Gallus v. Elmer*, 193 Mass. 106, 78 N. E. 772 (1906); *Bailen v. Badger Import Co.*, 99 Neb. 24, 154 N. W. 850 (1915) (transfer to trustees for benefit of such creditors as should agree to take their pro rata share of the goods and release the debtor's personal liability).

ness,²⁵ while a more liberal construction of the statute has led to the conclusion that it was applicable to the sale of an interest in the business to an incoming partner.²⁶ A few additional illustrations are given in the footnote.²⁷

THE SAME—GOODS COVERED

Bulk sales statutes according to their terms usually apply to the sale of a "stock of merchandise" in bulk. Giving such language a strict interpretation, it is applicable only to such articles as the merchant keeps for sale in the ordinary course of his business. Accordingly it has been held not to apply to the fixtures,²⁸ equipment,²⁹ appliances,³⁰ manufacturer's stock of raw materials,³¹ or restaurant keeper's stock of provisions.³² After decisions of this sort had been

²⁵ Schoeppel v. Pfannensteil, 122 Kan. 630, 253 Pac. 567, 51 A. L. R. 398 (1927).

²⁶ Marlow v. Ringer, 79 W. Va. 568, 91 S. E. 386, L. R. A. 1917 D, 619 (1917).

²⁷ Conquest v. Atkins, 123 Me. 327, 122 Atl. 858 (1923) (bulk sales statute, held applicable to the sale of merchandise in broken lots not in the ordinary course of business, at least in the absence of proof of an established custom among retail dealers to sell broken lots at the end of the season); Maskell v. Alexander, 100 Wash. 16, 170 Pac. 350, L. R. A. 1918 C. 929 (1918) (bulk sales statute, strictly construed held inapplicable to a transfer of the business and stock of merchandise to a corporation in exchange for all the capital stock of the corporation); Blanchard Co. v. Ward & LeMay, 124 Wash. 204, 213 Pac. 929, 33 A. L. R. 59 (1923) (bulk sale statute, strictly construed, not applicable to sale of a mere portion, a department, etc., not amounting to "substantially the entire stock of goods" as stated in the statute).

²⁸ Boise Ass'n of Credit Men v. Ellis, 26 Idaho 438, 144 Pac. 6, L. R. A. 1915 E, 917 (1914) (after this decision, the Idaho statute was amended, however, to include fixtures); Gallus v. Elmer, 193 Mass. 106, 78 N. E. 772 (1906); Lee v. Gillen & Boney, 90 Neb. 730, 134 N. W. 278 (1912); Swift & Co. v. Tempelos, 178 N. C. 487, 101 S. E. 8, 7 A. L. R. 1581 (1919); Johnson v. Kelly, 32 N. D. 116, 155 N. W. 683 (1915).

²⁹ Johnson v. Kelly, 32 N. D. 116, 155 N. W. 683 (1915); Golden Rod Milling Co. v. Connell, 164 Pac. 588 (Ore. 1917) (machinery and appliances of a mill); Lewis, Hubbard & Co. v. Loughran, 85 W. Va. 235, 101 S. E. 465 (1919) (lunch wagon, with its equipment and supplies).

³⁰ Bowen v. Quigley, 165 Mich. 337, 130 N. W. 690 (1911) (tools, vehicles, and appliances used in connection with a retail coal business); McPartin v. Clarkson, 240 Mich. 390, 215 N. W. 390, 54 A. L. R. 1535 (1927) (pool tables in pool room); Ferrat v. Adamson, 53 Mont. 172, 163 Pac. 112 (1917) (pool tables in a pool hall).

³¹ Lee v. Gillen & Boney, 90 Neb. 730, 134 N. W. 278 (1912).

³² Swift & Co. v. Tempelos, 178 N. C. 487, 101 S. E. 8, 7 A. L. R. 1581 (1919).

rendered by the courts the statute in question has in various states been so amended at the instance of the creditor group as to apply, at least to some extent, to fixtures.³³ The exact present range of the language used in the statute of any given state must therefore be found by carefully consulting the local legal materials. More liberally construed in the instance, the statute has been held applicable to the sale of the stock of merchandise in a store although the store was operated by the selling corporation merely as an incident to its large plantation operations, its tenants obtaining their supplies at the store.³⁴ Still more liberally construed in another instance, the statute has been held applicable to the sale of the stock of merchandise in a warehouse from which a chain of retail stores owned by the seller were regularly supplied.³⁵

THE SAME—SELLERS COVERED

Narrowly construed, the language of the bulk sales statute relating to "merchandise" has been held to confine its application to sales by merchants, traders, or dealers in such articles.³⁶ Accordingly the statute does not apply to a sale in bulk of the property used in connection with a livery and boarding stable business.³⁷ Similarly, the statute has been held inapplicable to the sale of a restaurant business, even though a cigar stand and soda fountain were maintained incidental thereto.³⁸ So, also the statute has been held inapplicable to the sale of an automobile repair shop with its stock of automobile parts, even though occasional sales of parts had from time to time been made therefrom.³⁹ The statute does not apply to the sale of his manufactured prod-

³³ A reference to such amendment is found, for instance, in *Golden Rod Milling Co. v. Connell*, 164 Pac. 588 (Ore. 1917).

³⁴ *Prins v. American Fruit Co.*, 275 S. W. 914 (Ark. 1925).

³⁵ *Keller v. Fowler*, 148 Tenn. 571, 256 S. W. 879 (1923).

³⁶ *Grove Mfg. Co. v. Salter*, 106 S. E. 208, (Ga. App. 1921).

³⁷ *Balter v. Crum*, 199 Mo. App. 380, 203 S. W. 566 (1918).

³⁸ *D. C. Goff Co. v. First State Bank of DeQueen*, 175 Ark. 158, 298 S. W. 884 (1927).

³⁹ *Fisk Rubber Co. v. Hinson Auto Co.*, 168 Ark. 418, 270 S. W. 605 (1925).

uct by a manufacturer.⁴⁰ On the other hand, the bulk sales statute has been interpreted to apply to the sale of the stock of merchandise of a wholesale business⁴¹ as well as of a retail business, and its application to the merchandising business is not affected by the fact that the proprietor is also carrying on other lines of business than merchandising.⁴² Under the especially broad provisions adopted in Illinois, it is held that the bulk sales statute is applicable to sales made by farmers⁴³ as well as to sales by other people in business. With the ever changing combination of activities in the business field it is thus readily apparent that the fundamental underlying conflict of interest as between security of contracts for the seller's creditors and security of acquisitions for the buyer may be fought out afresh at any time under the guise of a struggle between the respective advocates of liberal and of strict interpretation of the bulk sales statutes in their application to novel situations.

THE SAME—CREDITORS COVERED

Very strictly construed, bulk sales statutes do not enable omitted creditors of the seller to take the goods from the purchaser where the purchaser complies with the statute with respect to creditors listed by the seller even though the fraudulent seller deliberately omitted certain creditors from

⁴⁰ *Root Refineries v. Gay Oil Co.*, 171 Ark. 129, 284 S. W. 26, 46 A. L. R. 979 (1926) (*dictum*); *Connecticut Steam Brown Stone Co. v. Lewis*, 86 Conn. 386, 85 Atl. 534 (1912) (stone cutter selling the product of his own labor on raw materials bought for the purpose); *Cooney, Eckstein & Co. v. Sweat*, 133 Ga. 511, 66 S. E. 257, 25 L. R. A. (N. S.) 758 (1909) (sawmill selling the product of its own manufacture); *Nichols, North, Buse Co. v. Green County Canneries*, 205 N. W. 804, 41 A. L. R. 1211 (Wis. 1925) (cannery selling its entire production for the season).

⁴¹ *Root Refineries v. Gay Oil Co.*, 171 Ark. 129, 284 S. W. 26, 46 A. L. R. 979 (1926); *Niklaus v. Lessenhop*, 99 Neb. 803, 157 N. W. 1019 (1916).

⁴² *Root Refineries v. Gay Oil Co.*, 171 Ark. 129, 284 S. W. 26, 46 A. L. R. 979 (1926) (incidentally also manufacturing to some extent); *Prins v. American Fruit Co.*, 275 S. W. 914 (Ark. 1925) (retail store an adjunct to a large plantation business).

⁴³ *Hall v. Main*, 34 F. (2d) 528 (1929); *Weskalnies v. Hesterman*, 288 Ill. 199, 123 N. E. 314, 4 A. L. R. 128 (1919).

the list.⁴⁴ More liberally construed, however, such statutes enable any omitted creditor to treat the sale as void as to him.⁴⁵ Such statutes do not apply in favor of subsequent creditors, whose claims have been incurred after the bulk sales in question,⁴⁶ nor in favor of creditors whose claims are barred by the statute of limitations.⁴⁷ They apply, however, in favor of all prior creditors who hold valid claims, irrespective of whether such claims originated in dealings concerning the identical goods,⁴⁸ and such claims need not have been already reduced to judgment.⁴⁹

THE SAME—PURCHASERS AFFECTED

There seems to have been little question under the usual wording of bulk sales statutes, namely, "void as to creditors" without excepting bona fide purchasers, that the seller's creditors may by using appropriate process follow the goods and take them from the purchaser as if there had been no sale even though the purchaser is a purchaser in good faith for value without notice.⁵⁰ In this respect, therefore, it is easily seen that bulk sales statutes go much farther in protecting the seller's creditors at the expense of the purchaser than do the ordinary common law rules relating to fraudulent conveyances. Whether bulk sales statutes should be so

⁴⁴ *McKelvey v. John Schaap & Sons Drug Co.*, 143 Ark. 477, 220 S. W. 827 (1920); *Swafford v. Ketchum*, 9 S. W. (2d) 806 (Ark. 1928).

⁴⁵ *Lindstrom v. Spicher*, 205 N. W. 231, 41 A. L. R. 968 (N. D. 1925); *Oregon Mill & Grain Co. v. Hyde*, 169 Pac. 791 (Ore. 1918).

⁴⁶ *Faeth Co. v. Bressie*, 125 Kan. 425, 264 Pac. 1077, 57 A. L. R. 1046 (1928); *Kimball v. Cash*, 176 N. Y. S. 541 (1919).

⁴⁷ *Fisher v. Woodard*, 103 Neb. 253, 170 N. W. 907 (1919).

⁴⁸ *Prins v. American Trust Co.*, 275 S. W. 914 (Ark. 1925); *Interstate Rubber Co. v. Kaufman*, 98 Neb. 562, 153 N. W. 585 (1915); *Cech v. Costello*, 117 Neb. 224, 220 N. W. 236 (1928) (claim for wages as farm laborer); *Lindstrom v. Spicher*, 205 N. W. 231, 41 A. L. R. 968 (N. D. 1925) (county with claim for taxes).

⁴⁹ *Scheve v. Vanderkolk*, 97 Neb. 204, 149 N. W. 401 (1914).

⁵⁰ *Prins v. American Trust Co.*, 275 S. W. 914 (Ark. 1925); *Adams v. Young*, 200 Mass. 588, 86 N. E. 942 (1909); *Farrar v. Lonsby Lumber & Coal Co.*, 149 Mich. 118, 112 N. W. 726 (1907); *Interstate Rubber Co. v. Kaufman*, 98 Neb. 562, 153 N. W. 585 (1915); *Pennell v. Robinson*, 164 N. C. 257, 80 S. E. 417 (1913); *Fechheimer-Keiffer Co. v. Burton*, 128 Tenn. 682, 164 S. W. 1179, 51 L. R. A. (N. S.) 343 (1914).

liberally construed in the interest of the seller's creditors as to permit them to follow the goods even through successive later transfers is open to much greater question. A few cases have given or suggested such far-reaching effect for the statute in the instance involved.⁵¹ In this view, "void as to creditors" is regarded as equally applicable to remote subsequent sales by the buyer to sub-purchasers as it is to the first sale by the fraudulent seller to the buyer. Most of the authorities to date, however, reject this liberal interpretation of the statute on the point and hold instead, interpreting the statute strictly, that purchasers for value without notice from the original buyer are protected even though the original sale was not in compliance with the bulk sales statute.⁵² Applying the analogy of fraudulent conveyances where the bulk sales statute does not expressly conclude the point, the weight of authority gives complete effect to re-sales by the buyer, conceiving that the broader construction of the statute would involve both unnecessary restraint upon trade and unmerited hardship upon innocent subsequent buyers, which could not have been intended by the legislature.⁵³ According to this view the additional protection to the seller's creditors realizable from a power to follow the goods through successive later transfers is not regarded as

⁵¹ *Kett v. Masker*, 86 N. J. L. 97, 90 Atl. 243 (1914) (*dictum*); *Mayfield Co. v. Harlan & Harlan*, 184 S. W. 313 (Tex. Civ. App. 1916) (*dictum*); *Midland Shoe Co. v. A. L. & K. Dry Goods Co.*, 281 S. W. 344 (Tex. Civ. App. 1926).

⁵² *McKelvey v. John Schaap & Sons Drug Co.*, 43 Ark. 477, 220 S. W. 827 (1920); *Grove Mfg. Co. v. Salter*, 106 S. E. 208 (Ga. App. 1921); *Kelly-Buckley Co. v. Cohen*, 195 Mass. 585, 81 N. E. 297 (1907); *Markarian v. Whitmarsh*, 78 N. H. 1, 95 Atl. 788 (1915); *Kasper v. Spokane Merchants' Ass'n.*, 87 Wash. 447, 151 Pac. 800 (1915); *Prokopovitz v. Chimka*, 170 Wis. 190, 174 N. W. 448 (1919). It is intimated in *Scheve v. Vanderkolk*, 97 Neb. 204, 149 N. W. 401 (1914), and *Niklaus v. Lessenhop*, 99 Neb. 803, 157 N. W. 1019 (1916), that for the subsequent purchaser to be protected the sale to him by the first buyer must itself have been in compliance with the bulk sales statute. Even this, however, is in *Markarian v. Whitmarsh*, 78 N. H. 1, 95 Atl. 788 (1915), said to be unnecessary.

⁵³ This argument is most deliberately formulated in *Kasper v. Spokane Merchants' Ass'n.*, 87 Wash. 447, 151 Pac. 800 (1915).

worth the sacrifice of the interests of such subsequent innocent parties both in security of acquisitions and in freedom of commerce.

THE SAME—CREDITOR'S REMEDIES

The several distinctive types of bulk sales statutes, as already intimated above, themselves differ as to the extent of protection that is available to the seller's creditors thereunder.⁵⁴ One of the most important provisions respecting creditors' remedies, which is common to most of the statutes, is that any purchaser who shall not conform to the provisions of the statute shall upon the application of any of the creditors of the seller become a receiver and be held accountable to such creditors for all the goods that have come into his hands by virtue of such sale. This provision has been rather liberally interpreted, once the fact of non-compliance with the statute is established as against the buyer affected, to justify resort to a wide range of remedies for creditors of the seller. Liberal interpretation in the interest of the creditor with respect to the remedies to which he may resort has been applied much more freely than with respect to what purchasers are affected, for instance, where strict interpretation has been customary in the interest of security of property and freedom of commerce for later parties. Thus it is usually said that attachment or execution against the goods at the creditor's instance is an appropriate remedy,⁵⁵ although instances of a stricter interpretation not going so far may be found.⁵⁶ Such attachment furnishes a good defense to replevin proceedings.⁵⁷ It has also been held that the buyer where the statute has not been complied with may be sued in trover as a converter for the value of the

⁵⁴ See footnotes 7-11 above.

⁵⁵ *Mutz v. Sanderson*, 94 Neb. 293, 143 N. W. 302 (1923); *Dickinson v. Harbison*, 78 N. J. L. 97, 72 Atl. 941 (1909); *Wilson v. Edwards*, 32 Pa. Super. Ct. 295 (1907); *Prokopovitz v. Chimka*, 170 Wis. 190, 174 N. W. 448 (1919) (*dictum*).

⁵⁶ *Newman v. Garfield*, 104 Atl. 881, 5 A. L. R. 1507 (Vt. 1918).

⁵⁷ *Kett v. Masker*, 86 N. J. L. 97, 90 Atl. 243 (1914).

goods.⁵⁸ Where the buyer has in turn already disposed of the goods it is generally held that he can be subjected to garnishment for the proceeds.⁵⁹ Where for various reasons these legal remedies may be inadequate in the instance to accomplish redress for the creditor, it is held that a creditor's bill in equity or suit moulded on equitable grounds may be brought to meet the situation and do justice to the various parties.⁶⁰ In accord with the view that the remedial provision of the statute is to be construed liberally for the protection of the creditors, it is also held that where the buyer has commingled the goods in question with other goods, rendering them indistinguishable, the creditors' remedies may be exercised with respect to the entire commingled mass.⁶¹ So, a creditor does not waive the benefits to which he is entitled under the bulk sales statute by permitting one of his employees to participate in an appraisal that is made in the deal between the seller and buyer.⁶² Similarly, interpreting these provisions liberally, where the buyer has paid designated creditors of the seller, and the sale is later

⁵⁸ *Conquest v. Atkins*, 123 Me. 327, 122 Atl. 858 (1923); *Douglas Fir Lumber Co. v. Star Lumber Co.*, 27 N. M. 403, 201 Pac. 867, 41 A. L. R. 1474 (1921).

⁵⁹ *Appel Mercantile Co. v. Barker*, 92 Neb. 669, 138 N. W. 1133 (1912); *Interstate Rubber Co. v. Kaufman*, 98 Neb. 562, 153 N. W. 585 (1915); *Home Pattern Co. v. Gore*, 113 Neb. 535, 204 N. W. 68 (1925); *Oregon Mill & Grain Co. v. Hyde*, 169 Pac. 791 (Ore. 1918); *Kell Milling Co. v. H. O. Wooten Grocery Co.*, 195 S. W. 342 (Tex. Civ. App. 1917). In several cases it has been held or intimated that garnishment for the value of the goods is equally available against the buyer whether or not he has previously resold the goods: *Mutz v. Sanderson*, 94 Neb. 293, 143 N. W. 302 (1913); *Cech v. Costello*, 117 Neb. 224, 220 N. W. 236 (1928); *Prokopovitz v. Chimka*, 170 Wis. 190, 174 N. W. 448 (1919) (*dictum*).

⁶⁰ *Scheve v. Vanderkolk*, 97 Neb. 204, 149 N. W. 401 (1914); *Niklaus v. Lessenhop*, 99 Neb. 803, 157 N. W. 1019 (1916); *William Tackaberry Co. v. German State Bank*, 39 S. D. 185, 163 N. W. 709 (1917).

⁶¹ *Mutz v. Sanderson*, 94 Neb. 293, 143 N. W. 302 (1913); *Marlow v. Ringer*, 79 W. Va. 568, 91 S. E. 386, L. R. A. 1917 D, 619 (1917).

⁶² *Home Pattern Co. v. Gore*, 113 Neb. 535, 204 N. W. 68 (1925).

avoided at the instance of omitted creditors, such buyer is entitled to be subrogated to the position of the creditors he has paid.⁶³

A few courts, however, have applied a stricter interpretation of the provisions of the bulk sales statute with respect to the creditors' remedies. Thus, it has been held that quasi-contractual redress is not available against the buyer,⁶⁴ but that creditors must proceed in equity to have the sale set aside,⁶⁵ even though such narrow construction on the point is opposed by the weight of authority.

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⁶³ Adams v. Young, 200 Mass. 588, 86 N. E. 942 (1909); Fechheimer-Keiffer Co. v. Burton, 128 Tenn. 682, 164 S. W. 1179, 51 L. R. A. (N. S.) 343 (1914).

⁶⁴ Freeman v. Collard, 163 N. E. 166 (Mass. 1928). In Anthony Wholesale Grocery Co. v. Otto Weiss Milling Co., 227 Pac. 374 (Kan. 1924), it was held that a creditor's merely suing the purchaser for the debt established no priority over other creditors with respect to the goods.

⁶⁵ Newman v. Garfield, 104 Atl. 881, 5 A. L. R. 1507 (Vt. 1918).