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The Bulk Sales Law in Washington

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THE BULK SALES LAW IN WASHINGTON

The recent case of *Hull v. Minkler*[1] clarifies certain aspects and presents some new problems concerning Washington's Bulk Sales Law.[2] The purpose of this comment is to discuss the general application of the statute as well as the principles set forth in the *Minkler* case.

LEGISLATIVE BACKGROUND

Since the enactment of the original Bulk Sales Law in 1901, no less than five amendments[3] have been passed by the legislature that in some measure modify the law. However, the general purpose of the statute, to prevent the defrauding of creditors by secret sale in bulk of all or substantially all of a vendor's stock of goods and fixtures[4] has never been materially altered. To achieve this desired purpose, the basic requirement of the statute is that the vendee of a sale in bulk must obtain from the vendor a list of the vendor's creditors, and see to it that the purchase price is applied pro rata to the payment of those creditors.

At the present time all fifty states have some form of the Bulk Sales Law,[5] all of which have the same general purpose. The various state laws are not uniform, however. To understand more fully the present status of the law in Washington, reference will occasionally be made to decisions of other states having similar statutes, as well as to Washington cases and statutes.

The object of the first amendment, in 1913,[6] to the Washington Bulk Sales Law was to include the sale of "fixtures." In 1925 at the special session of the Washington Legislature, the entire act was polished and changed into substantially the form of the present law,[7] except for the following amendments: (1) In 1939, the legislature extended the act beyond solely mercantile businesses to include "any restaurant, cafe,

[1] 51 Wn.2d 508, 319 P.2d 815 (1958).

[2] RCW 63.08.010 —.060.

[3] Wash. Sess. Laws 1913, c. 174; Wash. Sess. Laws, Ex. Sess. 1925, c. 135; Wash. Sess. Laws 1939, c. 122; Wash. Sess. Laws 1943, c. 98; Wash. Sess. Laws 1953, c. 247.

[4] Hull v. Minkler, 51 Wn.2d 508, 319 P.2d 815 (1958); Blanchard Co. v. Ward, 124 Wash. 204, 213 Pac. 929 (1923); McAvoy v. Jennings, 44 Wash. 79, 87 Pac. 53 (1906); McDaniels v. J. J. Connelly Shoe Co., 30 Wash. 549, 78 Pac. 37 (1902). See also: Mill & Logging Supply Co. v. West Tenino Lumber Co., 44 Wn.2d 102, 265 P.2d 807 (1954).

[5] NEW YORK STATE LAW REVISION COMMISSION—STUDY OF UNIFORM COMMERCIAL CODE, ARTICLE 6—BULK TRANSFERS (Leg. Doc. No. 65 (G) 1955).

[6] Wash. Sess. Laws 1913, c. 174.

[7] Wash. Sess. Laws, Ex. Sess. 1925, c. 135 (now codified, with three subsequent amendments, in RCW 63.08.010-.060). See also Driscoll, *The "Sales in Bulk" Act*, 4 WASH. L. REV. 97 (1929).

beer parlor, tavern, hotel, club or gasoline station."[8] This amendment also added two requirements to be stated in the vendor's affidavit of creditors: Amounts owing to employees, and the consideration to be paid by the vendee.[9] (2) The 1943 amendment[10] modified the wording of the statute slightly, one objective being to clarify the meaning of the act as amended in 1939. The major substantive effect of this amendment was to include protection of those creditors who rendered services to the vendor. (3) The most recent amendment, in 1953,[11] added the requirement of listing unpaid taxes on the sworn statement of the vendor[12] and a statement that all taxes have been paid, or if unpaid, that the amount in the statement is the correct amount due and owing to the best of the vendor's knowledge.[13] The statement also must now be made in triplicate instead of duplicate, with the additional copy going to the office of the state tax commission.[14] The newest amendment also provides that the purchase price will first be applied to payment of taxes.[15]

PURPOSE OF THE BULK SALES LAW

The prevention of secret and fraudulent sales in bulk by the vendor to the detriment of his creditors is the purpose of Washington's Bulk Sales Law.[16] There is a penal section[17] to the statute which declares

[8] Wash. Sess. Laws 1939, c. 122.

[9] RCW 63.08.020 contains these requirements as provided by Wash. Sess. Laws 1939, c. 122. See also *Washington Legislation,* 14 WASH L. REV. 197 (1939).

[10] Wash. Sess. Laws 1943, c. 98.

[11] Wash. Sess. Laws 1953, c. 247.

[12] RCW 63.08.020.

[13] RCW 63.08.030 shows a form of the statement that must be obtained. RCW 63.08.020 provides that the statement of creditors must be sworn to "substantially" as provided for in RCW 63.08.030.

[14] RCW 63.08.040 provides: "The verified statement shall be made and executed in triplicate and delivered to the vendee who shall cause one of such statements to be filed in the office of the county auditor of the county in which the stock or fixtures proposed to be purchased are situated and served upon the office of the state tax commission, by mail or otherwise, at least seven days before the consummation of the purchase, and it shall be indexed as chattel mortgages are indexed, the name of the vendor being indexed as mortgagor and the name of the intending purchaser as mortgagee."

It should be noted that there is no requirement in the Washington statute for direct notice to the creditors. All that is necessary is that the above statute is followed; this is deemed to be constructive notice to such creditors. Some other states have a requirement for personal service of notice upon the creditors instead of merely filing with the county auditor. See VOLD, SALES § 81 (2d ed. 1959).

[15] RCW 63.08.050.

[16] Plass v. Morgan, 36 Wash. 160, 78 Pac. 784 (1904); see cases cited note 4 *supra.*

[17] RCW 63.08.060 provides: "Any vendor of all or substantially all of any stock of goods, wares or merchandise, of any restaurant, cafe, beer parlor, tavern, hotel, club or gasoline service station, and/or all or substantially all of the fixtures and equipment used in and about the business of the vendor, sold or transferred in bulk, or any other person who is acting for or in behalf of such vendor, who shall knowingly or wilfully make or deliver, or cause to be made or delivered, a statement as provided for in RCW 63.08.020 through 63.08.040, which shall not include the names of all of the creditors of

the vendor guilty of perjury if he knowingly or wilfully delivers to the vendee a false or incomplete statement of creditors. The statute as a whole is a restriction of the common law right to alienate property, but the constitutionality of the Bulk Sales Law has been upheld in Washington as a proper exercise of state police power.[18] Similar statutes have been upheld in other jurisdictions, on various grounds.[19] There is a conflict of opinion as to whether a bulk sales statute should be liberally or strictly construed,[20] but it appears that it is afforded strict construction by the Washington court.[21]

SALE, EXCHANGE, OR TRANSFER

The statute includes as a sale in bulk "Any sale, exchange, or transfer . . ."[22] of all or substantially all of the vendor's goods or fixtures. Although there appeared some confusion in early Washington cases whether the Bulk Sales Law applied to transfers for other than cash or credit,[23] the recent case of *Hull v. Minkler*[24] held that a transfer, even *without* consideration, is within the purview of the statute. The court there defined "sale" as a passage of property for a price or consideration,[25] "exchange" as any transfer of goods for other goods or

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such vendor, of the character specified in RCW 63.08.020 through 63.08.040, together with their addresses, and the correct amounts due, and to become due each of them respectively, or which shall contain any false statement, shall be deemed guilty of perjury."

See State v. Epstein, 138 Wash. 118, 244 Pac. 338 (1926) (list of vendor's creditors may be defective unless sworn to before a notary); Thompson v. Nakamura, 128 Wash. 637, 223 Pac. 1055 (1924) (affidavit will not be insufficient because of mere trivial errors; omitting comma and word "or" held too trivial).

[18] McDaniels v. J. J. Connelly Shoe Co., 30 Wash. 549, 71 Pac. 37 (1902).

[19] *E.g.*, McLean v. Miller Robinson Co., 55 F.2d 232 (E.D. Pa. 1931); Item Co. v. National Dyers and Cleaners, 15 La. App. 108, 130 So. 879 (1930); Miller v. Myers, 300 Pa. 192, 150 Atl. 588 (1930) (no violation of due process, equal protection or privileges and immunities prohibitions in the United States Constitution); and Raleigh Tire & Rubber Co. v. Morris, 181 N.C. 184, 106 S.E. 562 (1921), (proper exercise of police power). Utah has not expressly held its present statute constitutional. A statute there (prior to an amendment thereto) was held to be unconstitutional in Block v. Schwart, 27 Utah 387, 76 Pac. 22 (1904), and to this date the constitutionality of the amended statute has not been decided.

[20] The tendency in most jurisdictions seems to be toward a more liberal construction in favor of creditors, but at present there is no clear majority either way. VOLD, SALES § 81 (2d ed. 1959). Section 1.102(1) of the UNIFORM COMMERCIAL CODE, adopts a rule of liberal construction.

[21] Thompson v. Nakamura, 128 Wash. 637, 223 Pac. 1055 (1924); Blanchard Co. v. Ward, 124 Wash. 204, 218 Pac. 929 (1923). *But see* Hull v. Minkler, 51 Wn.2d 508, 319 P.2d 515 (1958); and Electrical Prods. Consol. v. Smyser, 19 Wn.2d 509, 143 P.2d 452 (1943), which held the controlling rule, as to the Bulk Sales Act, is that the words of the statute be given their ordinary and accepted meaning.

[22] RCW 63.08.010.

[23] Driscoll, *The "Sales in Bulk" Act*, 4 WASH. L. REV. 97 (1929).

[24] 51 Wn.2d 508, 319 P.2d 815 (1958).

[25] Hull v. Minkler, 51 Wn.2d 508, 319 P.2d 515 (1958). See also North Idaho Grain Co. v. Callison, 83 Wash. 212, 145 Pac. 232 (1915).

property,[26] and "transfer" as any act that vests property in another, whether for consideration or otherwise.[27] The court reasoned that had the legislature intended to include only transfers for value, the words "sale" and "exchange" would have been sufficient. The court points out that in the 1925 amendment,[28] the words "attempted sale, exchange, or transfer" were included, showing additional evidence that the legislature intended to include within the statute *all* bulk transfers that may perpetrate fraud upon creditors.[29] (A more complete discussion of the *Minkler* case appears later in this Comment.)

The significance of the word "attempted" in the statutory phrase, *attempted* sale, exchange, or transfer[30] is difficult to ascertain. Other than the court's reliance on the entire phrase in *Hull v. Minkler*[31] as previously indicated, there has been no interpretation or indication by the court of the impact of this clause. It would seem that an *attempted* transfer could not harm the creditor in any way since the title would remain with the vendor until the transfer was completed.[32]

Certain transfers are not included within the Bulk Sales Law. For instance, the statute specifically excludes sales or transfers of property by executors, administrators, receivers, or public officers acting under judicial process.[33] Although the Washington court has not been presented the question, it is generally held that sales at public auctions are not within the purview of the statute.[34] Since "preferential transfers" are acceptable in Washington under certain circumstances, the Bulk Sales Law does not apply where the failing debtor transfers his stock of goods in preference to one of his creditors, if the stock is of less value than the debt owed to that creditor.[35] The statute is not applicable when the goods purchased from a particular creditor

[26] Hull v. Minkler, *supra* note 25. See also BLACK, LAW DICTIONARY 671 (4th ed. 1951).

[27] Hull v. Minkler, *supra* note 25. See also Gazzam v. Young, 114 Wash. 66, 194 Pac. 810 (1921).

[28] Wash. Sess. Laws, Ex. Sess. 1925, c. 135 (Now codified as RCW 63.08.010).

[29] Hull v. Minkler, *supra* note 25. The court was not persuaded by the dicta in Daniels v. Pacific Brewing & Malting Co., 86 Wash. 416, 150 Pac. 609 (1915), to the effect that all that was necessary to take a transfer out of the sales in bulk act was that no purchase money should pass.

[30] RCW 63.08.010, which includes in the definition of bulk sale "Any sale, exchange or transfer, *or attempted sale, exchange or transfer* . . ." [Emphasis added].

[31] *Supra* note 24.

[32] Driscoll, *supra* note 23, at 105, 106.

[33] RCW 63.08.010 states: *"Provided,* That nothing contained in this chapter shall apply to sales or transfers of property by executors, administrators, receivers, or public officers, acting under judicial process." See McRae v. Levy, 177 Wash. 332, 31 P.2d 1028 (1934).

[34] Goetz v. Michael Tauber & Co., 282 F. 869 (7th Cir. 1922); Schwartz v. King Realty & Inv. Co., 93 N.J.L. 111, 107 Atl. 154 (1919).

[35] Peterson v. Doak, 43 Wash. 251, 86 Pac. 663 (1906). *Cf.* Daniels v. Pacific Brewing & Malting Co., 86 Wash. 416, 150 Pac. 609 (1915).

are returned to that creditor by the failing debtor.[36] A common law assignment by a failing debtor for the benefit of creditors is not a sale within the meaning of the Bulk Sales Law,[37] and the assignee has been held not to be a purchaser within the meaning of the act.[38] The assignee, however, does take title in trust for the creditors and any rights of such creditors are enforceable in an action at law against said assignee.[39] It is not clear whether these rules are applicable to all assignments for the benefit of creditors in Washington,[40] or whether as in the *McAvoy* case[41] they will be limited only to financially insecure or failing debtors. A chattel mortgage given on a stock of goods for a bona fide debt apparently does not constitute a bulk sale in Washington.[42] Although this is the general rule, at least one jurisdiction having a Bulk Sales Law similar to Washington's has held differently.[43]

Extent of Coverage of the Washington Bulk Sales Law

Types of subject matter covered. Fixtures and equipment as well as stocks of goods, wares or merchandise fall under the scope of the Bulk Sales Law.[44] Goods of any merchandising establishment, restaurant, beer parlor, tavern, hotel, club or gasoline service station are expressly included in the act.[45] "Fixtures and equipment" include those

[36] Globe Elec. Co. v. Montgomery, 85 Wash. 452, 148 Pac. 596 (1915); See Annot., 59 A.L.R.2d 1115 (1958).

[37] McAvoy v. Jennings, 44 Wash. 79, 87 Pac. 53 (1906).

[38] Kasper v. Spokane Merchants' Ass'n, 87 Wash. 447, 151 Pac. 800 (1915).

[39] Norris v. Anderson, 134 Wash. 403, 235 Pac. 966 (1925).

[40] Driscoll, *The "Sales in Bulk" Act*, 4 Wash. L. Rev. 97 (1929). See also Note, *Preferential Transfers (Bulk Sales)*, 11 Sw. L. J. 369 (1957).

[41] McAvoy v. Jennings, *supra* note 37.

[42] Daniels v. Pacific Brewing & Malting Co., 86 Wash. 416, 150 Pac. 609 (1915). See Shattuck, *Secured Transactions (Other Than Real Estate Mortgages)—A Comparison of the Law in Washington and the Uniform Commercial Code, Article 9*, 29 Wash. L. Rev. 1, 21 (1954).

[43] For example, see Texas Bank & Trust Co. v. Teich, 283 S.W. 552 (Tex. Civ. App. 1926). See also, Annot., 57 A.L.R. 1049 (1928).

[44] RCW 63.08.010 states a sale in bulk includes transfer of: "the fixtures and equipment used in and about the business of a vendor. . . ."

[45] RCW 63.08.010 includes as bulk sale the transfer of "all or substantially all of any stock of goods, wares or merchandise, and/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 kind or description, or in the business of operating a restaurant, cafe, beer parlor, tavern, hotel, club or gasoline service station. . . ."

Goods of establishments that are included in the Bulk Sales Law are indicated in part by the following cases: Hull v. Minkler, 51 Wn.2d 508, 319 P.2d 815 (1958) (gasoline service station); Arnold v. King, 236 F.2d 877 (9th Cir. 1956) (egg grading and processing plant); Norris v. Anderson, 134 Wash. 403, 235 Pac. 966 (1925) (grocery business); Eklund v. Hopkins, 36 Wash. 179, 78 Pac. 787 (1904) (second hand store); Kohn v. Fishback, 36 Wash. 69, 78 Pac. 199 (1904) (retail liquor, cigars and sundries); Fitz Henry v. Munter, 33 Wash. 629, 74 Pac. 1003 (1903) (dry goods and notions). See also Annot., 168 A.L.R. 762 (1947).

items used in and about the business that help the merchant to store, handle, display and market his goods, and include store, warehouse and office fixtures and equipment.[46] Sale of an interest in a business will constitute a bulk sale[47] if the business is one which comes within the scope of the act. Sales of real property or intangibles have generally not been considered bulk sales,[48] unless included in the sale of the business as a whole.

Type of business covered. During the early history of the Bulk Sales Law, the courts were undecided as to what type of businesses the law encompassed—whether it included only the retail mercantile businesses, or a much broader category.[49] The amendment in 1925 stressed that the vendor covered by the act was to be "engaged in the business of buying and selling and dealing in goods, wares and merchandise."[50] It is apparent that the act now is not intended to include manufacturers, jobbers, canners, wholesalers and packers, but rather is limited to mercantile businesses[51] and those specific exceptions listed in the act.[52] The Bulk Sales Law, as any other statute, may be incorporated into a contract of sale of a business, even though that business automatically does not fall within the purview of the act.[53]

Types of transfer covered. To come within the scope of the statute, there must be a transfer in bulk of all or substantially all of the bulk

[46] Driscoll, *supra note* 23, at 107, 108.

[47] RCW 63.08.010 defines a bulk sale also as being "the 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 . . ." [Emphasis added]. See also Hull v. Minkler, 51 Wn.2d 508, 319 P.2d 815 (1958); Arnold v. King, 236 F.2d 877 (9th Cir. 1956); Minder v. Gurley, 37 Wn.2d 123, 222 P.2d 185 (1950); Garner v. Thompson, 161 Wash. 317, 296 Pac. 1043 (1931).

[48] Farrel v. Paulus, 309 Mich. 441, 15 N.W.2d 700 (1944); Thorndike & Hix Lobster Co. v. Hall, 132 Misc. 732, 230 N.Y.S. 554 (1928); Ventrilla v. Tortorice, 160 La. 516, 107 So. 390 (1926); Hall v. Conine, 230 S.W. 823 (Tex. Civ. App. 1921).

[49] Everett Produce Co. v. Smith, 40 Wash. 566, 82 Pac. 905 (1905) (livery feed and boarding stable not within the act); Plass v. Morgan, 36 Wash. 160, 78 Pac. 784 (1904) (boarding house and restaurant within the act); McDaniels v. J. J. Connely Shoe Co., 30 Wash. 549, 71 Pac. 37 (1902) (retail shoe business within the act).

[50] *Supra* note 7.

[51] Seattle Lodge No. 211, Loyal Order of Moose v. Par-T-Pak Beverage Co., 155 Wash. Dec. 649, 349 P.2d 229 (1960) (Bulk Sales Act not applicable to a sale of a beverage manufacturing concern); Mill & Logging Supply Co. v. West Tenino Lumber Co., 44 Wn.2d 102, 265 P.2d 807 (1954) (Bulk Sales Act not applicable to sale of lumber mill). See also Annot. 41 A.L.R. 1214 (1926); 46 A.L.R. 982 (1927); 168 A.L.R. 735 (1947). *But see* Arnold v. King, 236 F.2d 877 (9th Cir. 1956) (business purchased eggs from producers, and operated plant where eggs were candled and processed for sale; held, a business of buying and selling merchandise in the regular course of business, and within the act).

[52] RCW 63.08.010.

[53] Seattle Lodge No. 211, Loyal Order of Moose v. Par-T-Pak Beverage Co., 155 Wash. Dec. 649, 349 P.2d 229 (1960), where it was held that the parties can agree to incorporate the Bulk Sales Law into the sale contract, even though the business (bottling and manufacturing) normally would not be covered by the statute.

seller's goods or fixtures. The difficulty arises in the determination of what constitutes "substantially all" of the vendor's goods. Sale of one-half interest in a business and the stock of goods may constitute a bulk sale.[54] Transfer of two thirds of restaurant personal property has been held within the act.[55] But sale of all the sheet music of a music store which constituted only about seven percent of the value of the entire stock was held not to be a bulk sale, even though such transfer was the entire sheet music business of the vendor.[56] Likewise, sale of approximately one-fourth of the goods of a small retail store was held not to be governed by the sales in bulk act.[57] The court interprets "substantially all" as the effect upon the controlling interest of the vendor in relation to the extent to which the creditor's position is jeopardized, rather than "practically all" of the vendor's goods or business.[58] If the effect upon the vendor's control of the business is substantial, there might be situations where something less than half of the business interest or of the goods sold in bulk could be considered a "bulk sale" and thus within the requirements of the statute.

The determination of what constitutes a bulk sale made "out of the usual and ordinary course of business"[59] creates another problem. In most instances, it is fairly obvious when a sale is not in the normal business pattern of the vendor. But what of the instance where a retail seller holds an "off season," "close-out" or "obsolete" sale? What if the vendor periodically holds such sales? The Washington court has not yet been presented with these questions. In other jurisdictions, it generally has been held that these are bulk sales and within the scope of the statute. However,[60] at least one case has held such sales, when an established operational pattern of the business, to be within

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[54] Spokane Merchants' Ass'n. v. Koska, 118 Wash. 445, 203 Pac. 169 (1922).

[55] Mindur v. Gurley, 37 Wn.2d 123, 222 P.2d 185 (1950).

[56] Blanchard Co. v. Ward, 124 Wash. 204, 213 Pac. 929 (1923).

[57] Fudge v. Brown, 126 Wash. 475, 218 Pac. 251 (1923). In this case, the purchases were $1,090.60 on one date and $487.34 two weeks later. The total value of the stock of goods owned by the seller was in controversy, one party claiming the value as being $20,000, and the other claiming the value as being only $6,000. Since it was admitted that the sale was only a portion of the stock and not "substantially all," the court found the sale not within the Bulk Sales Law.

[58] Driscoll, *supra* note 23, at 106, 107.

[59] RCW 63.08.010.

[60] Jubas v. Sampsell, 195 F.2d 333 (9th Cir. 1950), (obsolete shoe styles "sale" held not within the ordinary course of business); Butler Bros. v. Sinkin, 129 Tex. 331, 104 S.W.2d 14 (1937) (sale of goods damaged by fire ("fire sale") held within the Bulk Sales Act); Irving Trust Co. v. Rosenwasser, 5 F.Supp. 1016 (D.C.N.Y. 1934), ("close-out" shoe sale held not within the ordinary course of business, even though seller periodically and regularly held such sales); Conquest v. Atkins, 123 Me. 327, 122 A. 858 (1933), (sale of broken lots of wallpaper held within the Bulk Sales Law); Cohen v. Calhoun, 168 Miss. 34, 150 So. 198 (1933), (sale of 150 shopworn dresses held within the Bulk Sales Law).

the "ordinary course of business" of the vendor and hence not subject to the terms of the Bulk Sales Law.[61] It would seem that the better view would be to look to the facts of each individual case, rather than categorically state that all such sales come within or without the statute. If the business periodically holds such sales to move out a block of goods or merchandise for the purpose of making way for the new stock, there is no reason for requiring compliance with the Bulk Sales Law. However, since the primary purpose of the Bulk Sales Law is for the protection of the creditor, perhaps the policy of such protection outweighs the disadvantage of inconvenience to buyer in such sales.

CREDITORS

Who is a creditor. Not everyone may avail himself of the protection of the Bulk Sales Law. In order to succeed in an action based upon the statute, the plaintiff must show that he is a creditor within the meaning of the act.[62] In *Hull v. Minkler,* the court stated that a person is a "creditor" within the meaning of RCW 63.08.020 when the debt was incurred for the purpose of carrying on the business, if that debt was incurred subsequent to the acquisition and prior to the disposition of the business.[63] It is, therefore, the "business creditor" who is protected. Included are only those creditors of the vendor who are creditors because of indebtedness for goods, wares, merchandise, fixtures or equipment, services rendered to the vendor, or because of money borrowed by the vendor to carry on his business.[64]

It was once held that one who is a creditor because of personal services rendered is not a creditor protected by the Bulk Sales Law.[65] Since that decision, the statute has been amended to include creditors who render services to the vendor.[66] Liability for rent cannot be based upon the Bulk Sales Statute;[67] the lessor of a display sign was held

[61] Sternberg v. Rubenstein, 305 N.Y. 235, 112 N.E.2d 210 (1953). See also Annot., 36 A.L.R.2d 1141 (1954).

[62] Electrical Prods. Consol. v. Smyser, 19 Wn.2d 509, 143 P.2d 452 (1943); Hardwick v. Gettier, 43 Wash. 644, 86 Pac. 943 (1906).

[63] Hull v. Minkler, 51 Wn.2d 508, 319 P.2d 815 (1958). See also Electrical Prods. Consol. v. Smyser, 19 Wn.2d 509, 143 P.2d 452 (1943); Annot., 102 A.L.R. 565 (1936), and Annot., 84 A.L.R. 1406 (1933).

[64] Driscoll, *supra* note 23, at 108, 109.

[65] McRae v. Levy, 177 Wash. 332, 31 P.2d 1028 (1934).

[66] RCW 63.08.020 includes creditors within the statute as those "to whom the vendor is indebted for or on account of *services,* commodities, goods, wares, or merchandise, or fixtures and equipment.... [Emphasis added]. See Seattle Lodge No. 211, Loyal Order of Moose v. Par-T-Pak Beverage Co., 155 Wash. Dec. 649, 349 P.2d 229 (1960), where utilities (lights and water) were held to be "services" within the meaning of the statute.

[67] Seattle Lodge No. 211, Loyal Order of Moose v. Par-T-Pak Beverage Co., *supra* note 66.

not to be a creditor of the lessee within the meaning of the statute.[68] A holder of individual notes of a partner is not a creditor of the partnership under the statute.[69] On the other hand, a vendor in a conditional sales contract who has elected to stand on the contract and not to retake the property has been held to be a creditor within the protection of the act.[70] A consignor of goods may also be a protected creditor.[71] The sale must be a completed one, however. For example, a person to whom an order for goods was given for future delivery was held not to be a creditor, at least not until some of the goods had been delivered.[72]

The creditor's remedies. The proper remedy for the creditor when the parties fail to comply with the statute is garnishment or attachment of the property, but where the goods cannot be reached because of disposal or resale by the vendee, the creditor may sue the vendee for the value of the goods without first pursuing the property itself.[73] As a condition precedent to recovery from the vendee, the creditor must either obtain a judgment or at least commence action against the vendor to establish the debt owed the creditor.[74] It is not enough that the affidavit of creditors be obtained from the vendor by the vendee;[75] it is the *duty* of the buyer to apply the purchase price pro rata to the bona fide claims of the creditors.[76] If the purchaser does not comply

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[68] Electrical Prods. Consol. v. Smyser, 19 Wn.2d 509, 143 P.2d 452 (1943). This case was decided under the law as amended in 1939. It is possible that the result would be different under the 1943 amendment. The 1943 amendment includes creditors who render services to the vendor as being within the protection of the act. See *supra* note 10, and text pertaining thereto.

[69] Whitehouse v. Nelson, 43 Wash. 174, 86 Pac. 174 (1906). See also Garner v. Thompson, 161 Wash. 317, 296 Pac. 1043 (1931), where it was held that only partnership creditors need be listed on the affidavit of creditors, not the individual creditors of each partner.

[70] Stewart & Holmes Drug Co. v. Reed, 74 Wash. 401, 133 Pac. 577 (1913).

[71] McRae v. Levy, *supra* note 65.

[72] Hardwick v. Gettier, 43 Wash. 644, 86 Pac. 943 (1906).

[73] Minder v. Gurley, 37 Wn.2d 123, 222 P.2d 185 (1950); Friedman v. Branner, 72 Wash. 338, 130 Pac. 360 (1913).

[74] Mill & Logging Supply Co. v. West Tenino Lumber Co., 44 Wn.2d 102, 265 P.2d 807 (1954).

[75] The vendee has a duty to obtain the list of creditors, under the provisions of RCW 63.08.020. See Friedman v. Branner, 72 Wash. 338, 130 Pac. 360 (1913); Olwell v. Gordon & Co., 40 Wash. 185, 82 Pac. 180 (1905); Fitz Henry v. Munter, 33 Wash. 629, 74 Pac. 1003 (1903); McDaniels v. J. J. Connelly Shoe Co., 30 Wash. 549, 71 Pac. 37 (1902).

[76] RCW 63.08.050 states that as to creditors within the scope of the statute, the sale will be fraudulent and void if the vendee fails to apply "... such purchase price first, to the taxes with respect to the operation of the business of the vendor and without applying or causing to be applied the balance of such purchase price; secondly, pro rata to the payment of the bona fide claims of the creditors of the vendor as shown upon the statement..." See Rustuen v. Apro, 40 Wn.2d 395, 243 P.2d 479 (1952); Spokane Merchants' Ass'n v. Koska, 118 Wash. 445, 203 Pac. 969 (1922).

with the statute, he holds the goods he has obtained as a trustee for the benefit of all creditors.[77]

It is clear that the creditor has an adequate remedy when there is a complete failure by the vendee to obtain a statement of creditors from the vendor. What is the result where a statement is obtained but there is an inadvertent omission of a creditor from the list? The purchaser has complied with the statute to the fullest extent possible under the circumstances. Does the omitted creditor have a claim against the purchaser? May he treat the sale as being "fraudulent and void"? Although no Washington case has passed upon these questions directly, it would seem from the statutory language that creditors may treat the sale as void *only* upon failure to obtain a statement and failure to apply the purchase price as directed by the statute.[78] Thus, if a seller honestly and inadvertently omits a creditor from his list, such creditor should not be permitted to recover from the purchaser. It could be argued that the purpose of the Bulk Sales Law (to protect the defrauded creditor) is defeated by this result. If the statute is to be construed liberally in favor of creditors, the omitted creditor should be able to treat the sale void as to him;[79] if there is a more strict construction, the creditor who has been inadvertently omitted from the list will not be allowed to follow the goods to the purchaser, nor sue him directly for the value of the goods.[80] On the other hand, if the vendor *knowingly* omits a creditor from the sworn list, the vendor is criminally liable for furnishing such false statement to the buyer.[81]

"Void" or "voidable" sale as to creditors. If the procedure as prescribed by the statute is not followed, RCW 63.08.050 provides that the "sale or transfer shall be fraudulent and *void* as to creditors of the vendor." [Emphasis added.] It should be noted that the sale of the goods without compliance with the statute does not render the transfer *absolutely* void. The Bulk Sales Law makes such transfer

[77] Kohn v. Fishback, 36 Wash. 69, 78 Pac. 199 (1905).

[78] RCW 63.08.050. The section is headed "Effect of failure to obtain statement." The statute section requires three things to be done by the vendee: (1) Demand and receive from the vendor the affidavit of creditors; (2) apply the purchase price first to unpaid taxes and, secondly, pro rata to creditors listed upon the statement; (3) file the statement in the office of the county auditor at least seven days prior to the consummation of the purchase.

[79] Lindstrom v. Spicher, 53 N.D. 195, 205 N.W. 231 (1925); Oregon Mill & Grain Co. v. Hyde, 87 Ore. 163, 169 Pac. 791 (1918).

[80] Marcus v. Knitzer, 168 Misc. 9, 4 N.Y.S.2d 308 (1938); Highway Signs & Servicing Co. v. Scott, 134 Kan. 658, 8 P.2d 391 (1932); McKelvey v. John Schaap & Sons Drug Co., 143 Ark. 477, 220 S.W. 827 (1920); see also VOLD, SALES, § 81 (2d ed. (1959).

[81] *Supra* note 17.

fraudulent only as to the creditors of the transferor. As between the transferor and the transferee, the title does pass.[82] RCW 63.08.050 specifically states that a bulk sale without compliance with the statute (because of failure to obtain a statement of creditors from the vendor) is fraudulent and *void* as to the creditors of the vendor. In *Hull v. Minkler,*[83] the court construed the sale as being *voidable,* rather than completely void. In that case, *A,* the owner, transferred an entire gasoline station business to *B,* the transferee, without any consideration for the transfer. *B* in turn transferred the property to the *B-C* partnership. In neither transfer was there compliance with the Bulk Sales Law. *H,* a business creditor of *A,* obtained a money judgment against *A.*[84] *H* commenced this garnishment action against the *B-C* partnership, based upon that judgment. The court found that the second transfer clearly was within the purview of the Bulk Sales Law[85] and that the first transfer, even though it was without consideration, was also within the scope of the statute.[86] The court further held that since *C,* the partner and second transferee took the property of the business without notice of the "voidable" nature of *B*'s title, *C* stood as a bona fide purchaser for value and as to *H* the creditor, *C* was not personally liable.

It should be noted that *H* was allowed to satisfy his judgment out of the partnership assets that could be traced after that second transfer (the one from *B* to the *B-C* partnership) because the partnership itself was not a bona fide purchaser. The court stated that the situation was analagous to that in which one partner obtains assets through fraud while not acting within the scope of his employment. As long as the assets are traceable, they are recoverable, but the partner having no knowledge of the fraud is not personally liable.

In the *Minkler* case, the fact that there was a voidable title in the hands of the first transferee suggests that good title could be passed to a second bona fide purchaser for value.[87] The use of the word

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[82] Hull v. Minkler, 51 Wn.2d 508, 319 P.2d 815 (1958); Norris v. Anderson, 134 Wash. 403, 235 Pac. 966 (1925); Kasper v. Spokane Merchants' Ass'n., 87 Wash. 447, 151 Pac. 800 (1915).

[83] 51 Wn.2d 508, 319 P.2d 815 (1958).

[84] The creditor must establish his debt by judgment or commencement of action *against the vendor;* he cannot establish it initially in a direct action against the bulk purchaser. Mill & Logging Supply Co. v. West Tenino Lumber Co., 44 Wn.2d 102, 265 P.2d 807 (1954).

[85] See Minder v. Gurley, 37 Wn.2d 123, 222 P.2d 185 (1950).

[86] See notes 24 through 29 *supra,* and text pertaining thereto.

[87] Hull v. Minkler, *supra* note 84 at 516, 517. See also Kasper v. Spokane Merchants' Ass'n., 87 Wash. 447, 151 Pac. 800 (1915).

"voidable" by the court is in direct conflict with the statutory word "void." It would seem that if the wording of the statute is literally construed, *i.e.*, construed in favor of the creditor,[88] the first purchaser could pass nothing to a bona fide purchaser for value, since as to the creditor the original transfer would be absolutely void and a nullity. This result would make *any* subsequent sale of the merchandise, however remote, ineffective as against the creditor of the original vendor. The court apparently felt that such was not the legislative intent when the Bulk Sales Law was enacted.[89] By making the distinction between the case of a *single* transfer by the vendor and that of a *resale* by the vendee to a subsequent purchaser in good faith and without notice of outstanding creditors, the Washington court has indicated that bona fide "sub-purchasers" for value *will* take good title, regardless of the wording of the statute. This is in accord with the majority of other jurisdictions.[90]

CONCLUSION

The Bulk Sales Law in Washington has generally achieved its desired effect, namely, the protection of creditors from the defrauding seller. The various amendments to the act since its inception point out to a significant degree the technical changes in the scope of the statute without a substantial difference in the purpose. Ambiguities have been minimized, but not eliminated. In every bulk sale of goods or transfer of a business interest, the practicing attorney should be aware of the impact of the statute and be cognizant of its application. Lack of such awareness may result in a financially embarrassing situation for the client, whether he is a creditor, buyer or seller. Following the bulk sale statutory procedure carefully, step by step, will avoid the possibility of a defective sale or transfer.

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[88] Construing the statute as a whole in favor of the creditor is considered a "liberal" construction of the Bulk Sales Law. VOLD, SALES § 81 (2d ed. 1959). See notes 20, 21 *supra*.

[89] Kasper v. Spokane Merchants' Ass'n., 87 Wash. 447, 151 Pac. 800 (1915).

[90] For example, see: Grove Mfg. Co. v. Salter, 26 Ga. App. 369, 106 S.E. 208 (1921); McKelvey v. John Schaap & Sons Drug Co., 143 Ark. 477, 220 S.W. 827 (1920); Prokopovitz v. Chimka, 170 Wis. 190, 174 N.W. 448 (1919); Kelly-Buckley Co. v. Cohen, 195 Mass. 585, 81 N.E. 297 (1907). See also VOLD, SALES, § 81 (2d ed. 1959).