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John M. Hollis

FRAUDULENT CONVEYANCES—BULK SALES ACT AS APPLIED TO SALE OF FIXTURES BY RESTAURATEUR

A restaurant was sold without compliance with the Virginia Bulk Sales Act, VA. CODE ANN. §5187 (Michie, 1942). The seller was subsequently adjudicated an involuntary bankrupt. Her trustee in bankruptcy filed a petition for attachment of the equipment and fixtures included in the sale, upon the ground that the transfer was void as to creditors. The lower court sustained the contention of the trustee and entered a personal judgment against defendant buyer for the amount of the debts owed prior to transfer. On appeal, *held,* reversed. The transaction did not come within the scope of the language of the Bulk Sales Act, which should be strictly construed. *O'Connor* v. *Smith,* 188 Va. 214, 49 S. E. 2d 310 (1948).

The Virginia Bulk Sales Act, which follows the general pattern of the New York Statute, used in two-thirds of the states,[1] provides in effect that if anyone engaged in buying and selling merchandise, sells, transfers, or assigns in bulk any port or the whole of a stock of merchandise, or the fixtures pertaining to the conduct of said business, otherwise than in the ordinary course of business, such sale shall be void as to creditors of the seller, unless the seller and purchaser make an inventory of the goods to be sold and unless the purchaser notifies all of the creditors of the seller at least ten days before taking possession of or paying for the goods.

It frequently happens that debtors, after selling their goods, depart from the jurisdiction and cannot be found by their creditors. The purpose of Bulk Sales Acts is to prevent the debtor from defrauding his creditors by selling his goods in bulk, thereby putting his assets beyond their reach.[2]

There is a conflict of authority as to whether these statutes should be given a strict or a liberal construction. The majority of jurisdictions hold that since the acts are in derrogation of the common law rights to sell or encumber property, and also impose a liability upon the purchaser, under certain circumstances, they should not be extended to cover transactions not strictly within the scope of the language employed.[3] Other courts feel that since the acts are remedial in nature, they should be given a liberal construction.[4] In Virginia the settled rule of construction is that even though a statute be remedial, when, at the same time, it is also in derrogation of the common law, it must be strictly construed.[5]

Retail merchants are the main class of sellers to which the statutes apply, and there is a split among the states as to whether the act

is applicable to wholesalers. What other sellers are included within the act will depend upon the language of the local statute and whether or not the courts of the jurisdiction adopt a strict or a liberal construction. The following types of sellers have been held not to come within the statute: manufacturers and packers, pea canneries, logging and lumbering, farmers, hotel owners, boardinghouse or roominghouse keepers, lunch wagons, repair shops, bakeries, dyers and cleaners, shoemakers, stonecutters, livery stable keepers, apartment house owners, proprietors of pool and billiard halls, those whose business is rendering personal services to others for hire, and restaurant keepers.[6]

One reason advanced in the instant case for excluding restaurant owners from the operation of the act is that they do not sell merchandise but sell services. The same argument has been followed by many courts in denying the liability of the restaurant owner in actions based on the theory of breach of an implied warranty of wholesomeness of food served to customers, although Professor Williston states[7] and some courts have held that the transaction is of such a nature that there may be an implied warranty even though it is not deemed a sale of merchandise.[8] It is said that the customer of a restaurant is privileged to satisfy his appetite, and no more. No title to the food passes, except as an incident to the customer's consumption of it.[9] It is submitted that this reasoning is not necessary to the decision of the principal case and may possibly deal a serious blow to the application of the breach of warranty theory in cases hereafter arising which involve the sale of unwholesome food by a restaurant. The decision could have been confined to the reason given by the court that a restaurant does not carry what may be designated as a stock of merchandise as that term is used within the Bulk Sales Act. Rather, like manufacturers, to whom the acts have been held not to apply, their principal investment is equipment for the preparation and serving of food, and they sell their product merely as an incident to the business.

Also if followed to a logical conclusion, the reasoning that there is no sale of the food would produce absurd results. For example, a person who ordered a meal in a restaurant and gave his dessert to an accompanying friend would be guilty of the tort of conversion or even a crime. However, it is probable that in such a case the courts would find that the customer had a sufficient interest in the dessert to make the gift without being a wrongdoer.

The holding in the instant case, that restaurants are not within the scope of the Bulk Sales Act, is in accord with the weight of authority, and seems to be a sound conclusion.

JOHN M. HOLLIS

FOOTNOTES

1. 3 WILLISTON, SALES §643 (Revised ed. 1948); see Billig, **Bulk Sales Laws: A Study in Economic Adjustment,** 77 U. of Pa. L. Rev. 72.

2. See Billig, **id,** at 75.

3. **E.g.** Samuelson v. Goldberg, 13 N. J. Mis. R. 204, 177 A. 260 (1935); Lewis Hubbard Co. v. Loughran, 85 W. Va. 235, 101 S. E. 465 (1919).

4. **E.g.** Patmos v. Grand Rapids Dairy Co., 243 Mich. 417, 220 N. W. 724 (1928); Ben Bimberg Co. v. Unity Coat & Apron Co., 150 Misc. 836, 270 N. Y. S. 580 (1934); Affirmed 244 App. Div. 777, 280 N. Y. S. 220 (1935).

5. Hannabas et. al. v. Ryan, 164 Va. 519, 180 S. E. 416 (1935).

6. See Annotation, 168 A. L. R. 740-756.

7. 1 WILLISTON, SALES §242 (b) (Revised ed. 1948).

8. **E. g.** Cushing v. Rodman 65 App. D. C. 258, 82 F. 2d 864 (1936).

9. **E. g.** Merrill v. Hodson, 88 Conn. 314, 91 A. 533 (1914); Childs Dinning Hall Co. v. Swingler, 173 Md. 490, 197 A. 105 (1938); Nisky v. Childs Co. 103 N. J. L. 464, 135 A. 805 (1927). **Contra:** Temple v. Keeler 238 N. Y. 344, 144 N. E. 635 (1924); Friend v. Childs Dinning Hall Co. 231 Mass. 65, 120 N. E. 407 (1918).