

ST. LOUIS LAW REVIEW

Published Quarterly During the University Year by the
Undergraduates of Washington University Law School.

BOARD OF TRUSTEES

CHARLES NAGEL
EDWARD C. ELIOT
RICHARD L. GOODE
JAMES A. SEDDON
THEODORE RASSIEUR

JOHN F. LEE
WALTER D. COLES
FREDERICK N. JUDSON
FRANKLIN FERRIS
P. TAYLOR BRYAN

EDITORIAL BOARD

JAS. H. KELLEY
STANFORD HOLLOCHER

V. L. TURNER
H. A. POAGUE

BUSINESS MANAGER

FOSTER H. BROWN

ASSOCIATE EDITORS

CHARLES P. WILLIAMS

TYRRELL WILLIAMS

NOTES

“WHAT TRANSFEREES OF PROPERTY ARE WITH- IN THE PURVIEW OF THE BULK SALES ACT OF MISSOURI”

In 1913 the Legislature of the State of Missouri passed an Act regulating the sale, trade or disposition of certain stocks of merchandise generally known as the “Bulk Sales Act.” The act in general has been copied from similar Acts in other States and the wording of the Act is substantially similar to the Acts in other States, although it is not identically the same in wording as the Act of any other State.

Supply Company v. Smith, 182 Mo. App. 222 l. c.

The Act is set forth in the Laws of Missouri, 1913, page 163. It is a live question as to what transfers of property are within the meaning of this Act. The Act provides that it shall apply to "the sale, trade or other disposition of the major part in value or the whole of a stock of merchandise, or merchandise, fixtures and equipment, or equipment pertaining to the vendor's business, otherwise than in the ordinary course of trade and in the regular prosecution in the vendor business." Does the act apply to the sale of furniture of a boarding house, or does it apply to the sale of the fixtures of a barber shop, or does it apply to the transfer of all the office furniture of a real estate agent? In other words, does the Missouri Act apply to those bulk sales by persons engaged, not primarily in the sale of merchandise, but to bulk sales by persons whose business is supplying a service and whose business necessarily requires the ownership of equipment and fixtures as an incident thereto? The question of what property and what transfers are within the purview of the Act of Missouri has not been directly passed upon by any of the Missouri Courts of Appeals or by the Supreme Court of Missouri, but inasmuch as the Missouri Act is substantially similar in wording to the Acts of other States, we can look to the expressions of those States for the purpose of our statute.

Supply Co. v. Smith, 182 Mo. 222 l. c.

The purpose of the Missouri Act is stated in *Supply Co. v. Smith*, *supra*, at page 216, as follows:

"It is well to bear in mind that the bulk sales law is intended to prevent a *trader* who is indebted from disposing of his merchandise and fixtures in a manner other than the *regular course of trade* which would enable him to place his property beyond reach of his creditors."

It is the opinion of the writer that the Springfield Court of Appeals meant by those words that the Act applies only to the disposition of goods by those whose business it is to sell merchandise; for if that were not the Court's interpretation, the phrases "trader" and "other than in the regular course of trade" would be meaningless. It seems clear that the Act applies only to the disposition of goods by persons whose business it is to sell merchandise, making void their sales in bulk unless those sellers comply with the statutory restrictions. To one who is not engaged in the business of selling merchandise, the Act has no application. "Vendor" in the Act means vendor of a stock of merchandise.

An interesting case on this point is *Heslop et al. v. Golden*, decided in 1915 by the Illinois Court of Appeals, and reported in 184 Ill. App. 388. The facts are that one Charles A. Straw rented desk

space from defendant Golden in a suite of rooms at No. 19 South LaSalle street, Chicago; the tenancy was by the month; and there Straw conducted an employment agency. He had a desk, a chair, a filing case, a rug and a few other articles of office furniture. He sold nothing from said office, and had no connection with or semblance to a mercantile establishment. Straw sold his furniture to the plaintiffs and left the building. Plaintiffs made a demand of the defendant, Golden, for the furniture, but he claimed that he was a creditor of Straw, that no valid title passed to plaintiff because Straw had not complied with the provisions of the Bulk Sales Act before the transfer, and refused to give up the furniture, whereupon plaintiff brought a replevin suit.

The Court held that this property originally owned by Straw did not come within the operation of the Bulk Sales Law. The Statute of Illinois provides, in part, that

“The sale, transfer, or assignment in bulk of the major part or the whole of a stock of merchandise and fixtures, or other goods and chattels of the vendor’s business * * * shall be fraudulent and void as against creditors of the said vendor, unless,” etc.

It was claimed that the words “other goods and chattels of the vendor’s business” meant any and all fixtures, goods or chattels which may be used in any trade or business. The Court did not give these words, as used in the statute, so broad a meaning, but construed them to mean “other goods and chattels” used in connection with the business of selling merchandise, commodities or other wares. The court held that office furniture of an employment agency is not so used and is not affected by this statute and gave judgment for the plaintiff.

Following this decision the writer believes that the words of the Missouri Act “merchandise, fixtures and equipment or equipment pertaining to the vendor business” mean merchandise, fixtures and equipment or equipment pertaining to vendor’s business of selling merchandise, commodities or other wares, and where the business of the vendor is not the sale of merchandise, he is not affected by the Act. In other words, if the business of the vendor is primarily to render a service, and is not the sale of merchandise, the transfer of his property in bulk is not within the Act, and the words of the statute, “fixtures and equipment, or equipment pertaining to the vendor business,” do not apply to such a vendor. The Act applies only and wholly to a vendor’s stock of merchandise.

Numerous cases from other States sustain this view.

The Bulk Sales Act of Michigan provides that:

"The sale, transfer, or assignment in bulk of any part or the whole of a stock of merchandise, or merchandise and fixtures pertaining to the conducting of said business, otherwise than in ordinary course of trade, and in the regular and usual prosecution of the business of the seller, transferror or assignor shall be void," etc.

The Supreme Court of Michigan construing this Act in *Bowen v. Wigley*, 165 Mich. 337, held that the law did not apply to a transfer of horses, wagons, harnesses, coal bags and other implements used in the coal business, where no coal or other merchandise or fixtures were included in the conveyance.

And so it was held that the act did not apply to the business of an undertaker where vehicles, harness, caskets, and appliances used in the business of an undertaker were sold, holding that such articles and such a business did not come within the meaning of the statute.

People's Saving Bank v. Van Allebury, 165 Mich. 524.

Where an act makes sales, transfers, or assignments, in bulk "of any part or the whole of a stock of merchandise and fixtures pertaining to the conduct of said business otherwise than in the ordinary course of trade and in the regular prosecution of the business of the seller" void unless, etc., it does not apply to the furniture, fixtures, and utensils used in the operation of a restaurant business without proof that a merchandise business was conducted in connection with or incidental to said restaurant business.

Johnson v. Kelley, (Sup. Ct. of N. D. 1915), 155 N. W. 683.

This North Dakota Court went on to say:

"The Act, we think applies only to sales of commodities by persons who make it a business to buy commodities for sale, and who, in the ordinary course of trade, sell them at retail and in small quantities."

The Supreme Court of Utah, in 1916, in *Swanson v. DeVine*, 160 Pac. 872, held that the business of a shoemaker did not come within the statute. This Court quoted approvingly from *Conn. Steam Brown Stove Co. v. Lewis*, 86 Conn. 386; 85 Atl. 534, 45 L. R. A. (N. S.) 495, the following:

"And so, too, the extent to which retail sales are made by one, in connection with another business should be considered in deciding whether the person making such retail sales can be fairly said to be one 'who makes it his business' to sell commodities in small quantities for the purpose of making a profit. One who purchases metals and wood with which to manufacture and sell sewing machines at retail can hardly be said to make it his business to buy such original materials and sell 'the same' for the purpose of making a profit upon the commodities which he has bought, nor can a wholesale dealer

or manufacturer, because he has occasionally made a sale of goods at retail properly be said to 'make it his business' to sell commodities in small quantities for the purpose of making a profit upon the goods thus sold."

These latter two cases hold that the Act does not apply to any pursuit, occupation or business unless its *main purpose* is to dispose of merchandise by the means of selling at retail.

The Supreme Court of Georgia, in *Cooney, Eckstein & Company v. Sweat et al*, 133 Ga. 511, in holding that an act regulating the sale of goods, wares, and merchandise in bulk, has no application to a sale of substantially all the lumber manufactured by one who operates a sawmill at which trees are manufactured into lumber, states:

"The object of the legislature in passing the statute was the protection of persons who had extended credit to merchants on the faith of apparent prosperity indicated by a stock of goods, wares, and merchandise, which would not be sold in bulk to one person, but which would be sold out gradually, and replenished from time to time. When merchants sell their entire stock of goods to one person without notice of any kind to their creditors, a fraud is frequently perpetrated upon the creditors; and it was the intention of the legislature to afford a remedy to the victims of these fraudulent sales. The Act is in derogation of the common law, and of a person's right to alienate his property without restriction, and is, therefore, strictly construed. * * * * *

"In the construction of statutes of this kind it is always well to consider the evil intended to be reached. 'That evil,' says Vann, J., in his dissenting opinion, in the case of *Wright v. Hart*, 182 N. Y. 330, 2 L. R. A. (N.S.) 338, 'is the tendency and practice of merchants who are heavily in debt to make secret sales of their merchandise in bulk for the purpose of defrauding creditors. Common observation shows that when a dealer has reached a point in his business career where he cannot go on, owing to the claims of creditors, the temptation is strong and the practice common of making fraudulent sales.' The Act of 1903 (referring to the Bulk Sales Act of Georgia) bears internal evidence of a legislative intent to confine its operation to merchandise or dealers in merchandise.

"The word 'merchandise' is, however, not to be taken in such a restricted sense as to exclude the usual and customary accessories of a mercantile or trading establishment when a sales in bulk is made of the whole. Thus, bar fixtures, safes, desks, cash registers, cigar cases, pool tables, refrigerators and the like, *used in connection with a business to which they are appropriate, in facilitating the operation of such business, and the sale of goods connected therewith* have been held to be included in the sale of the business, within the meaning of the Bulk Sales Act."

In *Everett Produce Co. v. Smith*, 40 Wash. 566, 82 Pac. 905, 2 L. R. A. (N. S.) 33, it was held that a sale of the horses, wagons, and harness, comprising the stock in the livery stable of an undertaking company was not a sale of a stock of goods, wares, or merchandise within the meaning of the Statute, holding that the Statute only applied to a *vendor of merchandise* and that the business of the undertaking company is not within the purview of the Act.

In an action by a trustee in bankruptcy to recover certain property transferred, claiming that the transfer was void because in violation of the Bulk Sales Law, the Appellate Division of the Supreme Court of New York held that the Act did not apply to a transfer by a hotel keeper of furniture and fixtures of a hotel.

Steward v. Siegler, Sup. Ct. (App. Div.) N. Y., Nov. 1916, 161 N. Y. S. 489.

Though the particular point in question has not been decided by our Missouri courts, the point of view assumed in this article seems to have been taken inferentially by the Kansas City Court of Appeals in *Riley Pennsylvania Oil Company v. Symonds*, 190 S. W., 1038, *l. c.*, 1040, where that Court states:

"It seems to us that the meaning of the statute (referring to the Missouri Act), is that a *vendor who buys and obtains possession of merchandise in bulk*, without ascertaining the vendor's creditors and notifying them as required by the statute," etc.

The Illinois Act is more inclusive than our Missouri Act and the matter in hand has been passed upon in that State several times.

In *Richardson Coal Co. v. Cermak et al.*, 109 Ill. App. 106, decided December, 1914, a replevin suit, the only question presented on the record was one of law, whether what is known as the Bulk Sales Law of 1913 (Hurds R. S., 1913, p. 906), applied to a sale of a double team of horses, including harness and wagon, which the vendor had been personally using to haul coal for others at a compensation of so much per ton.

The act, as heretofore recited, renders fraudulent and void as against creditors of the vendor, unless the vendee complies with certain conditions therein named, "the sale, transfer, or assignment in bulk of the major parts or the whole of a stock of merchandise, or merchandise and fixtures *or other goods and chattels of the vendor's business*, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the vendor's business."

The Court held that this was construed in *Johnson Co. v. Belosky*, 263 Ill. 363, as prohibiting the sale of any goods and chattels in bulk otherwise than in the ordinary course of trade in the regular prosecu-

tion of trade in the regular prosecution of business, and the Court specifically held that the Bulk Sales Act

"must be presumed, we think, to relate to a business or trade where, in the ordinary course and regular prosecution thereof, the goods or chattels, whatever they might consist of, are not ordinarily and regularly sold by the owner in bulk." "But here," the Court went on to state, "the vendor was working for wages. * * * Manifestly the act did not contemplate that one called on to render personal services cannot sell the chattels, goods, or things that are appurtenant thereto unless the conditions imposed by said Act are complied with. Otherwise, a lawyer could not sell his library, a surgeon his instruments, a broker his office furniture, or a carpenter his tools without compliance with such conditions. If such were the proper interpretation of the Act, we could hardly imagine a more burdensome restriction upon one's property rights."

The same principle is maintained in a Montana case recently decided, which carefully reviews the authorities.

In *Ferrat v. Adamson*, 163 Pac. 112, decided by the Supreme Court of Montana, January 22, 1917, the facts are that in March, 1914, one Madden owned a pool hall business in the conduct of which he employed certain pool tables, cues, and balls, and also kept for sale small quantities of tobacco, cigars, etc. He sold the entire property in one transaction to one Ferrat without attempting to comply with the Bulk Sales Law of Montana. Leo Spring, a creditor of Madden, reduced his claim to judgment, secured an execution and placed it in the hands of a constable. Assuming to act under the execution, Adamson seized and sold the pool tables, cues, and balls as the property of Madden. Ferrat thereupon commenced this action to recover; the cause was tried, resulting in a judgment for plaintiff from which defendants appeal.

The question most important for our purposes on appeal was "Did the pool tables, cues, and balls used in conducting the pool hall business constitute a stock, or a part of a stock of goods, wares, or merchandise, the sale of which is regulated by the Bulk Sales Law (R. C. Mont. 6131-6135)?"

The title of the Act is:

"An Act regulating the sale of merchandise in bulk and making provision for the protection of the creditors of the vendor." Laws 1907, p. 373.

The Court stated that "nearly every State in the Union had adopted a like statute designed to accomplish the same end; that the scope of these acts had been considered in many cases, and the Court decided that *the weight of authority and better reasoning justify the*

conclusion that it was the legislative purpose to regulate the sale in bulk of such articles only as the merchant keeps for sale in the ordinary course of his business," citing numerous authorities, many of which have been cited herein.

The Montana Court then specifically held that the pool tables, cues, and balls *were kept for use, but not for sale*, and the transaction between Madden and Ferrat did not fall within the purview of the Bulk Sales Act.

Following the great weight of authority, it seems to me it was the purpose of the Missouri Act to regulate the sales in bulk of such articles only as a merchant keeps for sale in the ordinary course of his business, and that the Act does not apply to the sale or transfer of any of the fixtures or equipment of a business, unless the primary purpose of that business is to sell merchandise. I do not believe that it applies to a manufacturing business or to a hotel business; or to a professional business, such as doctor or a lawyer; or to the business of an artisan. To repeat, I believe that the Act applies only to vendors of merchandise, and by merchandise is meant such articles only as a merchant keeps for sale in the ordinary course of his business.

A. J. F.