

## BULK SALES LAWS: PROPERTY INCLUDED\*

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The interrelationship between the problem of what businesses are covered and that of what goods are covered by bulk sales statutes has already been stated.<sup>1</sup> In an earlier article the more general problem of what kinds of transactions are included was considered from the viewpoint of what businesses are covered.<sup>2</sup> This necessarily involved a consideration of what constitutes merchandise within the meaning of bulk sales statutes, since in most of the cases, the question was whether the business was a mercantile business, and a mercantile business is one which sells merchandise. The analysis contained in that article yields the conclusion that if what has been sold can be described as merchandise, the subject matter of the transaction under scrutiny falls within every bulk sales statute. This is not to say that every court has defined merchandise in such a way that all of the things included by each other court under that term will be included by it. Thus, to some courts the finished goods of a manufacturing establishment are merchandise,<sup>3</sup> while the same is not true of other courts.<sup>4</sup> Nevertheless the basic proposition remains valid; if the court is willing to call it merchandise, then it is covered by the statute. The reason is obvious: every statute uses the term merchandise or its equivalent.<sup>5</sup> Here there is no room for judicial interpretation beyond

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\*This is the second in a series of three articles by Professor Miller considering the problem of the kinds and quantity of goods, and the kinds of business covered by the bulk sales statutes. *Bulk Sales Laws: Businesses Included*, appears in the February, 1954, issue, and *Bulk Sales Laws: Meaning to be Attached to the Quantitative and Qualitative Requirements Phrases of the Statutes*, will appear in the June, 1954, issue of the WASHINGTON UNIVERSITY LAW QUARTERLY.

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1. Miller, *Bulk Sales Laws: Businesses Included*, 1954 WASH. U.L.Q. 1.
2. *Ibid.* The problems are discussed in Billig and Smith, *Bulk Sales Laws: Transactions Covered by the Statutes*, 39 W. VA. L.Q. 323 (1933).
3. *E.g.*, *Mosson v. Kriser*, 212 App. Div. 282, 208 N.Y. Supp. 566 (1st Dep't 1925).
4. *E.g.*, *Gitt v. Hoke*, 301 Pa. 31, 151 Atl. 585 (1930). The problem is discussed and the cases reviewed in detail in Miller, *supra* note 1, section II.
5. The following statutes cover a "stock of merchandise": ALA. CODE tit. 20, § 10 (Supp. 1951); ARK. STAT. ANN. § 68-1501 (1947); COLO. STAT. ANN. c. 27, § 1 (Supp. 1952); CONN. GEN. STAT. § 6705 (1949); DEL. CODE ANN. tit. 6, § 2101 (1953); ILL. ANN. STAT. c. 121½ § 78 (Supp. 1953); IND. ANN. STAT. § 33-201 (Burns 1949); IOWA CODE ANN. c. 555, § 555.1 (1950); KAN. GEN. STAT. § 58-101 (1949); LA. REV. STAT. ANN. § 9:2961 (1950); ME. REV. STAT. c. 106, § 6 (1944); MASS. ANN. LAWS c. 106, § 1 (1947); MICH. STAT. ANN. § 19.361 (1937); MINN. STAT. ANN. § 513.18 (West 1947); MISS. CODE ANN. § 274 (1942); MO. ANN. STAT. § 427.020 (Vernon 1950); NEB. REV. STAT. § 36-501 (1952); N.H. REV. LAWS c. 262, § 43 (1942); N.J. STAT. ANN. § 46:29-1 (1940); N.M. STAT. ANN. § 53-1001 (1941); N.Y. PERS. PROP. LAW § 44; N.C. GEN. STAT. § 39-23 (1950); N.D. REV. CODE § 51-0201 (1943); OHIO GEN. CODE ANN. § 11102 (1938); R.I. GEN. LAWS c. 483, § 1 (1938); S.C. CODE § 11-201 (1952); S.D. CODE § 54.0301 (1939); TENN. CODE ANN. § 7283 (Williams 1934); TEX. REV. CIV. STAT. ANN.

the decision as to whether the particular chattel in question constitutes merchandise. Of course the reverse is not necessarily true.<sup>6</sup> Many of the statutes expressly cover items other than merchandise,<sup>7</sup> and some of them have been interpreted to cover non-merchandise items of a business which has no merchandise.<sup>8</sup> Although some of the latter decisions are demanded by express statutory language, others are clearly misinterpretations.<sup>9</sup> For the most part, however, both the language of the statutes and the language of the cases have indicated primary interest in the problem of whether fixtures have been covered under varying circumstances, and what, as a matter of definition, are fixtures. In some cases the statutes are broad enough to cover any chattel of a business,<sup>10</sup> so that the only question is whether the business is a mercantile one, or even whether any chattels have been sold.

The cases in this area also announce the rules of statutory interpretation, but again there seems to be no satisfactory method of evaluating the impact of the rules. There is nothing in the cases to suggest that the observations made in an earlier article<sup>11</sup> (that such canons serve merely as props, as rules of convenience) are invalid. On the other hand, on this issue, the interpretation has frequently been a liberal-in-fact one, regardless of the nominally applicable canon of statutory interpretation.

A. *What is "merchandise," "goods, wares and/or merchandise," "a stock in trade"?*

There can be no real argument as to the presence of certain specific criteria in defining merchandise under the bulk sales statutes. Al-

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art. 4001 (1945); VT. REV. STAT. § 7846 (1947); VA. CODE § 55-83 (1950); WYO. COMP. STAT. ANN. § 41-701 (1945). The following statutes cover a "stock in trade": ARIZ. CODE ANN. § 58-301 (1939); CAL. CIV. CODE § 3440.1 (Supp. 1953). The following statutes cover "goods, wares and merchandise," or "goods, wares or merchandise": D.C. CODE ANN. § 28-1701 (1951); FLA. STAT. ANN. § 726.02 (1944); GA. CODE ANN. § 28-203 (1952); IDAHO CODE ANN. § 64-701 (1948); KY. REV. STAT. § 377.010 (1953); MD. ANN. CODE GEN. LAWS art. 83, § 97 (1951); MONT. REV. CODES ANN. § 18-201 (1947); NEV. COMP. LAWS § 6816 (Supp. 1949); OKLA. STAT. ANN. tit. 24, § 71 (1937); ORE. REV. STAT. § 79.010 (1953); UTAH CODE ANN. § 25-2-1 (1953); WASH. REV. CODE § 63.08.010 (1951); W. VA. CODE ANN. § 4001 (1949); WIS. STAT. § 241.18 (1951). The present Pennsylvania statute covers a "stock of goods, wares or merchandise," (PA. STAT. ANN. tit. 69, § 521 (1931), but, effective July 1, 1954, the Bulk Transfers Article of the *Uniform Commercial Code* (Official Draft, Text and Comments Ed. 1952) but incorporating the *Recommendations of the Editorial Board for Changes in the Text and Comments of the Uniform Commercial Code Official Draft, Text and Comments Edition* of June 1, 1953, will be the law of Pennsylvania, and will comprise part of Title 12A of *Purdon's Statutes*, the balance of which title will be the remainder of the *Uniform Commercial Code*. Section 6-102 (1) refers to "materials, supplies, merchandise or other inventory."

6. Miller, *supra* note 1, particularly section II, g.

7. See note 43, *infra*.

8. Miller, *supra* note 1, particularly section II, g.

9. *Ibid*.

10. See text at § B., (4) *infra*.

11. Miller, *supra* note 1, at note 30.

though the definitions given in the cases take somewhat different forms, nevertheless, they all in effect conclude that merchandise is tangible personal property which a businessman has purchased for the purpose of resale as a routine part of his business of selling such things. There are questions of whether what is purchased and sold, either in a changed form or as an integral part of a transaction also involving the sale of personal services, loses its character as merchandise by reason of the change in form or the tie-in with the sale of services, and the resolution of those questions has not been uniform. But that is merely a different way of stating the same problem which formed the subject matter of an earlier article in this series<sup>12</sup> and will not be re-analyzed here except insofar as necessary to make clear the rationale of the cases which belong in this article.

It is also true that the basic phrase "goods, wares and merchandise," has been occasionally expanded to include what most courts would call fixtures or equipment, but such holdings are unusual. In short, we may safely conclude that merchandise means what every layman thinks it means, goods which are owned by businessmen for the purpose of selling them to the next echelon in the chain of distribution, whether that be the ultimate consumer or not.

### B. *Fixtures.*

The question which arises most frequently in cases of the class under discussion is whether the sale of anything other than what is deemed merchandise by the particular court is covered by bulk sales statutes. Normally the items in dispute are what may be termed equipment used in the particular business, *e.g.*, the things which are used in the display and delivery of the merchandise. The particular word used most commonly in the statutes, and consequently in the cases, is "fixtures," although several of the statutes use much broader terminology, such as "equipment" or "other goods and chattels." The general problem is divisible into sub-problems and the lines of classification are dictated by a grouping of similar kinds of bulk sales statutes. The following sub-problems are presented by the statutes and cases:

- (1) Are fixtures included if they are part of the subject matter of a transaction which also includes merchandise?
- (2) Are fixtures included if they are sold independently of any merchandise?
  - (a) If it is a mercantile business?
  - (b) If the business has no stock in trade?
- (3) The meaning of the term "fixtures" in bulk sales statutes.

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12. Miller, *supra* note 1, *passim*.

- (4) A special consideration of the statutes which use language more clearly inclusive of all kinds of non-merchandise items than is the term "fixtures."

Questions (1) and (2) (a) will be discussed with reference to several kinds of statutes as follows:

- [a] Those which make no mention of fixtures.
- [b] Those which include merchandise and fixtures, and connect up the two by the conjunctive, thus, "merchandise and fixtures."
- [c] Those which include merchandise and fixtures, and connect up the two with the disjunctive, thus, "merchandise or fixtures."
- [d] The more broadly worded statutes to the extent that any of the problems under discussion here have been decided under them.

It will be readily observed that question (2) (b) is merely a restatement of a part of the more general problem of what businesses are covered discussed in the first article of this series and consequently will not be re-examined here except to the extent necessary to insure clarity and completeness.

*(1) Are fixtures included if they are part of a transaction which also includes merchandise?*

[a] *Under statutes which make no mention of fixtures or equipment?*

Many of the present bulk sales statutes make no mention of fixtures,<sup>13</sup> and many of the earlier ones,<sup>14</sup> since amended to take a broader form, likewise were silent on the point. Nearly all of the cases construing such statutes have taken the position that fixtures are not contemplated by them, even though the transaction is one involving the transfer of merchandise as well.<sup>15</sup> The rationale of those

13. ALA. CODE tit. 20, § 10 (Supp. 1951), §§ 11 to 14 (1940); ARIZ. CODE ANN. § 58-301 (1939); DEL. CODE ANN. tit. 6, §§ 2101 to 2104 (1953); D.C. CODE ANN. §§ 28-1701 to 28-1705 (1951); FLA. STAT. ANN. §§ 726.02 to 726.06 (1944); GA. CODE ANN. §§ 28-203 to 28-206 and 28-9901 (1952); ME. REV. STAT. c. 106, §§ 6 to 7 (1944); MASS. ANN. LAWS c. 106, §§ 1 to 2 (1947); MINN. STAT. ANN. § 513.18 (West 1947); MISS. CODE ANN. §§ 274, 277 and 278 (1942); N.H. REV. LAWS c. 262, §§ 43 to 44 (1942); N.M. STAT. ANN. §§ 53-1001 to 53-1003 (1941); N.C. GEN. STAT. § 39-23 (1950); OKLA. STAT. ANN. tit. 24, §§ 71 to 74 (1937); TENN. CODE ANN. §§ 7283 to 7285 (Williams 1934); VT. REV. STAT. §§ 7846 to 7847 (1947).

14. Conn. Laws 1901, c. 161; Idaho Laws 1903, c. 11; Md. Laws 1900, c. 579, § 18; Mont. Laws 1907, c. 145; Neb. Laws 1907, c. 62; Nev. Laws 1907, c. 102; Ore. Laws 1898, p. 248, § 2; S.C. Laws 1906, No. 1; Tex. Laws 1909, c. 27; Utah Laws 1901, c. 67; Wash. Laws 1901, c. CIX; W. Va. Laws 1909, c. 78.

15. Nolte v. Winstanley, 16 Ariz. 327, 145 Pac. 246 (1914); Boise Ass'n. of Credit Men v. Ellis, 26 Idaho 438, 144 Pac. 6 (1914); Rabalsky v. Levenson, 221 Mass. 289, 108 N.E. 1050 (1915); Adams v. Young, 200 Mass. 588, 86 N.E. 942 (1909); Gallus v. Elmer, 193 Mass. 106, 78 N.E. 772 (1906); Kolander v. Dunn, 95 Minn. 422, 104 N.W. 371 (1905); Botsford v. Holcomb, 127 Neb. 85, 254 N.W. 687 (1934); Marshon v. Toohey, 38 Nev. 248, 148 Pac. 357 (1915); Hood Rubber Products Co. v. Dickey, 167 Okla. 304, 29 P.2d 115 (1934); Texas Hide & Leather Co. v. Bonds, 155 Okla. 3, 8 P.2d 20 (1932); Muskogee Wholesale Grocer Co. v. Durant, 49 Okla. 395, 153 Pac. 142 (1915); Rice v. West, 80 Ore. 640, 157 Pac. 1105 (1916); Smith v. Boyer, 119 S.C. 176, 112 S.E. 71 (1921); Straus Cigar Co.

cases which exclude fixtures, even under the combined sale situation, is exemplified by the following language from an early Idaho case:<sup>16</sup>

We think that merchandise as used in this statute must be construed to mean such things as are usually bought and sold by merchants. Merchandise means something that is sold every day and is constantly going out of the store and being replaced by other goods, but the fixtures are not a part of the trade or business; they are not sold in the ordinary trade as goods. They remain from year to year. The merchant could not dispose of them as long as he remains in business. It is true that shelving, counters, drawers, tables and many other things are necessary in order to conduct the business of the retail merchant, and so are delivery wagons in the larger towns to deliver goods, and clerks to sell the goods, and so is a house or room in which to keep them, but the clerks are not part of the goods, wares or merchandise, and though the business cannot be conducted without a house or place to keep and display the goods, the house or the room where they are sold is not a part of the goods, wares and merchandise.<sup>17</sup>

In some of the cases the argument was advanced that an interpretation that fixtures are included would strengthen the bulk sales acts, but the courts have almost uniformly resisted such blandishments and have held, properly, that the strengthening of bulk sales laws is a legislative matter.<sup>18</sup>

Subject to the exceptions discussed, *infra*, the courts with similar statutes have reached the same conclusion as that reached by the Supreme Court of Idaho.<sup>19</sup> Thus in Massachusetts, in spite of a statement in one case that ". . . 'merchandise' is a word of large significance and has been held to be synonymous with tangible property which could be sold. . .,"<sup>20</sup> the case law is clear that fixtures are not part of a stock of merchandise.<sup>21</sup> Decisions from Minnesota,<sup>22</sup> Nevada,<sup>23</sup>

v. Bon Marche, 142 Tenn. 129, 218 S.W. 219 (1919); Third National Bank of Nashville v. Keathley, 35 Tenn. App. 82, 242 S.W.2d 760 (1951); Albrecht v. Cudihee, 37 Wash. 206, 79 Pac. 628 (1905).

16. Boise Ass'n. of Credit Men v. Ellis, 26 Idaho 438, 144 Pac. 6 (1914).

17. *Id.* at 448, 449, 144 Pac. at 9. The Idaho statute has since been amended to cover fixtures whether sold in connection with merchandise or not. IDAHO CODE ANN. § 64-701 (1948).

18. That argument was made and rejected in the *Boise* case, *ibid.*, but was accepted in *Walton v. Walter Fisher Co.*, 146 Miss. 291, 111 So. 364 (1927).

19. See note 15 *supra*.

20. *Tupper v. Barrett*, 233 Mass. 565, 568, 124 N.E. 427, 428 (1919).

21. *Rabalsky v. Levenson*, 221 Mass. 289, 108 N.E. 1050 (1915); *Adams v. Young*, 200 Mass. 588, 86 N.E. 942 (1909); *Gallus v. Elmer*, 193 Mass. 106, 78 N.E. 772 (1906).

22. *Kolander v. Dunn*, 95 Minn. 422, 104 N.W. 371 (1905). In *Melges Brothers Co. v. Duluth Brewing & Malting Co.*, 118 Minn. 139, 136 N.W. 401 (1912), however, the court did not distinguish between the merchandise and fixtures sold in reversing for new trial on the ground of erroneous instructions on the issue of whether the transaction was bona fide, but it is doubtful that this should be interpreted as meaning that fixtures are covered by the Minnesota statute in some cases.

23. *Marshon v. Toohey*, 38 Nev. 248, 148 Pac 357 (1915), holds that the transfer of a stock of liquors, furnishings used in connection with a dance-hall and

North Carolina,<sup>24</sup> Tennessee,<sup>25</sup> West Virginia,<sup>26</sup> Nebraska,<sup>27</sup> Oklahoma,<sup>28</sup> Montana,<sup>29</sup> Washington,<sup>30</sup> Oregon,<sup>31</sup> and Arizona,<sup>32</sup> all support

bar, and some money representing proceeds from the bar, was invalid insofar as the stock of liquors and the money were concerned but valid as to the other items. The Nevada statute has since been amended to cover fixtures whether or not sold in connection with merchandise. NEV. COMP. LAWS § 6816 (Supp. 1949).

24. In *Swift & Co. v. Tempelos*, 178 N.C. 487, 101 S.E. 8 (1919), after holding that a restaurant business falls outside the statute on the ground that it is a non-mercantile business, the court went on to say:

As to the furniture and fixtures used in the business of the keeper of the cafe, they are not kept for sale, and are not within the provisions of the statute. Now, if this stock itself is within it, it may be that, when the furniture and fixtures are sold with it, so as to be, in fact, a "clean-up" sale of the whole business, the appellee's position might, perhaps, be correct, but we do not decide, or intimate any opinion as to such a question.

*Id.* at 492, 101 S.E. at 10. The court went on, however, to quote from *Gallus v. Elmer*, 193 Mass. 106, 78 N.E. 772 (1906), the leading case for the proposition that fixtures are not covered even though accompanied by a sale of merchandise, with full approval and as representative of their (the North Carolina court's) view on the matter.

25. *Straus Cigar Co. v. Bon Marche*, 142 Tenn. 129, 218 S.W. 219 (1919); *Third National Bank of Nashville v. Keathley*, 35 Tenn. App. 82, 242 S.W.2d 760 (1951). See also, *Henry King & Co. v. Arnett Bros.*, 7 Tenn. App. 410 (1928), in which no appeal was taken from the ruling of the trial chancellor that fixtures are not covered even when part of a sale of both merchandise and fixtures.

26. In *Lewis, Hubbard & Co. v. Loughran*, 85 W. Va. 235, 101 S.E. 465 (1919), the court, after holding that the operator of a lunch-wagon carried no merchandise of any kind, went on to say:

What was the purpose of the Legislature in passing this Act? Evidently to preserve for those engaged in the wholesale mercantile business, as security for the payment of their debts for merchandise, the merchandise itself, unless the same was sold in the ordinary course of trade. The language "stock of merchandise, or any part thereof," was never intended to include the furniture, fixtures and appliances necessarily employed in the conduct of the business, for the very good reason that they are not sold by such merchants in the ordinary course of their business at all, and by its terms the act only applies to such merchandise as is sold in the ordinary and usual conduct of the business.

*Id.* at 240, 101 S.E. at 467. The West Virginia statute has subsequently been amended to cover fixtures whether or not sold in connection with merchandise. W. VA. CODE ANN. § 4001 (1949).

27. In *Lee v. Gillen & Boney*, 90 Neb. 730, 134 N.W. 278 (1912), the owner of a confectionery, who manufactured and sold ice cream and confections, and sold drinks from his soda fountain, gave a chattel mortgage on his machinery and equipment and on his stock of raw materials. The court held the statute inapplicable to "... fixtures or a manufacturer's stock of raw materials." In *Botsford v. Holcomb*, 127 Neb. 85, 254 N.W. 687 (1934), after holding that there had been substantial compliance with the statute in a sale of both merchandise and fixtures, the court cited the *Lee* case for the proposition that the statute does not apply to sales of fixtures. It should be noted that in the *Lee* case, no merchandise was sold, and that in the *Botsford* case, the act was complied with, with the result that neither case is a holding that the sale of fixtures is not interdicted by the statute if sold with merchandise. It seems fairly clear, however, that the language is sufficiently broad to justify the inference that a sale of fixtures is never included. Since these cases, the Nebraska statute has been amended to include fixtures whether sold alone or in connection with merchandise. NEB. REV. STAT. § 36-501 (1952).

28. *Hood Rubber Products Co. v. Dickey*, 167 Okla. 304, 29 P.2d 115 (1934); *Texas Hide & Leather Co. v. Bonds*, 155 Okla. 3, 8 P.2d 20 (1932); *Muskogee Wholesale Grocer Co. v. Durant*, 49 Okla. 395, 153 Pac. 142 (1915).

29. In *Ferrat v. Adamson*, 53 Mont. 172, 163 Pac. 112 (1917), the owner of a pool hall sold the entire business, including pool-tables, cues and balls, as well as small quantities of tobacco, cigars, etc., which he kept for sale. A creditor of

the proposition that fixtures are not covered by the limited language statutes under which the cited cases were decided.

Decisions from three jurisdictions are opposed to the rule stated above. Although the Mississippi cases<sup>33</sup> clearly establish the rule that fixtures are covered when they accompany merchandise in a single transaction, they go farther, reaching the position that the sale of fixtures alone is included within the area where compliance is necessary, and so will be discussed in that connection. In Georgia, however, a line of cases has been decided apropos to the point under discussion, but reach an opposite conclusion from that reached by most states.

In *Parham & Co. v. Potts-Thompson Liquor Co.*,<sup>34</sup> a stock of liquors and bar fixtures, safes, desks, cash registers, cigar cases, pool tables and refrigerators were sold without compliance with the statute. The court held that the enumerated items ". . . used in connection with a business to which they are appropriate, in facilitating the operation

the seller reduced his claim to judgment, secured an execution and had a constable seize and sell the pool-tables, cues and balls as the property of the seller. In the purchaser's action for damages against the constable, the court, without deciding that enough merchandise was or was not involved to make the business a mercantile one, held that the items sold under execution did not fall within the bulk sales statute on the ground that they were not kept for sale in the ordinary course of business. The Montana statute has since been amended to cover "trade fixtures," at least where they are sold in connection with merchandise. MONT. REV. CODES ANN. § 18-201 (1947).

30. The Washington cases under the early statute in that state are not conclusive. The first of the cases in point is *Plass v. Morgan*, 36 Wash. 160, 78 Pac. 784 (1904). There the sale of what was described in the plaintiff's affidavit contraverting garnishee defendant's answer as the goods, ware and merchandise of a boarding house and restaurant was held to be covered by the statute on the ground that there was

. . . no limit placed by the legislature on the meaning of the word "stock."

A stock of goods may mean, under the plain language of the statute, a great many different kinds of goods, different kinds of wares, or different kinds of merchandise.

*Id.* at 162, 78 Pac. at 785. The following year, without any mention of the *Plass* case, the court held that the statute applied only to items kept for sale, finding that the words "goods, wares or merchandise" were limited by the term "stock." *Albrecht v. Cudihee*, 37 Wash. 206, 79 Pac. 628 (1905). Faced with these directly opposed interpretations, the court, in *Everett Produce Co. v. Smith Bros.*, 40 Wash. 566, 82 Pac. 905 (1905), followed the *Albrecht* case, but distinguished the *Plass* case on the ground that in that case the items sold were items kept for sale, though in altered form, whereas in the instant case, nothing was sold in ordinary course by the keeper of a livery stable except services. In *Friedman v. Branner*, 72 Wash. 338, 130 Pac. 360 (1913), the court held the sale of a saloon business within the act without mention of the problem under discussion, though the subject matter of the transaction was the entire business, including the license and good will. The statute has since been amended to cover fixtures whether or not they are sold in connection with merchandise. WASH. REV. CODE § 63.08.010 (1951).

31. *Rice v. West*, 80 Ore. 640, 157 Pac. 1105 (1916). The Oregon statute has since been amended to include fixtures whether or not sold in connection with merchandise. ORE. REV. STAT. § 79.010 (1953).

32. *Nolte v. Winstanley*, 16 Ariz. 327, 145 Pac. 246 (1914).

33. *B. F. Goodrich Rubber Co. v. Breland*, 170 Miss. 117, 154 So. 303 (1934); *Walton v. Walter Fisher Co.*, 146 Miss. 291, 111 So. 364 (1927).

34. 127 Ga. 303, 56 S.E. 460 (1907).

of such business and the sale of the goods connected therewith, and included in a sale with the goods, are a part of a 'stock of goods, wares, and merchandise'. . . ."<sup>35</sup> Subsequently, several decisions of the court of appeals have insisted that fixtures are covered by the act only when sold in connection with merchandise, not otherwise.<sup>36</sup> The Maryland cases reached the same conclusion<sup>37</sup> under the earlier statute in that state.<sup>38</sup>

The decisions of the Georgia and Maryland courts seem clearly erroneous as a matter of statutory construction. The words "stock of goods, wares and merchandise" comprise a phrase which has a plain and simple meaning to everyone, at least to the extent that it excludes any item which is not intended to be sold as a regular part of the business.<sup>39</sup> The items which the Georgia courts include within what they call "accessories,"<sup>40</sup> and which other courts call fixtures, do not fit within the meaning of such a well-understood phrase. Apparently this is an example of a court's attempt to implement the legislative policy in an area where the statutory language will not reasonably bear the strain of the implementing interpretation.

[b]-[c]-[d] *Under statutes which use the term fixtures or its equivalent.*

Many of the statutes refer to the transfer of a stock of goods (or a stock of goods, wares and merchandise) *and* fixtures.<sup>41</sup> Obviously there

35. *Id.* at 303, 56 S.E. at 461.

36. *Bank of La Grange v. Rutland*, 27 Ga. App. 442, 108 S.E. 821 (1921); *Martin v. Taylor*, 24 Ga. App. 598, 101 S.E. 690 (1919). See also, *Walters v. Hagan*, 53 Ga. App. 547, 186 S.E. 563 (1936), and *Goodman v. Clarkson*, 39 Ga. App. 383, 147 S.E. 183 (1929), which reach the conclusion inevitably, in the light of the above cases, that the sale of the fixtures of a business which has no stock of merchandise is not interdicted by the statute.

37. *Calvert Building & Construction Co. v. Winakur*, 154 Md. 519, 141 Atl. 355 (1928); *Sakelos & Co. v. Hutchinson Brothers*, 129 Md. 300, 99 Atl. 357 (1916).

38. MD. ANN. CODE art. 83, §§ 101-104 (Bagby 1924). The statute has since been amended to cover fixtures whether sold in connection with merchandise or not. MD. ANN. CODE GEN. LAWS art. 83, § 97 (1951).

39. The limitation is employed to indicate awareness of the fact that the meaning of the phrase is not clear from doubt in a certain number of limited situations: *e.g.*, does it include the finished products or raw materials of a manufacturer, or repair parts when they are sold only in conjunction with services connected with the use of the repair parts? The answers to such questions are not clear, and the fact that the courts have arrived at different conclusions does not amount to unwarranted judicial legislation on the part of some of them, but rather to the normal and necessary performance of one of the most vital functions of any court. To this writer, however, the inclusion of fixtures in a definition of the phrase goes beyond the pale.

40. See, *e.g.*, *Martin v. Taylor*, 24 Ga. App. 598, 101 S.E. 690 (1919).

41. ARK. STAT. ANN. § 68-1501 (1947); COLO. STAT. ANN. c. 27, § 1 (Supp. 1952); IND. ANN. STAT. § 33-201 (Burns 1949); IOWA CODE ANN. c. 555, § 555.1 (1950); MICH. STAT. ANN. § 19.361 (1937); N.D. REV. CODE § 51-0202 (1943); S.D. CODE § 54.0301 (1939); TEX. REV. CIV. STAT. ANN. art. 4001 (1945); WYO. COMP. STAT. ANN. § 41-701 (1945). In addition the earlier statutes in New York and Ohio were in this form. See, N.Y. Laws 1909, c. 45, § 44, as amended by N.Y. Laws 1914, c. 507; Ohio Laws 1913, p. 462.

is no way to construe such a statute so as to exclude fixtures from its coverage when they are sold as a part of a transaction which also includes merchandise. The only questions presented by the cases decided under such statutes are those which arise when only fixtures are sold, either of a mercantile business or a non-mercantile business, and those questions will be discussed at a later point in this article.<sup>42</sup> Of course the same statement may be made with respect to all statutes which use the term fixtures or some equivalent, or a broader term.<sup>43</sup>

(2). *Are fixtures included if they are sold independently of any merchandise?*

(a) *If the business is a mercantile business?*

[a] *Under statutes which make no mention of fixtures?*

Since nearly all of the jurisdictions which have statutes which make no reference to fixtures have concluded that the sale of fixtures is not interdicted even in the situation where merchandise is also included in the transaction,<sup>44</sup> inquiry here is automatically limited to the three non-conforming jurisdictions which either have or have had a statute of the type under discussion, Georgia,<sup>45</sup> Maryland<sup>46</sup> and Mississippi.<sup>47</sup> Furthermore, in the discussion of the Georgia cases as they related to the problem of whether fixtures were covered under any circumstances, the conclusion was reached that the Georgia courts have consistently held that fixtures are not included unless the transaction also includes some merchandise.<sup>48</sup> That is also the apparent, but less clearly indicated, result of the Maryland cases.<sup>49</sup>

42. See text at § B, (2) (a) [b] *infra*.

43. In addition to those cited in note 41 *supra*, the following statutes presently employ fixtures or some equivalent: CAL. CIV. CODE § 3440.1 (Supp. 1953); CONN. GEN. STAT. § 6705 (1949); IDAHO CODE ANN. § 64-701 (1948); ILL. ANN. STAT. c. 121½, § 78 (Supp. 1953); KAN. GEN. STAT. § 58-101 (1949); KY. REV. STAT. § 377.010 (1953); LA. REV. STAT. ANN. § 9:2961 (1950); MD. ANN. CODE GEN. LAWS art. 83, § 97 (1951); MO. ANN. STAT. § 427.020 (Vernon 1950); MONT. REV. CODES ANN. § 18-201 (1947); NEB. REV. STAT. § 36-501 (1952); NEV. COMP. LAWS § 6816 (Supp. 1949); N.J. STAT. ANN. § 46:29-1 (1940); N.Y. PERS. PROP. LAW § 44; OHIO GEN. CODE ANN. § 11102 (1938); ORE. REV. STAT. § 79.010 (1953); PA. STAT. ANN. tit. 69, § 521 (1931) (but subsequent to July 1, 1954, Article 6 of the Uniform Commercial Code will govern the law of bulk transfers in Pennsylvania); R.I. GEN. LAWS c. 483, § 1 (1938); S.C. CODE § 11-201 (1952); UTAH CODE ANN. § 25-2-1 (1953); VA. CODE § 55-83 (1950); WASH. REV. CODE § 63.08-010 (1951); W. VA. CODE ANN. § 4001 (1949); WIS. STAT. § 241.18 (1951).

44. See notes 15-32 *supra*.

45. GA. CODE ANN. § 28-203 (1952).

46. Md. Laws 19, c. 579, § 18.

47. MISS. CODE ANN. § 274 (1942).

48. See notes 34-36 *supra*.

49. In *Sakelos & Co. v. Hutchinson Brothers*, 129 Md. 300, 304, 99 Atl. 357, 359 (1916), the court placed some emphasis on the fact that ". . . the assets and stock . . . undoubtedly included 'goods, wares and merchandise' within the purview of the statute. . . ." Emphasis was also placed on the fact that the transfer included the stock for sale as food of a restaurant as bringing the case within the rule of the *Sakelos* case in *Calvert Bldg. & Constr. Co. v. Winakur*, 154 Md. 519, 141 Atl. 355 (1928). Other language in the latter case contains a slight suggestion that under a rule of liberal construction, the statute might be interpreted even more

Only the Supreme Court of Mississippi has reached the conclusion that the sale of fixtures alone is interdicted by this kind of statute. The first case involving the sale of fixtures alone was *Carnaggio Bros. v. City of Greenwood*,<sup>50</sup> the holding of which is difficult to state precisely. The seller sold the good-will and fixtures of a restaurant business, but nothing that was kept for resale in ordinary course of trade. The exact language of the court in holding that the transaction did not fall within the statute is:

We are of the opinion that [the bulk sales statute] . . . does not apply to a business of this kind. The running of a restaurant is not mercantile business within the meaning of this statute, *where no merchandise is sold in the sale of the business*.<sup>51</sup> [Italics added.]

The lack of precision is due, of course, to the italicized portion of the quoted material, since it leaves uncertain whether a restaurant business is not covered at all, or whether a restaurant business is covered if the food on hand is sold but not where only fixtures are sold, and whether if such a business is covered when the food is sold, a combined sale of the fixtures and food would fall within the statute as to both or only as to the food.

The following year the doubt as to whether fixtures would be included under any circumstances was removed. In *Walton v. Walter Fisher Co.*,<sup>52</sup> the Court held that merchandise includes ". . . not only the movable goods, but fixtures and other appliances used in connection with the conduct of the business. . . ." <sup>53</sup> Since both merchandise, in the usual sense of the term, and fixtures were sold, the question of whether the sale of fixtures alone was covered remained undecided. However, in *B. F. Goodrich Rubber Co. v. Breland*,<sup>54</sup> one of the previously unanswered questions was resolved. Defendant, the owner of a filling station, returned his stock of merchandise to the persons from whom he purchased it. He then sold the filling station, apparently stripped of merchandise, to one Overstreet without complying with the statute. In the one day which intervened between the reaching of the agreement and the consummation of the sale, the defendant continued to operate the station, having purchased, at Overstreet's suggestion, oil and gasoline. The purchase price paid to defendant was \$789.62, of which Overstreet maintained that \$500 was for the fixtures and the remainder for the gasoline and oil purchased at Overstreet's suggestion. In answer to Overstreet's contention that he

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broadly, but the statute has since been amended to include fixtures, expressly, whether or not they are part of a transaction also involving merchandise. MD. ANN. CODE GEN. LAWS art. 83, § 97 (1951).

50. 142 Miss 885, 108 So. 141 (1926).

51. *Id.* at 893, 108 So. at 142.

52. 146 Miss. 291, 111 So. 364 (1927).

53. *Id.* at 296, 111 So. at 365.

54. 170 Miss. 117, 154 So. 303 (1934).

purchased only the fixtures from defendant and that defendant had purchased the gasoline and oil referred to as agent for Overstreet, the court said that it was immaterial whether the gasoline was purchased by defendant as agent for Overstreet, since defendant "... purchased it on his own credit, used it in his business, and it became for all intents and purposes a part of his stock and [sic] trade."<sup>55</sup> However, the court went on to say, citing in support the *Walton* case and treating the *Carnaggio Bros.* case as containing a distinguishable *dictum* that:

In so far as the fixtures are concerned, it would be immaterial whether any oil and gasoline were included in the sale to Overstreet, for fixtures *used in connection with a mercantile business* are a part of the owner's "stock of merchandise," and within the provisions of the Bulk Sales Law.<sup>56</sup> [Italics added.]

Thus it can be readily seen that the fixtures of a mercantile business are within the purview of the Mississippi statute, whether they are sold along with merchandise or not. Although the statement in the *Carnaggio Bros.* case that a restaurant business is not a mercantile business where no merchandise accompanies the sale of fixtures, leaves uncertain the question of whether the supplies of food in a restaurant are merchandise, it seems clear that in addition to fixtures a business must have some goods which can be described as merchandise, even though they need not be sold along with the fixtures, in order for a sale of the fixtures alone to come within the statute. The Mississippi cases are subject to the same criticism leveled at the Georgia and Maryland cases,<sup>57</sup> but they have, up to a point, the merit of logical consistency in that they do not say that fixtures are "merchandise" if they accompany the "merchandise" in a sales transaction, but are not "merchandise" if no "merchandise" is involved in the transaction, although they may not be "merchandise" to a sufficient extent to make up for the total lack of anything else in the business which could bear that label. The criticism of the Maryland, Georgia and Mississippi cases is not that they stopped short of full logical consistency; it is rather that the basic decision that merchandise means fixtures in any context is erroneous and that that error has led to the necessity for drawing the line at a logically indefensible place.

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55. *Id.* at 120, 154 So. at 303.

56. *Ibid.*

57. See text at notes 39-40 *supra*. For a similar criticism of the Mississippi cases, see 7 MISS. L.J. 215 (1934). For a general discussion of the Mississippi statute, see Satterfield, *The Bulk Sales Law As Construed In Mississippi*, 1 MISS. L.J. 422 (1929).

[b] *Under statutes which include merchandise and fixtures and connect up the two by the conjunctive, thus, "merchandise and fixtures."*

It should be noted at the outset that the immediate inquiry relates to the transfer of fixtures alone, but only to the fixtures of a business which has a stock of goods, and so can be classified as a mercantile business. Whether the transfer of the fixtures of a business which has no merchandise falls within the statutes is discussed in an earlier article,<sup>58</sup> for the solution to that problem is based on different considerations. The language of the statutes of every jurisdiction which has passed upon the precise point in question is substantially identical to that of each of the other such jurisdictions.<sup>59</sup> The most significant part of the statute for our purposes reads as follows:

The sale . . . in bulk . . . of any part of or the whole of a stock of merchandise, or merchandise and fixtures pertaining to the conduct of any such business. . . .<sup>60</sup>

As a matter of the normal meaning of words, it is arguable tenably that if the goods covered include merchandise and fixtures, as they clearly do, and if any part of the group of included items is a sufficient quantity to bring the transaction within the statute, as it clearly is, subject only to whatever quantitative implications the phrases "in bulk" and "otherwise than in the ordinary course of trade and in the regular prosecution of the business of the seller" may carry, a transfer of the fixtures alone must be covered. To state it differently: goods covered include both merchandise and fixtures; an interdicted sale is one of any part of the goods covered; therefore, a sale of fixtures alone is covered.<sup>61</sup>

58. Miller, *supra* note 1, at section II, g.

59. ARK. STAT. ANN. § 68-1501 (1947); IND. ANN. STAT. § 33-201 (Burns 1949); MICH. STAT. ANN. § 19.361 (bulk sales), § 19.371 (bulk mortgages) (1937); N.Y. Laws 1909, c. 45, § 44, as amended by N.Y. Laws 1914, c. 507 (The New York bulk sales statute was amended in 1934 to read in part ". . . of any part or the whole of a stock of merchandise or of fixtures, or merchandise and of fixtures. . . ." N.Y. PERS. PROP. LAW § 44); N.Y. LIEN LAW § 230a, which covers the bulk mortgages situation, retains the older language; TEX. REV. CIV. STAT. ANN. art. 4001 (1945). In addition the statutes of the following states employ the same language but there have been no decisions under them relating to the problem under discussion here: COLO. STAT. ANN. c. 27, § 1 (Supp. 1952); IOWA CODE ANN. c. 555, § 555.1; N.D. REV. CODE § 51-0202 (1943); S.D. CODE § 54.0301 (1939); WYO. COMP. STAT. ANN. § 41-701 (1945).

60. The quoted language is from ARK. STAT. ANN. § 68-1501 (1947), but the language of the other statutes which have been construed contains no material variations. The same may be said of the other statutes cited in note 59 *supra*, except the Iowa statute. IOWA CODE ANN. c. 555, § 55.1 (1950), reads simply ". . . of any part or the whole of a stock of merchandise and the fixtures pertaining to the conducting of said business . . ." See text at note 73 *infra*, for the suggestion that such a statute might well be interpreted to cover a transfer of fixtures alone.

61. Admittedly this overlooks the important quantitative and qualitative limitations imposed by the "in bulk" and "out of the ordinary course of trade" language, but those limitations are not important on the issue in question here. Their im-

Such is, in effect, the rationale of the cases decided under the Michigan statute.<sup>62</sup> Although in the first case in Michigan raising the point, the supreme court held that a chattel mortgage on the fixtures of a bar was not within the statute, it is significant that the decision was bottomed on the idea that a chattel mortgage was not a sale, transfer or assignment within the statute, rather than that a transfer of fixtures alone was not covered.<sup>63</sup> In *Bowen v. Quigley*,<sup>64</sup> the sale of the equipment, but not the merchandise, of a coal business was held to fall outside the statute, but on the ground that the equipment did not meet the test for fixtures; there was a concurring opinion based on the ground that the selling of fixtures alone was outside the scope of the statute.<sup>65</sup>

*Michigan Packing Co. v. Messaris*,<sup>66</sup> however, is a clear decision that the mortgaging of fixtures alone requires compliance with the bulk mortgages statute, although the conclusion seems to have been assumed, the primary question being whether a restaurant business is covered in any of its aspects by the statute. And in *Elliott Grocer Co. v. Field's Pure Food Market, Inc.*,<sup>67</sup> the court rejected the contention that the sale of fixtures only of a mercantile business was not covered by the bulk sales statute, relying on the *Michigan Packing Co.* case and saying:

The bulk sales statute is aimed at preventing the sale otherwise than in the regular course of trade of the *visible assets* of one who in his business possesses and uses merchandise and fixtures.<sup>68</sup> [Italics added.]

The court applied the rule of statutory construction which says that "[w]henever it is reasonably necessary to accomplish the obvious purpose of a statute the word 'and' may be read not only in the conjunctive but also in the disjunctive."<sup>69</sup>

Only one other case holding that a transfer of only fixtures under a statute of this kind is covered has been found.<sup>70</sup> In *Huckins v.*

portance is in terms of how much must be sold and under what circumstances, problems which form the subject matter of a later article which will appear in the June, 1954, issue of the Washington University Law Quarterly.

62. MICH. STAT. ANN. § 19.361 (bulk sales), § 19.371 (bulk mortgages) (1937).

63. *Hannah & Hogg v. Richter Brewing Co.*, 149 Mich. 220, 112 N.W. 713 (1907). The Michigan Bulk Mortgages Statute was not enacted until 1929. Mich. Acts 1929, no. 200. It was amended in 1931, Mich. Acts 1931, no. 198, and is now MICH. STAT. ANN. § 19.371 (1937).

64. 165 Mich. 337, 130 N.W. 690 (1911).

65. *Id.* at 340, 130 N.W. at 691.

66. 257 Mich. 422, 241 N.W. 236 (1932).

67. 286 Mich. 112, 281 N.W. 557 (1938).

68. *Id.* at 116, 281 N.W. at 558.

69. *Id.* at 115, 281 N.W. at 558.

70. But see, *Brecht Co. v. Robinowitz*, 275 S.W. 213 (Tex Civ. App. 1925). That the case is not law in Texas today, see *M System Stores, Inc. v. Johnston*, 124 Tex. 233, 76 S.W.2d 503 (1934). The Texas cases are discussed in the text at notes 81-88 *infra*.

*Smith*,<sup>71</sup> decided under the Arkansas statute, the United States Court of Appeals for the Eighth Circuit held that a chattel mortgage on the fixtures only of a men's clothing and furnishings business fell within the statute. Since this is the only case in which the rationale described above is stated in detail, it is worthy of quotation at length:

[The statute] . . . was intended to apply to the sale, transfer, mortgage or assignment in bulk of any part or the whole of the "stocks" therein described. Such stocks are described in the following language: "A stock of merchandise or merchandise and the fixtures pertaining to the conduct of any such business." The application of the act was not confined in perhaps the usual manner, to the term "stock of merchandise," which may, or may not, under the divergent views we have just considered, include fixtures. Reference was then made to another and more comprehensive stock, to wit, "merchandise and fixtures pertaining to the conduct of any such business." Obviously the words "a stock of" are to be read in after the word "or" and before the word "merchandise" in the latter designation. So, then, we have the act made to apply to a stock of merchandise and fixtures pertaining to the conduct of any such business, and the mortgage in bulk of any part of, or the whole of, such a stock composed of both merchandise and fixtures, without complying with the requirements of the statute, is prohibited.

It would seem obvious that the part of such a stock disposed of may consist of merchandise alone or fixtures alone.<sup>72</sup>

The language in question could, however, be interpreted differently. Thus it is entirely reasonable to say that the repetition of the word "merchandise" whenever the word "fixtures" is used is a clear indication that fixtures fall within the statute only if they are part of a transaction also involving merchandise. That is, the simpler and perhaps more natural way to express the idea that the transfer of either merchandise or fixtures alone is interdicted would be to say: ". . . any part or the whole of a stock of merchandise and fixtures . . ."<sup>73</sup> or "any part or the whole of a stock of merchandise or fixtures."

This, in effect, was the position taken in the cases decided under the New York statute in force until 1934,<sup>74</sup> as well as under the present New York Bulk Mortgages Law.<sup>75</sup> In *Heilmann v. Powelson*,<sup>76</sup> the court, following the previous holding to the same effect in *Sagui v. Wiricks*,<sup>77</sup> said:

[I]n my opinion the Bulk Sales Act does not apply here, as the sale was of fixtures only and not of merchandise. It seems to me

71. 29 F.2d 907 (8th Cir. 1928).

72. *Id.* at 909.

73. This is the language of the Iowa statute, IOWA CODE ANN. c. 555 § 555.1 (1950), but there are no cases interpreting it.

74. N.Y. Laws 1909, c. 45, § 44, as amended by N.Y. Laws 1914, c. 507.

75. N.Y. LIEN LAW § 230a.

76. 101 Misc. 230, 167 N.Y. Supp. 662 (Sup. Ct. 1917).

77. 167 N.Y. Supp. 661 (Sup. Ct. 1917).

that it was the plain intent of the legislature that the act should apply to a sale of a stock of merchandise primarily, and also to include in the prohibition fixtures pertaining to the business if sold in connection with the merchandise, but not to cover fixtures only. The repetition of the word "merchandise" and the punctuation of the paragraph, thus grouping "merchandise" with "fixtures" at each mention of the word "fixtures," after having already referred separately to the stock of merchandise, to my mind shows conclusively this intent.<sup>78</sup>

The same rule has been applied consistently by the federal courts when called upon to interpret the Bulk Mortgages statute,<sup>79</sup> and in 1935, the Supreme Court of New York indicated agreement with the federal courts insofar as the Bulk Mortgages statute is concerned in holding the statute inapplicable to a chattel mortgage on the fixtures only of a restaurant, but pointed out that since 1934 the Bulk Sales statute covers a sale of fixtures alone.<sup>80</sup>

In *M System Stores, Inc. v. Johnston*,<sup>81</sup> a different rationale for excluding the transfer of fixtures alone was offered by the Supreme Court of Texas. Emphasis was placed on the fact that following the statutory language relating to the transfer of merchandise or merchandise and fixtures was the statutory requirement that such transfer be ". . . otherwise than in the ordinary course of trade, and in the regular prosecution of the business of the seller or transferor. . . ."<sup>82</sup> Of this the court said:

It reasonably appears that these provisions primarily regard sales of merchandise which are made "otherwise than in ordinary course of trade and in the regular prosecution of the business of the seller or transferor." The provisions, in terms, deal with fixtures only in relation to a sale or transfer of merchandise. The terms of the provisions do not reasonably apply to fixtures except in conjunction with merchandise, *for otherwise the provision excluding sales and transfers made in the ordinary course of trade and in the regular prosecution of the business of the seller would involve a contradiction in terms.* For the business of the seller could not be the selling of fixtures where he is not engaged in such business; *and he could not make a sale of fixtures in the regular prosecution of such business.* It is only in cases involving a sale of merchandise, by one engaged in that business, that the provision respecting fixtures can have any application at all.<sup>83</sup> [Italics added.]

78. Heilmann v. Powelson, 101 Misc. 230, 231, 167 N.Y. Supp. 662 (Sup. Ct. 1917).

79. *In re United Traveling Goods Co.*, 297 Fed. 823 (2d Cir. 1924); *In re Laureate Co., Inc.*, 294 Fed. 668 (2d Cir. 1923). See also, *In re Henningsen*, 297 Fed. 821 (2d Cir. 1924); *In re Handerson*, 3 F. Supp. 92 (S.D.N.Y. 1933); *In re Traymore Shoe Shops, Inc.*, 300 Fed. 245 (S.D.N.Y. 1923).

80. *Atamian v. O'Leary*, 154 Misc. 757, 278 N.Y. Supp. 218 (Sup. Ct. 1935).

81. 124 Tex. 238, 76 S.W.2d 503 (1934).

82. TEX. REV. CIV. STAT. ANN. art. 4001 (1945).

83. *M System Stores, Inc. v. Johnston*, 124 Tex. 238, 243, 76 S.W.2d 503, 505 (1934).

Earlier cases interpreting the Texas statute were not uniform on this point. In two early federal district court cases<sup>84</sup> the same conclusion was reached as in the *M System* case. In one of them, Judge Hutcheson found the answer to be plain from the statutory language, saying:

The statute has employed plain and everyday language to express a thought not complex, but simple, that it shall be contrary to law for a sale or transfer in bulk of any part or the whole of the stock of merchandise, or merchandise and fixtures, to be made, except under the conditions named in the statute. The statute has not denounced a sale or transfer of fixtures apart from the merchandise, and the court has no authority to read into the statute a prohibition which the Legislature did not place there. Nor, if the spirit and purpose of the Legislature be searched, is it at all clear that the Legislature intended to bring within the Bulk Sales Act, which was designed to reach fraudulent sales of stocks of merchandise, a sale or transfer of fixtures alone, where the merchandise was not involved. To my mind, the evident purpose of the amendment<sup>[85]</sup> was, where a sale of merchandise in bulk occurred, to make the purchaser take the fixtures, if they were included in the sale, in the same case as he took the merchandise. In other words, the Legislature attached to the bulk sale of merchandise and fixtures the same stigma which attached to bulk sales of merchandise alone, so that a purchaser would take no good title to anything by that kind of a sale.<sup>86</sup>

On the other hand, in *Brecht Co. v. Robinowitz*,<sup>87</sup> the court of civil appeals devoted no discussion to the problem, holding that in any event there was compliance with the statute, but all parties seemed to have assumed the necessity for such compliance. However, in *Hobart Mfg. Co. v. Joyce & Mitchell*,<sup>88</sup> the court stated that a sale of fixtures alone does not fall within the statute, although the decision

84. *In re Gary*, 281 Fed. 218 (S.D. Tex. 1922); *In re Martin*, 283 Fed. 833 (E.D. Tex. 1921).

85. The reference to an amendment consists of the fact that the original statute (Tex. Laws 1909, c. 27) applied only to a stock of merchandise, and that in 1915 (Tex. Laws 1915, c. 114) the statute was amended to take its present form.

86. *In re Gary*, 281 Fed. 218, 220 (S.D. Tex. 1921). The learned judge continued by pointing out the risk of a departure from the plain-meaning rule when the statutory language is clear:

But in this view of what the Legislature intended this court may be entirely wrong. I only instance it to show the danger in courts undertaking to construe statutes as the trustee would have the court do, upon a supposed intention of the Legislature, rather than upon the actual language which the Legislature employed to express that intention.

*Id.* at 220.

87. 275 S.W. 213 (Tex. Civ. App. 1925).

88. 4 S.W.2d 185 (Tex. Civ. App. 1928). The Texas cases are discussed in Larson, *Bulk Sales: Texas Law and the Uniform Commercial Code*, 6 S.W.L.J. 417, 421 (1952).

was that a bakery business does not in any event fall within the statute.<sup>89</sup>

Although the rationale offered by Judge Van Valkenburgh in the *Huckins* case, which seems to be the basis for the decisions under the Michigan statutes as well, is an appealing one from the viewpoint of logic, yet it has an air of unreality; it neglects the strong contrary inference to be derived from the unusual placement of words emphasized in the *Heilmann* case, an inference which the writer believes is compelled by a consideration of all of the language involved. While the matter is not so clear of doubt as Judge Hutcheson would have us believe, yet the result he reaches from an application of the plain-meaning rule is justified on the basis of the New York rationale. However, the rationale offered by the Supreme Court of Texas in the *M System* case seems unduly technical and is apparently based on a very restrictive definition of the meaning of the "otherwise than in the ordinary course of trade, and in the regular prosecution of the business of the seller" language. Unless the court interprets that language to mean that the sale of anything except merchandise is out of the ordinary course of trade, because nothing except what is sold on a day to day basis is sold in the ordinary course of trade, the rationale is indefensible. In a broader sense, and probably a more justifiable one considering the purpose of bulk sales legislation, the "out of the ordinary course of trade" language is designed to exclude certain sales from the operation of the statute, where such sales are normal parts of the operation of the business. Certainly a businessman would not regard the replacement of equipment, worn through use or style change, with more modern and perhaps more functional equipment, as an unusual thing for a merchant to do. Nor should the courts so regard it, because the more probable reason for the phraseology is to protect the purchaser of fixtures as well as the purchaser of merchandise in the situation where the sale of fixtures is a normal action of a businessman who wishes to improve his equipment, and, conversely, to include the fixtures as items covered where the seller is selling out in one transaction or where the sale of the fixtures is part of a plan of closing out the business. In short, the result of the *M System* case may be correct, but its rationale assumes the impossibility of a situation existing which often does exist in fact.

[c] *Under statutes which include merchandise and fixtures and connect up the two with the disjunctive; thus, "merchandise or fixtures."*

The statutes in this general group have taken two forms, one of which removes any question as to the inclusion within the coverage

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89. The same result has been reached in Indiana, but no rationale was offered. See *Hughes-Curry Packing Co. v. Sprague*, 200 Ind. 540, 165 N.E. 318 (1929).

of the statute of the transfer of fixtures alone, the other of which also covers the sale of fixtures alone but without such a precise statutory command as in the former group. The latter group simply applies to the transfer of a stock of merchandise or fixtures,<sup>90</sup> while the former uses more comprehensive language in substantially this form: ". . . any stock of goods, wares or merchandise of any kind, in bulk, or fixtures, or any goods, wares or merchandise and fixtures. . . ." <sup>91</sup> While it might be contended that under the simpler form of the statute, the "or" should be read as "and," none of the courts have done so. Certainly such a contention is meaningless under the more precise statutes, and apparently has not been raised in cases decided under them. In any event, every case decided under this form of statute has reached the conclusion either expressly<sup>92</sup> or by implication,<sup>93</sup> that the sale of fixtures alone is covered by the statute.

(3) *Meaning of the term "fixtures" in bulk sales statutes.*

Two general and, at least initially, different approaches have been taken by the courts to the problem of defining the term "fixtures" as used in bulk sales statutes. One group of courts has nominally as-

90. KAN. GEN. STAT. § 58-101 (1949) (" . . . any part or the whole of a stock of merchandise or the fixtures pertaining thereto . . . "); KY. REV. STAT. § 377.010 (1953) (" . . . the whole or a large part of any stock of goods, wares or merchandise of any kind or fixtures in bulk . . . "); VA. CODE § 55-83 (1950) (" . . . any part or the whole of a stock of merchandise or the fixtures pertaining to the conduct of a business of selling merchandise . . . ").

91. The quoted language is from the Maryland statute, MD. ANN. CODE GEN. LAWS art. 83, § 97 (1951). The following statutes also fall within this group: CONN. GEN. STAT. § 6705 (1949) (" . . . stock of merchandise or of fixtures, or of merchandise and fixtures . . . "); N.Y. PERS. PROP. LAW § 44 (" . . . stock of merchandise or of fixtures, or merchandise and of fixtures . . . "); OHIO GEN. CODE ANN. § 11102 (1938) (" . . . stock of merchandise, or merchandise and the fixtures pertaining to the conducting of said business, or . . . of the fixtures pertaining to the conducting of said business . . . "); PA. STAT. ANN. tit. 69, § 521 (1931) (" . . . any stock of goods, wares, or merchandise of any kind, in bulk, or fixtures, or any goods, wares, or merchandise of any kind and fixtures . . . "); R.I. GEN. LAWS c. 483, § 1 (1938) (" . . . stock of merchandise and fixtures, or merchandise or fixtures . . . "); W. VA. CODE ANN. § 4001 (1949) (" . . . stock of goods, wares and merchandise and/or fixtures, pertaining to . . . "); WIS. STAT. § 241.18 (1951) (" . . . stock of goods, wares, and merchandise, or of the fixtures pertaining to the same, or of such goods, wares and merchandise and fixtures . . . ").

92. *In re Elliott*, 48 F. Supp. 146 (D.C. Kan. 1942) (Kansas statute); *Sproul v. Gambone*, 43 F. Supp. 575 (W.D. Pa. 1942) (Pennsylvania statute); *Maley v. Blakeney*, 184 Misc. 705, 54 N.Y.S.2d 68 (Sup. Ct. 1945); *Carl Ahlers, Inc. v. Dingott*, 173 Misc. 873, 18 N.Y.S.2d 434 (Sup. Ct. 1940) (recognizing that the 1934 amendment to the bulk sales statute nullified the cases of *Saqui v. Wiricks*, 167 N.Y. Supp. 661 (Sup. Ct. 1917), and *Heilmann v. Powelson*, 101 Misc. 230, 167 N.Y. Supp. 662 (Sup. Ct. 1917)); *The Union National Bank of Mahanoy City v. Garvey*, 29 Pa. D. & C. 638 (C.P. 1936).

93. *In re Dederick*, 91 F.2d 646 (10th Cir. 1937) (Kansas statute); *The Citizens State Bank of Hiawatha v. Rogers*, 155 Kan. 473, 126 P.2d 214 (1942); *Stockyards Petroleum Co. v. Bedell*, 128 Kan. 549, 278 Pac. 739 (1929). See also, *Flushing National Bank in New York v. Abrams*, 270 App. Div. 911, 61 N.Y.S.2d 609 (2d Dep't 1946), *aff'd without opinion* 296 N.Y. 1009, 73 N.E.2d 582 (1947).

signed to that term a meaning derived from the common law of that "now it's land, now it's chattel" hybrid called a fixture, and more particularly to that branch of it known as the law of "trade" or "tenant's" fixtures. In fact one of the statutes describes the fixtures to which it pertains as "trade" fixtures,<sup>94</sup> and many others require that the fixtures relate to the conduct of the business or its merchandise.<sup>95</sup> The effect of the inclusion of the modifying language in any particular statute cannot be demonstrated from a study of the cases, however.

That approach has inevitably resulted in difficulties, inevitably because of the historical development of the common law of fixtures which caused that body of law to be described in terms of confusion and chaos.<sup>96</sup> At least part of that confusion is caused by the fact that the word "fixtures" has been used in many senses, some of them contradictory in that the attachment of the label has led to one conclusion in one kind of case and an exactly opposite one in another kind. More specifically, the evolution of that branch of the law took the following pattern.<sup>97</sup>

Basically "fixture" means something attached to land, and it is certainly true that in the English as well as the American cases, the word has been used to describe the legal conclusion that the object about which the particular dispute centered was to be treated as land for the purpose with which the litigation was concerned. In the early cases the most significant fact which caused what might otherwise be classified as a chattel to be treated as realty was that the object was somehow physically annexed to the land, usually by screws, bolts,

94. MONT. REV. CODES ANN. § 18-201 (1947).

95. The following statutes all contain in some form the idea that the fixtures must somehow "pertain to" the merchandise or the conducting of the business: ARK. STAT. ANN. § 68-1501 (1947); CONN. GEN. STAT. § 6705 (1949); COLO. STAT. ANN. c. 27, § 1 (Supp. 1952); IDAHO CODE ANN. § 64-701 (1948); IND. ANN. STAT. § 33-201 (Burns 1949); IOWA CODE ANN. c. 555, § 555.1 (1950); KAN. GEN. STAT. § 58-101 (1949); LA. REV. STAT. ANN. § 9:2961 (1950); MICH. STAT. ANN. § 19.361 (bulk sales), § 19.371 (bulk mortgages) (1937); MONT. REV. CODES ANN. § 18-201 (1947); NEB. REV. STAT. § 36-501 (1952); NEV. COMP. LAWS § 6816 (Supp. 1949); N.Y. PERS. PROP. LAW § 44 (bulk sales); N.Y. LIEN LAW § 230a (bulk mortgages); N.D. REV. CODE § 51-0202 (1943); OHIO GEN. CODE ANN. § 11102 (1938); S.C. CODE § 11-201 (1952); TEX. REV. CIV. STAT. ANN. art 4001 (1945); UTAH CODE ANN. § 25-2-1 (1953); VA. CODE § 55-83 (1950); WASH. REV. CODE § 63.08.010 (1951); W. VA. CODE ANN. § 4001 (1949); WIS. STAT. § 241.18 (1951); WYO. COMP. STAT. ANN. § 41-701 (1945). However, it is highly dubious that language of that kind aids in the solution of the problem of what fixtures are, though it is arguable that the language might provide an impetus for *extending* the meaning of the word beyond its common law definition. While the rationales offered in the cases give no such indication, yet the results of most of them are consistent with it. See text at notes 98-142 *infra*.

96. See, EWELL, A TREATISE ON THE LAW OF FIXTURES, Preface (2d ed. 1905).

97. The capsule treatment given in the text is the author's condensation of the excellent discussions found in the following sources: BROWN, A TREATISE ON THE LAW OF PERSONAL PROPERTY c. 16 (1936); Bingham, *Some Suggestions Concerning the Law of Fixtures*, 7 COL. L. REV. 1 (1907); Niles, *The Rationale of the Law of Fixtures: English Cases*, 11 N.Y.U.L.Q. REV. 560 (1934).

or even cement. If physical annexation in that restricted sense could not be found, the object was treated as personalty.

Concurrently with that development, and as a part of it, the law of trade fixtures developed. Certainly in the beginning, the law of trade fixtures was an exception to the general law of fixtures. For the most part it consisted of cases which held that a tenant was entitled to the property as his chattel in spite of the fact that the test of physical annexation *could be met*. But it is impossible to over-emphasize the fact that before the question of whether a particular object was a fixture became legally significant, it was essential that the disputed object have some characteristics to support an argument that it should be treated as part of the land for the purpose of deciding the particular issue in the case at hand. To illustrate: A counter in a retail store which is bolted to the store floor is at least sufficiently "annexed to the realty" to support an argument that it should be treated as realty, but a cash register not fastened at all is just a plain unadorned chattel, and there can be no serious contention of a type which could have any bearing on the result of litigation that it was a part of the land. Consequently it should not bear the additional classifying name of trade fixture; "chattel" alone fully describes it.

At the same time that the category of things classified as trade fixtures was growing, other cases with different issues between parties standing in a different relation to each other from that of landlord and tenant were being decided. In those cases the concept, that it was not necessary for something to be annexed to the land in order for it to be treated as part of the realty, at least in as definite and clear-cut fashion as in the early cases, was replacing the older more rigid concept, with the result that an increasing number of things were classified as fixtures for the purpose of treating them like land for some purpose important to the litigants. Thus courts were simultaneously classifying objects as "fixtures" in order to treat them for some purposes as land, and classifying other objects as "trade fixtures" in order to treat them as "not-land" for some other purpose or as to some other parties. Finally, and of great significance, is the fact that courts have used, and are using all too frequently, the unmodified term "fixtures" to describe both of the above classes, a situation which obtained at the time of the passage of bulk sales statutes and to a large extent still obtains.

As a result of that background it is not surprising to find an early Michigan case,<sup>98</sup> which is the genesis for the restrictive definition of fixtures, emphasizing the annexation aspect in order to classify a particular object as a fixture. In that case the owner of a coal-yard sold

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98. *Bowen v. Quigley*, 165 Mich. 337, 130 N.W. 690 (1911).

everything except the merchandise, *i.e.*, the coal. Included in the sale were wagons, horses, harness, horse covers, coal bags, forks, shovels, coal screens, baskets, a desk, safe, chairs, chutes and the books of the business. The court held that since none of the enumerated articles was capable of annexation to the premises, they were not fixtures. In so doing the court rejected the contention that the words ". . . pertaining to the conducting of said business . . ." <sup>99</sup> should be held to broaden the meaning of the statute to ". . . include the furniture, tools, vehicles, and appliances which were used in and about the conducting of . . ." <sup>100</sup> the business. The court said:

Inasmuch as this law is aimed at the business of merchants, we think the word "fixtures," as used in the statute, must have reference to such chattels as merchants usually possess and annex to the premises occupied by them, to enable them the better to store, handle, and display their goods and wares. Such chattels when annexed to the premises become fixtures. They are generally removed without material injury to the premises at or before the end of the tenancy. They are sometimes called trade fixtures.

We are not persuaded that the legislature has indicated by the language made use of that it intended the word "fixtures" should have any other or different meaning than is usually given to it in the relation of landlord and tenant. It is probably true that the act could be made more effective if we were to give the word "fixtures" the enlarged meaning claimed for it, but we do not feel that the language of the statute will justify us in so doing. <sup>101</sup>

Obviously the court felt that the term, "fixtures," had at least a sufficient common law idea content to prevent much judicial freedom in shaping its meaning under the bulk sales statute, and that one important factor in that common law meaning was that the object had to be capable of and ordinarily attached to realty in order that the placing of the label "fixture" on it should have legal significance. A secondary idea, inherent in the *Bowen* definition, which later assumed great importance, was that the purpose of the object be to store, handle and display goods. Adherence to and emphasis on the "capability of annexation" aspect of the definition continued through the case of *People's Savings Bank v. Van Allsburg*, <sup>102</sup> in which case the court held that a funeral car, casket wagon, harness, buggy "and other impedimenta" of an undertaking business were not fixtures.

In *Hoja v. Motoc*, <sup>103</sup> though the *Bowen* case was cited with approval, the requirement of capability of annexation to the premises was departed from in fact. There the stock of a grocery and meat

99. MICH. STAT. ANN. § 19.361 (1937).

100. *Bowen v. Quigley*, 165 Mich. 337, 339, 130 N.W. 690, 691 (1911).

101. *Id.* at 339, 340, 130 N.W. at 690, 691.

102. 165 Mich. 524, 131 N.W. 101 (1911).

103. 235 Mich. 258, 209 N.W. 66 (1926).

market as well as a cash register, large refrigerator, computing scale, marble counter, large press, 30 gallon kettle and stove, meat block, safe, account file, sausage mill and other things were sold. Although the court held that all of the above items constituted fixtures under the *Bowen* test, it must be recognized that a safe was held not to be a fixture in the *Bowen* case, but was included in the *Hoja* case. But of greater import are the fact that several of the enumerated items simply do not meet the test of capability of annexation to the premises and the fact that capability of annexation as the criterion is nowhere mentioned in the *Hoja* opinion. The emphasis instead was clearly on the reason for the merchant's possessing the objects in question.

The following year saw the case of *McPartin v. Clarkson*<sup>104</sup> decided. There the owner of a pool room and cigar and candy stand sold the pool tables and the stock of tobacco and candy without complying with the statute. A creditor levied on two of the pool tables which were sold by the defendant sheriff. The action was by the non-complying purchaser of the tables against the sheriff for conversion. In holding for the plaintiff, the court refused to treat the tables as fixtures because they ". . . are not such chattels as tobacco and candy merchants or either of them 'usually possess and annex to the premises occupied by them to enable them the better to store, handle and display their goods and wares.'"<sup>105</sup> Although the usualness of annexation aspect is not present in this case, the capability of annexation aspect is, but the purpose for which the pool tables were kept was not in any sense to facilitate merchandising. It is apparent, regardless of whether the court adheres to the annexation requirement in either or both of its forms, that it is essential that the chattel be kept for the purpose of aiding in the handling, storage and display of goods; that is the *sine qua non* of the definition.

Although the full *Bowen* definition was quoted as controlling in *Patmos v. Grand Rapids Dairy Co.*,<sup>106</sup> the point in issue was whether the business involved was a merchandising business at all. It is significant that the court made no effort to distinguish the various items which formed the subject matter of the transaction in terms of inclusion and exclusion, although such widely different items as milk bottles and milk bottle caps on the one hand and pasteurizing machinery on the other were included. Clearly milk bottle caps cannot meet the annexation test. The annexation aspect of the *Bowen* test was further weakened in *Michigan Packing Co. v. Messaris*,<sup>107</sup> where the court found a chattel mortgage on ". . . chairs, tables, dishes,

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104. 240 Mich. 390, 215 N.W. 338 (1927).

105. *Id.* at 392, 215 N.W. at 339.

106. 243 Mich. 417, 220 N.W. 724 (1928).

107. 257 Mich. 422, 241 N.W. 236 (1932).

stoves, cooking utensils, etc. . . ." of a restaurant to be ". . . clearly within the term 'fixtures' as defined by previous decisions. . . ."<sup>108</sup> citing only the *Patmos* case, however. Certainly most of the listed items do not meet the test of annexation laid down in the *Bowen* case and quoted over and over again in subsequent cases. Although the *Bowen* definition was again quoted in full in the case of *Flint Citizens Loan & Investment Co. v. Moss*,<sup>109</sup> it is clear from a consideration of the case that the purpose of the owner in possessing the chattels which formed the subject matter of the sale was the controlling element. The case turned on the issue of whether non-mercantile businesses were covered by the bulk mortgage statute, the business in question being an insurance business. In holding that such businesses were not covered at all, the court pointed out that while a sale of fixtures alone is interdicted by the statute, the fixtures must be those used in connection with a mercantile establishment.

Finally a *dictum* in the most recent Michigan case<sup>110</sup> speaking to the question causes speculation as to whether it is still necessary that the chattel be used to store, handle or display merchandise, the annexation aspect having been fairly clearly abandoned. There, what everyone seemingly conceded to be fixtures of a mercantile establishment were sold. Although the holding of the case is simply that a sale of fixtures only is interdicted by the statute, in the course of the opinion, relying wholly on the *Patmos* decision and without citing any of the other cases, the court made this statement:

The bulk sales statute is aimed at preventing the sale otherwise than in the regular course of trade of the *visible assets* of one who in his business possesses and uses merchandise and fixtures.<sup>111</sup>  
[Italics added.]

From all this we may conclude that the annexation aspect of the *Bowen* definition has been discarded, and further that the requirement that the chattel be on hand to better store, handle or display merchandise may have been weakened by the most recent case, although not many things would be included in the phrase "visible assets" that would be excluded under the *Bowen* definition stripped of its annexation requirements.

Elsewhere the *Bowen* case has been cited and its definition apparently accepted,<sup>112</sup> but only in Texas has its impact been significant.<sup>113</sup>

108. *Id.* at 423, 241 N.W. at 236.

109. 265 Mich. 40, 251 N.W. 347 (1933).

110. *Elliott Grocer Co. v. Field's Pure Food Market, Inc.*, 286 Mich. 112, 281 N.W. 557 (1938).

111. *Id.* at 116, 281 N.W. at 558.

112. *Gaspee Cab Inc. v. McGovern*, 51 R.I. 247, 153 Atl. 870 (1931). There the *Bowen* definition was cited with approval, but the issue in the case was whether a fleet of taxicabs fell within the statute, an issue the resolution of which should be in terms of whether the business was an included one rather than whether the subject matter of the transaction fell within a definition of fixtures.

113. *Yeager v. Dallas Coffin Co.*, 46 S.W.2d 1016 (Tex. Civ. App. 1932).

In *Yeager v. Dallas Coffin Co.*,<sup>114</sup> the court found that “. . . 1 casket throw, 1 half couch, 1 desk, 1 office suit, 1 typewriter, 2 church trucks, and 1 cooling board. . .”<sup>115</sup> of an undertaking establishment did not constitute fixtures, relying on the *Bowen* definition. The court stated that:

Those articles were purchased, rather, to be retained and used in conducting the merchant's general business as a dealer in caskets and accessories and in performing personal services in his profession as an undertaker.<sup>116</sup>

When it is considered that the court took the position that the undertaking business is covered by the Texas Bulk Sales Statute,<sup>117</sup> it becomes obvious that considerable importance was attached to the technical definition of fixtures which contemplates something capable of annexation to realty as well as suitability for trade purposes.

The same restrictive view apparently obtains in Wisconsin, although the leading Wisconsin case<sup>118</sup> is not clear on the test for inclusion. A soft drink and lunch parlor was sold, but only an insignificant part of the transaction's subject matter consisted of merchandise. In upholding a trial court finding that the total value of the merchandise and fixtures was less than the seller's statutory exemption, the court excluded such things as chairs, trays, cups, plates, saucers and a player-piano used to entertain customers, saying that bulk sales statutes “. . . were not intended to restrict the sale in bulk of articles used by the seller in carrying on his trade or business and which are necessary to enable him to enjoy the fruits of his own labor.”<sup>119</sup> Apparently the court was willing to consider the business as an included one (though a very recent case makes it clear that the present Wisconsin Supreme Court would not so rule),<sup>120</sup> so the conclusion is inevitable that some test other than that finally adopted in Michigan will be used to determine what fixtures are under the Wisconsin statute. What that test may turn out to be is uncertain, but it may be safely hazarded, in the light of the unusually restrictive treatment which the Wisconsin court has accorded its statute, that it will be a narrow one.<sup>121</sup>

On the other hand some of the courts have preferred to disregard the common law connotations of the word fixtures, and have indicated that a “nontechnical” definition<sup>122</sup> is proper under bulk sales statutes.

114. *Ibid.*

115. *Id.* at 1018.

116. *Ibid.*

117. TEX. REV. CIV. STAT. ANN. art. 4001 (1945).

118. *Missos v. Spyros*, 182 Wis. 631, 197 N.W. 196 (1924).

119. *Id.* at 635, 197 N.W. at 197.

120. *State Bank of Viroqua v. Jackson*, 261 Wis. 538, 53 N.W.2d 433 (1952).

121. *Ibid.* The Wisconsin statute is discussed in Note, 1947 WIS. L. REV. 458.

122. See, e.g., *In re Elliott*, 48 F. Supp. 146 (D.C. Kan. 1942).

The two cases which contain the most definitive statements of this idea were decided in New York in the same year, 1945. In *Maley v. Blakeney*,<sup>123</sup> the seller had a small coal business, in connection with which he operated four trucks and three trailers constituting almost his entire equipment. He sold the trucks and trailers without compliance with the statute. After finding uncertainty and conflict in the cases which attempted definitions of the term "fixtures," the court, relying on the case of *Stockyards Petroleum Co. v. Bedell*,<sup>124</sup> reached the conclusion that the trucks and trailers were fixtures since they were used to handle the wares, and that "[t]he nontechnical use of the term 'is the sensible interpretation which ought to be applied.'"<sup>125</sup>

Two months later the Appellate Division sustained, as against a motion to dismiss, a complaint which alleged that the seller was engaged in the business of buying up and selling pulp wood and that he had sold, without complying with the statute, all the property he owned and used in conducting the business, including his stock of "manufactured wood."<sup>126</sup> In so ruling the court defined "fixtures" as used in the statute as ". . . all such things as are customarily and necessarily employed in the trade or traffic of the merchandise."<sup>127</sup>

Attention is directed to the fact that one of the cases principally relied on in the *Maley* case was decided by the Supreme Court of Kansas.<sup>128</sup> There, one who owned a filling station and the land on which it was located sold the merchandise on hand and "miscellaneous unattached appliances" to one person, and deeded the real estate to another. The gasoline pumps, tanks, air compressors, and similar appliances which were attached to the realty were treated by the parties as passing with the realty under the deed. The issue in the case was whether these attached items came within the bulk sales statute, which was not complied with. In holding that those items constituted fixtures under the statute, the court demonstrated a reluctance to be bound by technical common law rules relating to fixtures, but nevertheless discussed the problems in terms of factors which take their main significance from the fixtures rules, primarily the factor of removability. In passing, however, the court quoted with approval plaintiff's argument that:

[T]he "nontechnical use of the word 'fixture' seems to be the sensible interpretation which ought to be applied. Otherwise we become lost in the shifting rules as to what is removable, for ex-

123. 184 Misc. 705, 54 N.Y.S.2d 68 (Sup. Ct. 1945).

124. 128 Kan. 549, 278 Pac. 739 (1929).

125. *Maley v. Blakeney*, 184 Misc. 705, 708, 54 N.Y.S.2d 68, 71 (Sup. Ct. 1945).

126. *Davignon v. Raquette River Paper Co.*, 269 App. Div. 889, 56 N.Y.S.2d 249 (3d Dep't 1945).

127. *Id.* at 889, 56 N.Y.S.2d at 250.

128. *Stockyards Petroleum Co. v. Bedell*, 128 Kan. 549, 278 Pac. 739 (1929).

ample, as between landlord and tenant, mortgagor and mortgagee, and heir and executor, so that no creditor would ever know upon what to rely."<sup>129</sup>

This language became the basis for the decision in the *Maley* case discussed, *supra*, and had an important impact on later cases decided under the Kansas statute.

In *Joyce v. Armourdale State Bank*,<sup>130</sup> the question was whether a chattel mortgage previously held invalid for failure to comply with the bulk sales statute was also invalid as to a truck used to deliver merchandise. The court, in holding that the mortgage was valid as to the truck had this to say:

Appellant argues that the truck . . . is a fixture within the meaning of the bulk-sales law, but he cites no authorities in support of that view. Authorities cited by appellee (*People's Sav. Bank v. Van Allsburg*, . . . and cases there cited) are to the contrary.

But we do not rest our ruling on that point alone.<sup>131</sup>

The court went on to point out that in any event the truck was exempt property in the hands of the mortgagor and hence not covered by the statute. Here is an instance of the Kansas court's relying on a case with a restrictive definition of fixtures to come to a result consistent only with some common law notion of the meaning of the term. It is significant that the *Stockyards Petroleum Co.* case was not cited in the opinion.

Finally, in the course of the opinion in *In re Elliott*,<sup>132</sup> the court indicated that the Kansas definition of fixtures was a broad one and nontechnical in nature, relying primarily on the *Stockyards Petroleum Co.* case, but the *Elliott* case is a highly unusual one in that the nontechnical nature of the Kansas definition was utilized to exclude what would clearly have been a fixture at common law, even under the most rigid test, since it was a substantial building which the tenant had a right to remove under the terms of the lease. Thus it can be seen that a departure from common law fixtures concepts may result in exclusion as well as in inclusion of certain objects. Of the cases which have construed the Kansas statute, it may be said that only the *Joyce* case stands in the way of our concluding that there has been a full departure from the common law definition, but it is important to note that that case is the last word on the subject from the Supreme Court of Kansas. It is, however, impossible to reconcile the *Joyce* case with the broad language of the *Stockyards Petroleum Co.* case.

Uncertainty also exists in the Pennsylvania cases. The only state-

129. *Id.* at 551, 278 Pac. at 740.

130. 130 Kan. 147, 285 Pac. 525 (1930).

131. *Id.* at 148, 285 Pac. at 525.

132. 48 F. Supp. 146 (D.C. Kan. 1942). And see, *In re Dederick*, 91 F.2d 646 (10th Cir. 1937).

ment by the Supreme Court of Pennsylvania on the subject is a *dictum* found in a 1930 case, the holding of which was that a manufactory was not covered by the statute.<sup>133</sup> In passing, the court defined fixtures as ". . . evidently those which belong to the business, like trade fixtures, and not to the building."<sup>134</sup> Obviously we cannot be sure whether the court means that fixture under the bulk sales act means a trade fixture, or whether it is a broader word which not only includes trade fixtures, but also includes things which are like trade fixtures in the sense that they are chattels other than merchandise used to facilitate merchandising. Subsequent lower court and federal decisions have not fully resolved the doubt.

In *The Union National Bank of Mahanoy City v. Garvey*,<sup>135</sup> a situation identical to that posed by the *Elliott* case was presented. Defendant was the proprietor of a filling station located on a piece of leased land. Under the terms of the lease, the defendant was permitted to remove the building erected on the leased ground. Defendant sold the building as well as all other chattels used in the business. What was sold and the court's attitude toward proper classification of the various items may be gleaned from the following language:

The fixtures which are intended are those which belong to the business like trade fixtures, and the articles which [defendant] . . . sold were fixtures belonging to the business. The building constituting his service station was personal property and a necessary fixture in the prosecution of the business of selling gasoline and oil. The showcases, the sections of wall cases and shelving, the heatrola, the cash register, the chairs, and the lighting fixtures and shades, all of which were sold, unquestionably were trade fixtures used in the business. The equipment also included in the sale, such as grease guns, car jacks, air compressors, air hose and gauges, and miscellaneous tools, *may all have been of use in the business of selling gasoline and oil.*<sup>136</sup> [Italics added.]

Here it is clear that the court thought that fixtures under the bulk sales statute included not only trade fixtures, but also chattels which were like trade fixtures in the sense that they were useful in the business of merchandising.

*Sproul v. Gambone*<sup>137</sup> is another example of a willingness to depart from common law definitions of fixtures. There the federal district court held that cigarette-vending machines which were placed by their owner in hotels and candy stores throughout western Pennsylvania, and which served as the outlets for the owner's retail sales of tobacco,

133. *Gitt v. Hoke*, 301 Pa. 31, 151 Atl. 585 (1930).

134. *Id.* at 34, 151 Atl. at 585.

135. 29 Pa. D. & C. 638 (C.P. 1936).

136. *Id.* at 640. And see, *Robbins v. Fuller*, 148 Ark. 173, 229 S.W. 8 (1921); *B. F. Goodrich Rubber Co. v. Breland*, 170 Miss. 117, 154 So. 303 (1934).

137. 43 F. Supp. 575 (W.D. Pa. 1942).

were fixtures. The court, after holding that the machines were not themselves merchandise because they were not usually bought and sold, went on to say:

[I]t seems perfectly plain that the cigarette-vending machines are fixtures within the meaning of the [Bulk Sales] Act. . . . In view of the fact that these machines were used by the bankrupt in his business of selling cigarettes, they must be regarded as fixtures. These machines served as storage cases for the cigarettes, and as cash boxes for the bankrupt in connection with his retail cigarette business. The fact they were distributed in different locations does not alter their character. Today many commodities that in the past were sold over counters in stores are now being sold through vending machines placed in all types of public places for the purpose of making such commodities more available to the consuming public.<sup>138</sup>

Here again, the court showed a willingness to treat as fixtures everything which a merchant uses to facilitate the further distribution of his merchandise. However, a very recent case decided by the superior court<sup>139</sup> plus the fact that the Pennsylvania Supreme Court has not spoken to the point since the *Gitt* case,<sup>140</sup> cast some doubts on the conclusion which could fairly be derived from the lower court and federal cases. In *Smith v. Munizza*,<sup>141</sup> a beer distributing business, consisting of “. . . ‘the beer on hand, a list of customers, the office furniture, and a truck’ . . . ,”<sup>142</sup> was sold. The court included the beer and excluded the list of customers, but declined to say whether the truck was a fixture since the issue was not raised by the parties. This gratuitous remark, offered by the court without apparent prompting by counsel, should serve as some warning that the law in Pennsylvania on this point is not so well settled that the definition of fixtures is as broad as the cases discussed have indicated. It seems clear, however, that the Pennsylvania courts on the whole have given the term a broad meaning and that the *Union National Bank* case is perhaps the most liberal case as a matter of actual decision on the point in the United States.

In those jurisdictions which have interpreted their statutes to include things other than merchandise even though the particular statutes make no mention of fixtures, the extension has been a liberal one. In Georgia, the courts have used the term “accessories” to describe the included non-merchandise items and have defined accessories as including the usual and customary things used in connection

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138. *Id.* at 576. And see, *Bac Corporation v. Welsh*, 33 Del. Co. R. 113 (1944).

139. *Smith v. Munizza*, 170 Pa. Super. 122, 84 A.2d 352 (1951).

140. *Gitt v. Hoke*, 301 Pa. 31, 151 Atl. 585 (1930).

141. 170 Pa. Super. 122, 84 A.2d 352 (1951).

142. *Id.* at 123, 84 A.2d at 353.

with a business to which they are appropriate.<sup>143</sup> In one case<sup>144</sup> this included bar fixtures, safes, desks, cash registers, cigar cases, pool tables and a refrigerator. And in two other cases,<sup>145</sup> the holdings of which were that the entire transaction fell outside the scope of the statute because no merchandise, as we ordinarily define that term, was included, the items that were sold would apparently have been considered as falling within the statute had some merchandise been included in the transaction. In one of the cases,<sup>146</sup> these included all sorts of shoe repairing machines and equipment, and in the other<sup>147</sup> all the equipment of a coal yard including such things as mules, wagons, harness, and tools of various sorts useful in the business.<sup>148</sup>

Several conclusions may be fairly drawn from this study of what things courts have treated as fixtures. First of all, the word fixtures initially seems to have a definite common law idea content, which may have been in the minds of the legislators, at the time the statutes were passed. Certainly the common law was and is replete with cases dealing with the problem of fixtures. The difficulty which arose, however, was that there was too much inconsistent idea content to be found in the common law decisions. As we have seen, "fixture" could mean, in terms of result at least, "land." On the other hand it could mean "not land." Furthermore, although the special label "trade" when attached to fixtures meant that the object was to be treated as a chattel, the draftsmen of the bulk sales statutes did not attach the modifier. An ambiguity thus existed, but an ambiguity which could be *partially* resolved without much difficulty from a consideration of the over-all purpose and plan of the statutes. Thus it was clear that if the choice lay between assigning a meaning to the term which resulted in the statute's covering only such things as at common law were sufficiently closely related to the realty to be classified as land on the one hand, and on the other hand the meaning which is conveyed by the term "trade fixtures," both the purpose of the legislation, the context of the term, and not unimportantly, common sense, dictated that the choice be the latter one.

But that was only a partial solution of the problem. Once it was

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143. *Cooney, Eckstein & Co. v. Sweat*, 133 Ga. 511, 66 S.E. 257 (1909); *Parham & Co. v. Potts-Thompson Liquor Co.*, 127 Ga. 303, 56 S.E. 460 (1907); *Bank of LaGrange v. Rutland*, 27 Ga. App. 442 (1921); *Martin v. Taylor*, 24 Ga. App. 598 (1919).

144. *Parham & Co. v. Potts-Thompson Liquor Co.*, 127 Ga. 303, 56 S.E. 460 (1907).

145. *Harris v. Kilgore*, 56 Ga. App. 516, 193 S.E. 179 (1937); *Martin v. Taylor*, 24 Ga. App. 598 (1919).

146. *Harris v. Kilgore*, 56 Ga. App. 516, 193 S.E. 179 (1937).

147. *Martin v. Taylor*, 24 Ga. App. 598 (1919).

148. See also, *Calvert Building & Construction Co. v. Winakur*, 154 Md. 519, 141 Atl. 355 (1928); *B. F. Goodrich Rubber Co. v. Breland*, 170 Miss. 117, 154 So. 303 (1934).

decided that the statutes referred to trade fixtures, the question arose as to whether the term did not have an even broader meaning, *e.g.*, accessories or equipment. It must be remembered that in order for the label "trade fixture" to be attached to a chattel, the chattel had somehow to be enough a part of the realty so that an argument could be made that it ought to be treated as land, though the argument, of course, had to be unsuccessful. Apparently the early Michigan cases, as well as some of the others, drew the line at just that point, for the *Bowen* definition surely contemplates that the article must be one both capable of annexation and usually annexed to realty. In so concluding, the Michigan court is not subject to extensive criticism, though perhaps the exercise of a little more imagination and a somewhat greater understanding of the purpose of bulk sales legislation would have led them immediately to take the broader view of the matter which they eventually did take.

On the other hand, those courts which faced the issue at a later point in time, a time when the bulk sales statutes over the nation had been more extensively construed and were, perhaps, better understood by both lawyers and courts, took the next step. They adopted the position that while trade fixtures were undoubtedly included, the term in its context was broader, and that those things which were kept by merchants as useful in the business but which did not quite meet the more rigid tests for trade fixtures, nevertheless were to be included, because they logically fell into the same class for bulk sales purposes. It must be remembered that bulk sales statutes were not enacted to settle disputes between landlords and tenants as to the ownership of pieces of property; they were designed to prevent creditors from losing those things which served as the real basis for the credit extension. Especially was this true in situations where the credit was unsecured. With the notable exceptions discussed in the text, it may be said that courts are no longer tied to the common law conceptions of the nature of a fixture. They have rather evolved a definition which takes into account adequately the situation which gave rise to bulk sales legislation, the general nature of the adopted solution and the context in which the disputed word is used.

(4) *Statutes containing more inclusive language than "fixtures."*

Thirteen statutes<sup>149</sup> contain language which is more clearly inclusive of various kinds of chattels than that of other statutes, but one

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149. CAL. CIV. CODE § 3440.1 (Supp. 1953); IDAHO CODE ANN. § 64-701 (1948); ILL. ANN. STAT. c. 121½, § 78 (Supp. 1953); LA. REV. STAT. ANN. § 9:2961 (1950); MO. ANN. STAT. § 427.010 (Vernon 1950); MONT. REV. CODES ANN. § 18-201 (1947); NEB. REV. STAT. § 36-501 (1952); NEV. COMP. LAWS § 6816 (Supp. 1949); N.J. STAT. ANN. § 46:29-1 (1940); ORE. REV. STAT. § 79.010 (1953); S.C. CODE § 11-201 (1952); UTAH CODE ANN. § 25-2-1 (1953); WASH. REV. CODE § 63.08.010 (1951).

of them<sup>150</sup> has received a construction which, in effect, makes the statute one of the more restricted ones. Although these statutes are not uniform in detail, they all have as a common characteristic one or more of the following descriptive terms: "equipment,"<sup>151</sup> "other goods and chattels,"<sup>152</sup> "property,"<sup>153</sup> or "personal property."<sup>154</sup> The most inclusive of all the statutes is that of South Carolina, since in addition to stock and fixtures it covers ". . . accounts or notes receivable, choses in action or any property of whatever kind and description used in connection with . . . [a] mercantile business. . . ."<sup>155</sup> Although this statute has not been judicially construed, it is clear that any property belonging to any mercantile business is subject to it provided the major portion thereof is sold in bulk.

Several of the statutes refer to "personal property"<sup>156</sup> or "property,"<sup>157</sup> other phrases of broad content, but neither have any of those statutes been subjected to judicial construction. Again it is clear that the most limited construction which could reasonably be given to such statutes is that they apply to all tangible chattels, although "property," unmodified, would normally be construed to include realty as well as personalty.

An examination of the cases from those jurisdictions whose statutes apply to "goods and chattels" or "other goods and chattels" of the business reveals that this seemingly broad language has not received uniform construction. Three statutes contain that phraseology, those of Illinois,<sup>158</sup> Louisiana<sup>159</sup> and New Jersey.<sup>160</sup> The Louisiana statute reads in part:

[A]ny portion or the whole of a stock of merchandise, or merchandise and fixtures, or of all or substantially all of the fixtures

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150. N.J. STAT. ANN. § 46:29-1 (1940). See text at note 171 *infra*, for a discussion of *VanGendern v. Arrow Bus Lines, Inc.*, 107 N.J. Eq. 217, 151 Atl. 605 (Ct. Err. & App. 1930), the case which limited the New Jersey statute, perhaps to the merchandise and fixtures of a retail merchant. The earlier broad interpretation given the New Jersey statute by the Supreme Court of Errors of Connecticut in *Kranke v. American Fabrics Co.*, 112 Conn. 58, 151 Atl. 312 (1930), has been repudiated by the New Jersey Supreme Court. See *Samuelson v. Goldberg*, 13 N.J. Misc. 204, 177 Atl. 260 (Sup. Ct. 1935).

151. CAL. CIV. CODE § 3440.1 (Supp. 1953); IDAHO CODE ANN. § 64-701 (1948); LA. REV. STAT. ANN. § 9:2961 (1950); MO. ANN. STAT. § 427.010 (Vernon 1950); NEB. REV. STAT. § 36-501 (1952); NEV. COMP. LAWS § 6816 (Supp. 1949); ORE. REV. STAT. § 79.010 (1953); UTAH CODE ANN. § 25-2-1 (1953); WASH. REV. CODE § 63.08.010 (1951).

152. ILL. ANN. STAT. c. 121½, § 78 (Supp. 1953); LA. REV. STAT. ANN. § 9:2961 (1950); N.J. STAT. ANN. § 46:29-1 (1940).

153. IDAHO CODE ANN. § 64-701 (1948); S.C. CODE § 11-201 (1952); UTAH CODE ANN. § 25-2-1 (1953).

154. MONT. REV. CODES ANN. § 18-201 (1947).

155. S.C. CODE § 11-201 (1952).

156. MONT. REV. CODES ANN. § 18-201 (1947).

157. IDAHO CODE ANN. § 64-701 (1948); S.C. CODE § 11-201 (1952); UTAH CODE ANN. § 25-2-1 (1953).

158. ILL. ANN. STAT. c. 121½, § 78 (Supp. 1953).

159. LA. REV. STAT. ANN. § 9:2961 (1950).

160. N.J. STAT. ANN. § 46:29-1 (1940).

or equipment used or to be used in the display, manufacture, care, or delivery of any goods, wares, or merchandise including movable store and office fixtures, horses, wagons, automobile trucks and other vehicles or other goods or chattels of the business. . . .<sup>161</sup>

Two cases, both decided in 1930, have construed the statute on this point. In *Denekamp v. Heisler*,<sup>162</sup> the court said that the words ". . . plainly relate to the goods or chattels of the same kind referred to in the detailed description."<sup>163</sup> What the court meant by that language was made clear shortly thereafter in *Item Co., Ltd. v. National Dyers & Cleaners, Ltd.*,<sup>164</sup> where all of the chattels of a cleaning and dyeing establishment were sold without compliance with the statute. The issue in the case was whether the words "other goods or chattels" should be interpreted as bringing within the statute non-mercantile businesses. In refusing to so interpret the statute, the court said:

However, we do not feel that by including in the inhibition the sale of "other goods or chattels" the Legislature intended to bring into the contemplation of the statute all businesses, but that the words above quoted were inserted for the purpose of bringing within the terms of the statute, not all businesses, *but all properly* owned by anyone engaged in the particular class of business contemplated, that of buying and selling merchandise.<sup>165</sup> [Italics added.]

The Illinois cases, on the other hand, have gone farther, and have held that the words not only have reference to property owned but also to the kinds of businesses covered by the statute. Unquestionably the influence of the *Off* case<sup>166</sup> holding the earlier Illinois statute unconstitutional on the ground that its coverage was not sufficiently broad has been great.<sup>167</sup> It is clear, however, that the Illinois statute has been construed as including every conceivable kind of personal property, including even intangibles, of all kinds of businesses.<sup>168</sup>

161. LA. REV. STAT. ANN. § 9:2961 (1950).

162. 12 La. App. 471 (1930).

163. *Id.* at 474.

164. 15 La. App. 108, 130 So. 879 (1930). A companion case, *Deverges v. National Dyers & Cleaners, Ltd.*, 15 La. App. 339 (1930), was decided on the same reasoning.

165. *Item Co., Ltd. v. National Dyers & Cleaners, Ltd.*, 15 La. App. 108, 110, 130 So. 879, 881 (1930).

166. *Charles J. Off & Co. v. Morehead*, 235 Ill. 40, 85 N.E. 264 (1908).

167. The legislative and judicial history of the Illinois statute which has led to the broad construction now given it is traced in Miller, *supra*, note 1, text at notes 66 *et seq.*

168. *Landers Frary & Clark v. Vischer Products Co.*, 201 F.2d 319 (7th Cir. 1953); *Main v. Hall*, 41 F.2d 715 (7th Cir. 1930); *Swern v. Liggett*, 51 F.2d 821 (E.D. Ill. 1931); *Coon v. Doss*, 361 Ill. 515, 198 N.E. 341 (1935); *LaSalle Opera House Co. v. LaSalle Amusement Co.*, 289 Ill. 194, 124 N.E. 454 (1919); *Weskalnias v. Hesterman*, 288 Ill. 199, 123 N.E. 314 (1919); *G. S. Johnson Co. v. Belosky*, 263 Ill. 363, 105 N.E. 287 (1914); *Corrigan v. Miller*, 338 Ill. App. 212, 86 N.E.2d 853 (1949); *St. Paul-Mercury Indemnity Company of Saint Paul v. Hoey*, 325 Ill. App. 693, 60 N.E.2d 641 (1945); *Copeliars v. Copeliars*, 297 Ill.

Perhaps the extreme example of the liberal attitude of the Illinois courts toward the statute is *LaSalle Opera House Co. v. LaSalle Amusement Co.*,<sup>169</sup> where the court held that the lease, furniture, fixtures, good will, trade-marks, trade names and all other property of a theatrical business were covered by the statute.

But in New Jersey, an equally broadly-worded statute has received anything but a broad construction. The New Jersey statute refers to the

. . . whole or a large part of the stock or merchandise and fixtures or merchandise or fixtures, or goods and chattels, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business or occupation. . . .<sup>170</sup>

Examination of the quoted language indicates that this is one of the broadest of all bulk sales statutes, for the words "or occupation" suggest that it is not even confined to mercantile businesses; certainly it would not seem to exclude any kind of tangible chattel of a mercantile business. But the Court of Errors and Appeals gave the statute a much narrower construction in *VanGenderen v. Arrow Bus Lines*.<sup>171</sup> There a bus company sold its fleet of buses without complying with the statute. As in the Louisiana cases,<sup>172</sup> the contention was made that "other goods and chattels" should be construed to include the goods and chattels of non-mercantile businesses. Like the Louisiana court, the New Jersey court rejected that contention, but it went farther and said:

The words "otherwise than . . . in the regular and usual prosecution of the seller's business" indicate by necessary implication, as it seems to us, that the goods, chattels and merchandise which are the subject matter of the statute are those which the owner sells in parcels in the regular and usual prosecution of his business. In other words, that the class of vendors embraced in the statutory provision are those whose business is the sale of stock

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App. 647, 18 N.E.2d 120 (1938); *Tipsword v. Doss*, 273 Ill. App. 1 (1933); *Athon v. McAllister*, 205 Ill. App. 41 (1917); *Page v. Wright*, 194 Ill. App. 149 (1915). In *People ex rel. Nelson v. Sherrard State Bank*, 258 Ill. App. 168 (1930), the court held the statute inapplicable to intangibles, but indicated agreement with the text statement as to the scope of the statute with reference to tangibles. In concluding that intangibles were not covered, the court seemed to be unaware of the case of *LaSalle Opera House Co. v. LaSalle Amusement Co.*, 289 Ill. 194, 124 N.E. 454 (1919). In this regard see, *Landers Frary & Clark v. Vischer Products Co.*, 201 F.2d 319 (7th Cir. 1953). See also, *Herschi v. H. Albrecht & Co.*, 202 Ill. App. 573 (1916), and *Larson v. Judd*, 200 Ill. App. 420 (1916). *Contra*: *Ettelson v. Sonkopp*, 210 Ill. App. 348 (1918); *H. S. Richardson Coal Co. v. Cermak*, 190 Ill. App. 106 (1914); *Heslop v. Golden*, 189 Ill. App. 388 (1914). The latter cases clearly do not represent the law in Illinois. The *Heslop* and *Richardson* decisions were apparently handed down prior to the supreme court decision in *G. S. Johnson & Co. v. Belosky*, 263 Ill. 363, 105 N.E. 287 (1914), but that is not true of the *Ettelson* case.

169. 289 Ill. 194, 124 N.E. 454 (1919).

170. N.J. STAT. ANN. § 46:29-1 (1940).

171. 107 N.J. Eq. 217, 151 Atl. 605 (Ct. Err. & App. 1930).

172. See text at note 162 *et seq.*, *supra*.

or merchandise to intending customers who resort to the place where such stock or merchandise is kept for sale to such persons. The prohibition of the statute, as we see it, is directed solely at the bulk sale of this stock or merchandise by a person carrying on such business, and includes the sale of the fixtures used by such person in the carrying on of that business.<sup>173</sup>

But that reasoning will not bear analysis. Under this statute the court is faced with two alternatives, either the language “. . . in the ordinary course of trade and in the regular and usual prosecution of the seller's business or occupation. . .” modifies and limits all the items preceding it, or none of them. Obviously it cannot be interpreted to modify none of the items, else it would be useless. Thus far the court is on sound ground. The logical alternative, however, is not “some” but “all” of the items preceding the language in question. Here is the place where the court went astray, and the error was doubtless based on the same idea, discussed earlier, which led the Supreme Court of Texas to exclude the sale of fixtures alone from the operation of the Texas statute.<sup>174</sup> The rationale is that only merchandise can be sold in the ordinary course of trade, and, therefore, the sale of anything else is *always outside the ordinary course of trade*. Consequently, if the statute forbids the sale of items outside the ordinary course of trade, there is a negative inference that under some circumstances such items must be capable of sale in the ordinary course of trade. In the Texas case, the conclusion from those premises was that the subject matter of an interdicted transaction had to consist, at least in part, of something which could be so sold, *i.e.*, in the ordinary course of trade.<sup>175</sup> In the New Jersey case, however, the court was less logical. It reached the conclusion, at least in terms of result, that “other goods and chattels” can never be sold in the ordinary course of trade unless they are synonymous with merchandise, but that fixtures can. The basic difficulty, the faulty premise, is that something other than merchandise can never be disposed of in the ordinary course of trade. As has been explained earlier in this article in connection with the Texas cases, that assumption is simply not true when consideration is given to the purpose of the “ordinary course of trade” language.<sup>176</sup> In the New Jersey case, that false premise has led to an unjustifiably restricted definition of the phrase, but,

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173. *VanGendereen v. Arrow Bus Lines*, 107 N.J. Eq. 217, 218, 219, 151 Atl. 605, 606 (Ct. Err. & App. 1930).

174. See text at notes 81 *et seq.*, *supra*, for a discussion of the rationale underlying the decision in *M System Stores, Inc. v. Johnston*, 124 Tex. 238, 76 S.W.2d 503 (1934).

175. *Ibid.*

176. See text at notes 82-83 *supra*. Recognition of the fact that some bulk mortgages may be in the ordinary course of trade may be found in *First National Bank of Shreveport, La. v. Sharp*, 54 F.2d 886 (5th Cir. 1932).

more important, it has caused the court to do great violence to the clear statutory language.

Perhaps the word most often found in the group of statutes under consideration in this section is "equipment."<sup>177</sup> That, too, is a broad term which, in the few cases arising under these statutes, has been construed to mean those things which ". . . the vendor or merchant or trader owns and uses in connection with and incident to the sale of his goods, wares and merchandise."<sup>178</sup> In short, "equipment" means the same thing that "fixtures" means to those courts which have given a nontechnical meaning to the latter term.<sup>179</sup> Other specific items mentioned in some of the statutes include "supplies,"<sup>180</sup> "machinery,"<sup>181</sup> "motor vehicles,"<sup>182</sup> "horses,"<sup>183</sup> "wagons"<sup>184</sup> and "furniture."<sup>185</sup>

Only the California statute requires further detailed consideration. The statute refers to

The sale . . . of a stock in trade . . . and the sale . . . of the fixtures or store equipment of a baker, cafe or restaurant owner, garage owner, machinist, cleaner and dyer, or retail or wholesale merchant. . . .<sup>186</sup>

In *Woodruff v. Laughran*,<sup>187</sup> a chattel mortgage was given on three types of property of a jewel manufacturing business, which sold its output at both wholesale and retail: (1) the stock in trade, (2) machines used in the business such as electric motors and cutting machines, and (3) what the court described as ". . . [property] used to do merchandising with, wholesale and retail."<sup>188</sup> The court held the mortgage invalid as to items (1) and (3), but not as to item (2), taking the position that machines used in manufacturing were neither fixtures nor store equipment of machinists or of retail or wholesale merchants. Undoubtedly the use of the modifying and limiting term

177. CAL. CIV. CODE § 3440.1 (Supp. 1953); IDAHO CODE ANN. § 64-701 (1948); LA. REV. STAT. ANN. § 9:2961 (1950); MO. ANN. STAT. § 427.010 (Vernon 1950); NEB. REV. STAT. § 36-501 (1952); NEV. COMP. LAWS § 6816 (Supp. 1949); ORE. REV. STAT. § 79.010 (1953); UTAH CODE ANN. § 25-2-1 (1953); WASH. REV. CODE § 63.08.010 (1951).

178. *Independent Breweries Co. v. Lawton*, 200 Mo. App. 238, 241, 204 S.W. 730, 731 (1918). And see, *Bolanovich v. Peter Hauptmann Tobacco Co.*, 261 S.W. 723 (Mo. App. 1924); *Balter and Miller v. Crum*, 199 Mo. App. 380, 203 S.W. 506 (1918).

179. See the discussion in the text at notes 122 *et seq.*, *supra*.

180. IDAHO CODE ANN. § 64-701 (1948); ORE. REV. STAT. § 79.010 (1953); UTAH CODE ANN. § 25-2-1 (1953).

181. NEB. REV. STAT. § 36-501 (1952).

182. LA. REV. STAT. ANN. § 9:2961 (1950) (automobile trucks and other vehicles); NEV. COMP. LAWS § 6816 (Supp. 1949) (motor or other vehicles or trucks); ORE. REV. STAT. § 79.010 (1953) (motor vehicles).

183. LA. REV. STAT. ANN. § 9:2961 (1950).

184. *Ibid.*

185. IDAHO CODE ANN. § 64-701 (1948); UTAH CODE ANN. § 25-2-1 (1953).

186. CAL. CIV. CODE § 3440.1 (Supp. 1953).

187. 50 F.2d 532 (9th Cir. 1931).

188. *Id.* at 535.

"store" in the statute caused the court to take that position, for otherwise the decision is clearly erroneous. In the case of *In re Bowers*,<sup>189</sup> the court held the statute applicable to a mortgage on such things as the tables, dishes, chairs, benches, pots, pans and silverware of a "breakfast club."

On the whole, the courts have interpreted the broader statutes consonantly with both their language and spirit. The terms employed in these statutes point clearly to an over-all legislative purpose to extend the scope of the older forms of bulk sales legislation, and the courts have aided in the carrying out of that purpose. The New Jersey Court of Errors and Appeals, however, has taken a position, with respect to its statute, that is difficult to justify either from the viewpoint of the language alone, or from the over-all purpose and scope of that statute as disclosed by the breadth of the language employed.

### C. Intangibles.

Although only the South Carolina statute<sup>190</sup> expressly designates certain intangibles as coming within its scope, a few of the other statutes contain language which is broad enough to include intangible property. Thus the terms "property"<sup>191</sup> and "personal property,"<sup>192</sup> found in some of the statutes are clearly descriptive of both tangible and intangible property. However, none of those statutes has ever been judicially construed with reference to the point under discussion.

Courts, when faced with the issue of whether intangibles are covered by bulk sales statutes, have almost uniformly excluded them from the coverage of the statutes. Thus good will,<sup>193</sup> a franchise,<sup>194</sup> a list of customers,<sup>195</sup> leases,<sup>196</sup> accounts receivable,<sup>197</sup> prepaid insur-

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189. 33 F. Supp. 965 (S.D. Cal. 1940). The principal issue in the case was whether a "breakfast club," the owner of which served meals and drinks to only selected portions of the public by special arrangement, was a restaurant or cafe under the statute. The court held that it was.

190. S.C. CODE § 11-201 (1952).

191. IDAHO CODE ANN. § 64-701 (1948); S.C. CODE § 11-201 (1952); UTAH CODE ANN. § 25-2-1 (1953).

192. MONT. REV. CODES ANN. § 18-201 (1947).

193. *Thorndike & Hix Lobster Co. v. Hall*, 132 Misc. 723, 230 N.Y. Supp. 554 (Sup. Ct. 1928).

194. *Begnell v. Safety Coach Line, Inc.*, 198 N.C. 688, 153 S.E. 264 (1930). It should be pointed out, however, that the holding in the case was that a company operating a bus line had no merchandise of any kind, so that whatever it sold, tangible or intangible, fell outside the operation of the statute.

195. *Smith v. Munizza*, 170 Pa. Super. 122, 84 A.2d 352 (1951).

196. *Begnell v. Safety Coach Line, Inc.*, 198 N.C. 688, 153 S.E. 264 (1930) (see discussion in note 194 *supra*); *Leidersdorf v. Kress*, 169 Wis. 484, 173 N.W. 218 (1919) (by implication). See also, *Saqui v. Wiricks*, 167 N.Y. Supp. 661 (Sup. Ct. 1917).

197. *Hood Rubber Products Co. v. Dickey*, 167 Okla. 304, 29 P.2d 115 (1934); *Fischer v. Rio Tire Co.*, 65 S.W.2d 751 (Tex. Com. App. 1933).

ance,<sup>198</sup> unexpired vehicle licenses,<sup>199</sup> conditional sales contracts and notes,<sup>200</sup> and trade names<sup>201</sup> have been held to be outside the scope of the statutes. A notable exception, however, is the interpretation given the Illinois statute on this point, an interpretation consistent with that given to the same statute in connection with the problems of businesses covered<sup>202</sup> and tangible property covered.<sup>203</sup>

Reference has already been made<sup>204</sup> to the case of *LaSalle Opera House Co. v. LaSalle Amusement Co.*,<sup>205</sup> which held the statute applicable to the sale of the lease, furniture, fixtures, equipment, good will, trade-mark and trade names of a theatrical company. Although in *People v. Sherrard State Bank*,<sup>206</sup> the court ruled that the Illinois statute did not cover the transfer of intangibles, it is apparent that the court must have been unaware of the *LaSalle* case; it was nowhere mentioned in the opinion. In *Landers Frary & Clark v. Vischer Products Co.*,<sup>207</sup> there is a clear holding that the Illinois statute covers intangible as well as tangible property, the intangibles being patent rights on which royalties were being collected.

It is clear that except for the statutes such as that of South Carolina and those which employ the phrases "property" or "personal property," since intangibles are not goods, wares, merchandise, fixtures, equipment, or other goods and chattels of a business, they should not be held to come within the bulk sales statutes. Again reference must be made to the reasons behind the extremely broad interpretation given to the Illinois statute not only in this but in other areas, for the Illinois cases are not otherwise explicable.

#### D. Real Property.

Three of the statutes<sup>208</sup> refer to "property" without the limiting adjective "personal." There is room for argument that such statutes contemplate not only personal property but also real property as coming within their scope. Nevertheless, if the word be considered in its context, it is very doubtful that the broader meaning should be given it. The South Carolina statute lists several kinds of personal

198. *Fischer v. Rio Tire Co.*, 65 S.W.2d 751 (Tex. Com. App. 1933).

199. *Ibid.*

200. *Starr Piano Co. v. Sammak*, 235 N.Y. 566, 139 N.E. 737 (1923).

201. *Begnell v. Safety Coach Line, Inc.*, 198 N.C. 688, 153 S.E. 264 (1930) (see discussion in note 194 *supra*).

202. See Miller, *supra* note 1, text at notes 66 *et seq.*

203. See text at notes 166 *et seq.*, *supra*.

204. See text at notes 169 *supra*.

205. 289 Ill. 194, 124 N.E. 454 (1919).

206. 258 Ill. App. 168 (1930).

207. 201 F.2d 319 (7th Cir. 1953). The federal court relied on the cases of *Coon v. Doss*, 361 Ill. 515, 198 N.E. 341 (1935); *LaSalle Opera House Co. v. LaSalle Amusement Co.*, 289 Ill. 194, 124 N.E. 454 (1919), and *G. S. Johnson Co. v. Belosky*, 263 Ill. 363, 105 N.E. 287 (1914).

208. IDAHO CODE ANN. § 64-701 (1948); S.C. CODE § 11-201 (1952); UTAH CODE ANN. § 25-2-1 (1953).

property followed by the words “. . . or any property of whatever kind and description. . . .”<sup>209</sup> Although the last phrase makes the *ejusdem generis* rule of dubious applicability, yet it remains true that all of the listed items are personal property, either tangible or intangible. Further, there is no evidence to show that the sale of real estate in any way was responsible for the rise of bulk sales legislation; much of the difficulty arose from the fact that the goods, as well as the seller of them, were spirited out of reach, and that cannot be accomplished with real estate.<sup>210</sup>

The Utah statute<sup>211</sup> requires that the property must be used in carrying on the business, and although real property certainly can be and is used, in one sense, to carry on a business to which it belongs, yet the word “property,” as the first item in a list of things including furniture, fixtures, equipment and supplies, probably means something less than “property” in the fullest possible sense of the term. Else, why list the other things, for certainly they too are property. The same may be said of the Idaho statute,<sup>212</sup> although curiously enough under that statute there is no requirement that the “property” be used in carrying on the business, whereas there is such a requirement with respect to the other listed items.<sup>213</sup>

The few cases which have considered the problem have been clear and definite in holding that bulk sales legislation was not designed to affect the disposition of realty.<sup>214</sup> Certainly those cases, decided under statutes which contain no affirmative suggestion that they apply to realty, which, in fact, contain internal evidence that they are restricted to personalty, have been correctly decided.

#### E. *Exempt Property.*

Although only five<sup>215</sup> of the statutes expressly exclude exempt property from their operation, many of the courts have reached the same

209. S.C. CODE § 11-201 (1952).

210. See Note, 20 IOWA L. REV. 815 (1935).

211. UTAH CODE ANN. § 25-2-1 (1953).

212. IDAHO CODE ANN. § 64-701 (1948).

213. *Ibid.* The section reads in part:

[O]r any portion of the property, furniture, fixtures, or equipment or supplies of a hotel, restaurant, barber shop or any place of business wherein the furniture, fixtures, or equipment are used in carrying on said business. . . .

Attention is directed to the fact that in describing what is used in carrying on the business, only some of the items previously mentioned are repeated.

214. *Root Refineries v. Gay Oil Co.*, 171 Ark. 129, 284 S.W. 26 (1926); *Ventrilla v. Tortorice*, 160 La. 516, 107 So. 390 (1926); *Geck v. Security State Bank*, 133 Okla. 67, 271 Pac. 152 (1928); *Hall v. Conine*, 230 S.W. 823 (Tex. Civ. App. 1921). See also, *In re Elliott*, 48 F. Supp. 146 (D.C. Kan. 1942), and *Robbins v. Fuller*, 148 Ark. 173, 229 S.W. 8 (1921).

215. ALA. CODE tit. 20, § 12 (Supp. 1951); CAL. CIV. CODE § 3440.1 (Supp. 1953); ILL. ANN. STAT. c. 121½, § 80 (Supp. 1953); MO. ANN. STAT. § 427.010 (Vernon 1950); N.C. GEN. STAT. § 39-23 (1950). The following cases decided under these statutes have been recognized by implication or otherwise that they do

conclusion in the absence of express provision.<sup>216</sup> In fact, most of the appellate litigation on the question has been concerned with what has to be done under what circumstances in order to enable the noncomplying bulk purchaser to take advantage of the seller's statutory exemptions. In short, the theory underlying all of the decisions is that under some circumstances property exempt to the seller may be sold without compliance with the bulk sales statutes. The circumstances which might have the result of making the exemption unavailable are these: (1) the seller did not specifically claim the exemption; (2) the property forming the subject matter of the controversy was exempt, not absolutely, but only if selected by the claimant and claimed as his exemption; and (3) the absence of a good faith effort to comply with the statute.

Several cases have taken the position that the seller must claim his exemption at the time of the transfer, in some more or less formal way, in order that the purchaser may have the benefit of the seller's exemption.<sup>217</sup> If, however, the property sold, as well as any other property owned by the seller prior to the sale, is less in total value than the amount of the exemption, there is no necessity for selection; thus the bulk sales statute has no application to such a transfer.<sup>218</sup> In fact the Michigan case cited imposes the requirement of selection by the seller only if the amount of property involved in the transaction sought to be subjected to the bulk sales statute is greater than the amount of the exemption.<sup>219</sup>

In the Pennsylvania cases a distinction has been drawn between transfers which are fraudulent in fact and transfers which fail only because of inadvertent noncompliance with the statute. In both

not apply to exempt property: *Stickney v. L. & E. Lamar*, 201 Ala. 549, 78 So. 903 (1918); *Herschi v. H. Albrecht & Co.*, 202 Ill. App. 573 (1916); *Brown Shoe Co. v. Sacks*, 201 Mo. App. 360, 211 S.W. 133 (1919); *Whitmore-Ligon Co., Inc. v. Hyatt*, 175 N.C. 117, 95 S.E. 38 (1918).

216. The following cases, decided under statutes which make no reference to exempt property, have held the statutes inapplicable to it without any suggestion that there might be circumstances where that would not be true: *In re Dederick*, 91 F.2d 646 (10th Cir. 1937) (Kansas Statute); *Rich v. The C. Callahan Co.*, 179 Ind. 509, 101 N.E. 810 (1913); *Des Moines Packing Co. v. Uncaphor*, 174 Iowa 39, 156 N.W. 171 (1916); *Joyce v. Armourdale State Bank*, 130 Kan. 147, 285 Pac. 525 (1930); *Saunders v. Graff*, 103 Kan. 261, 173 Pac. 413 (1918); *Orgill Bros. v. Gee*, 152 Miss. 590, 120 So. 737 (1928); *Congress Candy Co. v. Farmer*, 73 N.D. 174, 12 N.W.2d 796 (1944); *Cross v. Inge*, 105 Okla. 145, 231 Pac. 1066 (1924); *Missos v. Spyros*, 182 Wis. 631, 197 N.W. 196 (1924).

217. *Griffin v. Puryear-Meyer Grocer Co.*, 202 Ark. 495, 151 S.W.2d 656 (1941); *Merchants' & Farmers' Bank v. Reel*, 181 Ark. 969, 28 S.W.2d 725 (1930); *Griffin v. Batterall Shoe Co.*, 137 Ark. 37, 207 S.W. 439 (1918); *Hoja v. Motoc*, 235 Mich. 258, 209 N.W. 66 (1926); *McCormick v. Kistler*, 175 Mich. 422, 141 N.W. 593 (1918); *J. L. Hudson Co. v. No-Name Hat Co.*, 174 Mich. 109, 140 N.W. 507 (1913).

218. *McCormick v. Kistler*, 175 Mich. 422, 141 N.W. 593 (1913). There is a suggestion in the case of *Griffin v. Batterall Shoe Co.*, 137 Ark. 37, 207 S.W. 439 (1918), that the same rule may apply in Arkansas.

219. *McCormick v. Kistler*, 175 Mich. 422, 141 N.W. 593 (1913).

cases<sup>220</sup> arising under the Pennsylvania statute, the purchase money was put in escrow, and in both of them the seller claimed that he was entitled to be paid three hundred dollars, the amount of his statutory exemption. There the similarity ended, for in one of the cases<sup>221</sup> the seller denied that he had any creditors, while in the other<sup>222</sup> a list of creditors was given by the seller but the buyer failed to notify one of them. In the latter case the Superior Court reversed the trial court's refusal to permit the exemption, taking the position that a claimant's right to his statutory exemption will be lost only if fraud exists in the very transaction in which a levy is made, and that the "constructive fraud" arising from noncompliance with the bulk sales law is not sufficient to deprive the seller of his exemption. In the *Kourge* case, however, no distinction was drawn between transfers fraudulent in fact and those merely constructively fraudulent, the court stating broadly that the exemption statutes were not designed to aid a debtor in defrauding his creditors. The court relied on the trial court's decision in the *Bixler Co.* case, but was apparently unaware of the fact that the case had been reversed by the Superior Court. Nevertheless, it is apparent that since there was a wilful denial by the seller of the existence of creditors, the *Kourge* decision was a correct one under the distinction drawn in the *Bixler Co.* case. It should be noted at this point that the question in the Pennsylvania decisions was whether the exemption was available to the seller, whereas in the other cases the question was whether the purchaser could take advantage of the seller's exemption.

In *Congress Candy Co. v. Farmer*,<sup>223</sup> the Supreme Court of North Dakota refused to draw a distinction between property absolutely exempt and property which a debtor may claim as exempt by some process of selection. In holding the bulk sales law inapplicable to the sale of any kind of exempt property the court offered the following rationale:

It seems clear that no injury is caused to a creditor because a debtor disposes of property which he can claim as exempt in event the creditor seeks to enforce payment of the claim by levy of attachment or execution against such property. Certain it is that no greater injury will be caused to a creditor if the debtor disposes of the property before the creditor seeks to subject the property to the creditor's claim, than if the debtor retains the property, and exercises his legal right and claims the property as

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220. *Bixler Co. v. Kennedy*, 64 Pa. Super. 41 (1916), *reversing*, 18 Luz. Leg. Reg. Rep. 135 (1915); *Kourge v. Sariotes*, 30 Pa. Dist. 65 (1920).

221. *Kourge v. Sariotes*, 30 Pa. Dist. 65 (1920).

222. *Bixler Co. v. Kennedy*, 64 Pa. Super. 41 (1916), *reversing*, 18 Luz. Leg. Reg. Rep. 135 (1915).

223. 73 N.D. 174, 12 N.W.2d 796 (1944).

exempt after the creditor has instituted legal proceedings to subject the property to the payment of the claim.<sup>224</sup>

The rationale of the North Dakota court, which underlies many of the other decisions as well,<sup>225</sup> is clearly correct. If the creditor cannot reach the property in the hands of the debtor because of the operation of the exemption laws, he loses nothing when that property is sold by the debtor. Nor should it be necessary in the situation in which he has both exempt and nonexempt property, that the debtor select his property in advance as exempt, for the creditor in such a case can easily force the debtor to make a selection at the time of levy and execution, and proceed against what must then be available as nonexempt property.

#### F. *The Uniform Commercial Code Solution.*<sup>226</sup>

Section 6-102 of the Uniform Commercial Code provides:

(1) A "bulk transfer" is any transfer in bulk and not in the ordinary course of the transferor's business of a major part of the materials, supplies, merchandise or other inventory (Section 9-109) of an enterprise subject to this Article.

(2) A transfer of a substantial part of the equipment (Section 9-109) of such an enterprise is a bulk transfer if it is made in connection with a bulk transfer of inventory, but not otherwise.

Section 9-109 states that:

Goods are

(2) "equipment" if they are used or bought for use primarily in business (including farming or a profession) or by a debtor who is a non-profit organization or a governmental subdivision or agency or if the goods are not included in the definitions of inventory, farm products or consumer goods;

(4) "inventory" if they are held or are being prepared for sale or are to be furnished under a contract of service or if they are raw materials, work in process or materials used or consumed in a business. If goods are inventory they are neither farm products nor equipment.

224. *Id.* at 190, 12 N.W.2d at 803.

225. *See, e.g.*, the statement of Burch, J., in *Saunders v. Graff*, 103 Kan. 261, 173 Pac. 413 (1918):

[T]he bulk-sales act was intended to operate only on property toward which creditors may look for satisfaction of their claims. While the statute is remedial, in that it is designed to frustrate fraud, and for that reason is to be liberally construed . . . , there is no fraud in withholding exempt property from satisfaction of a debtor's obligations. Creditors are not concerned with any disposition which the owner may make of it.

*Id.* at 262, 173 Pac. at 413.

226. All references to the Uniform Commercial Code are to the Official Draft, Text and Comments Edition (1952), as amended by Recommendations of the Editorial Board for Changes in the Text and Comments of the Uniform Commercial Code Official Draft, Text and Comments Edition, dated June 1, 1953.

Thus it is clear that there are two major kinds of goods which can form the subject matter of an interdicted transaction; inventory and equipment. In a general way, but in a general way only, these items correspond to the merchandise and fixtures of the present statutes. Comment 3 to section 9-109 states that "[t]he principal test to determine whether goods are inventory is that they are held for immediate or ultimate sale. . .," but recognizes ". . . that one class of goods which is not held for ultimate disposition to a purchaser is included in inventory: 'Materials used or consumed in a business'." It continues, "In general it may be said that goods used in a business are equipment when they are fixed assets or have, as identifiable units, a relatively long period of use; but are inventory, even though not held for sale, if they are used up or consumed in a short period of time in the production of some end product."

Obviously inventory, as defined in the Code, is a much broader term than merchandise, as defined by the courts under the existing statutes. Even the most liberal courts, those which have in effect considered the finished products of a manufactory to be merchandise, have not included the raw materials or works in process as does the Code. Furthermore, only a few courts have included such things as supplies consumed in the business, *e.g.*, fuel used or stationery, as merchandise, although some courts have included them within the term "fixtures."

Comment 5 to the same section states that "equipment" is principally defined in negative terms: any goods not covered by any other definition in the section; *i.e.*, if they are not "consumer goods," "farm products" nor "inventory," they are "equipment." Equipment, then, corresponds roughly to the term "fixtures" under the present statutes, for although it excludes some things which a few courts have included under the definition, those are items which the Code definition of "inventory" would include. Conversely, "equipment" and "inventory" together cover more things than any of the existing statutes cover under the headings of "merchandise" and "fixtures."

Although section 6-102 speaks of ". . . materials, supplies, merchandise. . .," those terms are not defined elsewhere in the Code. But certainly the broad definition of inventory includes materials, supplies and merchandise. Furthermore, the phrasing makes it abundantly clear that these are not things different from "inventory," but rather, some of the particular classes of things which comprise the general class "inventory."

Attention is directed to the fact that the sale of equipment alone is never subject to the article. If, and only if, the transfer qualifies as a transfer subject to the article under subsection 1, *i.e.*, independently of any equipment which is included in it, will the sale of the equip-

ment be covered. The comments do not reveal the reason for this choice. Probably it rests on a recognition of the fact that the inventory is the only thing which many classes of unsecured creditors can look to for payment, and so is the real basis for the extension of credit, whereas equipment is more often the security for direct lenders or even the sellers of the equipment itself. And it is a much simpler matter for the creditor who relies on the equipment as the basis for the extension of credit to protect himself.

Subsection 6-103(8) expressly excludes property exempt from execution, and the description of the included items is sufficiently definite to preclude any contention that either intangibles or real estate is covered.

#### CRITIQUE AND SUMMARY

One conclusion of considerable significance is affirmed by the analysis just completed. It is that only in a very general sense may bulk sales statutes be treated as a generic unit for purposes of determining to what kinds of property they apply. The variations in language in the statutes are much greater than has generally been assumed. Consequently the value of a study of this kind is greatest as a means of examining and comparing the solutions which the legislatures have worked out, using the cases only to understand and evaluate the legislative handling of the problem. Stated conversely, the study has limited value in the sense of its being a comparative study of how courts have reacted, for the stimuli to those reactions in which we are interested have been too variant to permit careful and accurate comparison. This is not to say that we can draw no conclusions, nor that this aspect of the study is completely without value. Rather the statement is made to destroy any notion that this kind of study yields even as satisfactory a basis for comparing the work of courts as does the more standard study of common law cases, limited though that may be by other local rules not common to most of the jurisdictions covered.

Nevertheless it is a fair conclusion to say that all of the statutes cover merchandise in the sense of goods purchased for resale in the ordinary course of trade; that many of them cover the transfer of fixtures, sometimes alone, and sometimes only in connection with the transfer of merchandise; that the precise statutory language is very important in determining the solution to the latter problem; that a substantial number of the statutes are clearly broader with respect to property covered than most of them; that intangibles and realty are almost never considered as coming within the bulk sales statutes; and, that under at least some circumstances exempt property is excluded from the operation of all of them.

Although there have been some very narrow interpretations given to statutory language in the cases under consideration in this article, on the whole the construction has been liberal in fact, and, in terms of results reached, seems to be becoming more liberal. In spite of the fact that several of the courts have reached unsatisfactory conclusions with respect to one or more sub-problems in this area, the vast majority of the results are sound, although faulty rationales are not too uncommon.

The solution offered by the draftsman for the Uniform Commercial Code Article on Bulk Transfers is not radically different in general outline from that which exists under many of the statutes today. Of significance, however, is that the Code section represents not the preponderance of existing practice, but the best of it. It is clear that intangibles and realty should form no part of property covered, and it is even clearer that exempt property should not. The definitions of inventory and equipment are more satisfactory than those of any of the present statutes. The inclusion of equipment only if inventory is also sold as part of the same transaction is sensible. Unsecured credit is not ordinarily extended on the basis of equipment, since the lender should realize that if he does not utilize the equipment as security, someone else will. On the other hand, it is also sensible to treat an entire transaction as a unit for bulk sales purposes, so that if a bulk transfer of inventory is made and substantial equipment is included, the whole transfer should fall within the act.

But above all, the statute fairly shouts the draftsman's awareness of the ever-existing conflict between the need for certainty and the need for exact justice in the commercial law area. That is not to say that a statute which is exact and certain must inevitably be unfair; quite the opposite may be true. But it is, nevertheless, a fact that borderline cases will frequently be decided less justly, in the lay sense, under very precisely worded statutes. The reason is clear: the more precise the language becomes, the less attention can be given to the infinite variants in facts. Here the draftsman in effect said frankly: we cannot list every possible kind of property in detail; there is some overlap between some of the categories in the sense that inclusion in one rather than the other will in certain fact situations be arguable; we cannot anticipate each of those fact situations; therefore, by illustration and explanation in the comments, we will provide a guide for merchants, lawyers and judges. That will enable the merchant to be guided by his attorney in acting, and it will be helpful to the judge if the borderline situations arise, as they inevitably do, without so tying his hands that he cannot distinguish variant fact situations which should be distinguished. In this effort, I believe, the draftsman has

been successful. Where exactness was possible and desirable, the language is precise, but where precision could be achieved only at the expense of fairness in some situations, more general language was used, and guides set out to aid in the solution of the unusual problem.