BULK SALES LAWS: MEANING TO BE ATTACHED TO THE QUANTITATIVE AND QUALITATIVE REQUIREMENTS PHRASES OF THE STATUTES*

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"Bulk Sales Statute" is a generic term employed to describe one of a group of statutes, similar in outline but markedly dissimilar in significant detail, aimed at remedying a specific evil.[1] All of them have in common one important limitation: they are inapplicable to routine mercantile transactions, transactions which lack those unusual characteristics which would cause them to fall within the class of transactions conceived as comprising the "evil to be remedied." The purpose of this article is to analyze how great a departure from the routine must be in order to cause the transaction to fall within the operation of the appropriate bulk sales statute. Several factors have been made important in the solution of the problem. Although the legislatures have supplied the original verbalization of these factors, it has, quite expectedly, been necessary for the courts to breathe meaning into the legislative language for the purpose of solving concrete cases.

The statutory requirements which must be met in order that the particular transaction fall outside the area of the routine vary, but, broadly speaking, there are three principal ones: (1) the sale must be "in bulk," (2) it must be "out of the ordinary course of trade," (3) it must include a certain proportion of the included property of the business. This is not to say that all three requirements are found in all statutes, for the statutory schemes are remarkably diverse in this regard. Nor may it be concluded that the three are entirely separate and distinct requirements. Indeed the absence of one of them in a particular statute may cause the court to give a somewhat different meaning to one of the others than would otherwise be the case in order to fill the gap presumably created by its absence. The inquiry then is to be whether, and in what combinations, these three factors

*This is the last 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: Property Included*, appears in the April, 1954, issue of the WASHINGTON UNIVERSITY LAW QUARTERLY. Some of the research for the articles was facilitated by funds provided by the American Law Institute while the author served as research assistant to the Reporter for Article 6 of the Uniform Commerical Code, Professor Charles Bunn of the University of Wisconsin Law School. The author wishes to express his deep appreciation for the encouragement and advice which Professor Bunn has given so freely.

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1. See Miller, *Bulk Sales Laws: Businesses Included*, 1954 WASH. U.L.Q. 1 at note 5.

appear in the various statutes, as well as the techniques used by courts in utilizing these factors as aids in distinguishing routine from unusual transactions.

I. THE MEANING OF "IN BULK"

It is by no means true that all bulk sales statutes require that under all circumstances a transfer must be "in bulk" as a requisite to its falling within the scope of the statute. Indeed several of the statutes make no mention of the words "in bulk" at all,[2] while many others require that the transaction be "in bulk" to fall within their purview only if the transfer is lacking in certain other characteristics;[3] *e.g.*, they may be applicable in their terms not only to all out of the ordinary course of trade transfers, whether or not such transfers are "in bulk," but also to some transfers which are not out of the ordinary course of trade but are "in bulk."[4] Again, many of the statutes require specifically that a certain proportion of the property be included,[5] while many others state that "any part" is enough,[6] and some

2. ARIZ. CODE ANN. § 58-301 (1939); KAN. GEN. STAT. §§ 58-101 to 58-104 (1949); MINN. STAT. ANN. § 513.18 (West 1947); MO. ANN. STAT. §§ 427.010 to 427.050 (Vernon 1949); R.I. GEN. LAWS c. 483, §§ 1 and 2 (1938).

3. The citations here represent the author's best efforts at translating what is frequently very unclear statutory language. In so doing I have not availed myself of the aid of the cases decided under the statutes at this point, primarily because there are practically none in point, but also because of a conviction which I hope to demonstrate in the course of the article, that the courts have not sought to solve the problems raised by the statutes by a resort to a close examination of their provisions in this area. Rather they have looked to cases decided in other jurisdictions having statutes containing strikingly different language, or they have spoken of bulk sales statutes generally without noting the important language variations adverted to above. ALA. CODE tit. 20, § 10 (Supp. 1952) *semble;* CAL. CIV. CODE § 3440.1 (Supp. 1953); DEL. CODE ANN. tit. 6, § 2101 (1953); IDAHO CODE ANN. § 64-701 (1948); MISS. CODE ANN. § 274 (1942); NEV. COMP. LAWS § 6816 (Supp. 1949) *semble;* N.M. STAT. ANN. § 53-1001 (1941); OKLA. STAT. ANN. tit. 24 § 71 (1937); S.C. CODE § 11-201 (1952); S.D. CODE § 54.0301 (1939) *semble;* TENN. CODE ANN. § 7283 (Williams 1934); UTAH CODE ANN. § 33-2-1 (1953) *semble;* WYO. COMP. STAT. ANN. § 41-701 (1945) *semble.*

4. See note 3 *supra.*

5. Major part: CONN. GEN. STAT. § 6705 (1949); ILL. ANN. STAT. c. 121 1/2, § 78 (Supp. 1952); MO. ANN. STAT. § 427.020 (Vernon 1949); R.I. GEN. LAWS c. 483, § 1 (1938); S.C. CODE § 11-201 (1952); Substantial part: CAL. CIV. CODE § 3440.1 (Supp. 1953); Large part: KY. REV. STAT. § 377.010 (1953); N.J. STAT. ANN. § 46:29-1 (1940); N.C. GEN. STAT. § 39-23 (1950); PA. STAT. ANN. tit. 69, § 525 (1931); 75%: ARIZ. CODE ANN. § 58-301 (1939); All or substantially all: WASH. REV. CODE § 63.08.010 (1951). In addition the Montana statute requires that the transaction be of an entire stock or of an entire stock of a particular character. MONT. REV. CODES ANN. § 18-204 (1947).

6. 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); 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); NEB. REV. STAT. § 36-501 (1952); N.H. REV. LAWS c. 262, § 43 (1942); N.M. STAT. ANN. § 53-1001 (1941); N.Y. PERS. PROP. LAW § 44; N.D. REV. CODE § 51-0202 (1943); OHIO GEN. CODE ANN. § 11102 (1938); S.D. CODE § 54.0301 (1939); TEX. REV. CIV. STAT. ANN. art. 4001 (1945); VT. REV. STAT. § 7846 (1947); VA. CODE § 55-83 (1950); W. VA. CODE ANN. § 4001 (1949); WIS. STAT. § 241.18 (1951); WYO. COMP. STAT. ANN. § 41-701 (1945).

of them provide that "any part" is enough if the transfer is out of the ordinary course of trade, but that some specified percentage must be sold if the transaction is not out of the ordinary course of trade.[7] Furthermore, under the latter alternative, there may or may not be an additional requirement that the sale be "in bulk."[8] Still other statutes include, in a definition section, a statement that a transfer is to be deemed "in bulk" if it is a transfer of a specified portion (or any part) either out of the ordinary course of trade or of substantially the entire business.[9] Although the variations are not infinite, they are numerous. Still it is possible to classify the statutes in such a way as to point up the characteristics which the statutory language seems to demand in each class, as well as to illustrate the various meanings assigned to the phrase "in bulk" as a result of the process of interpretation.

Many of the statutes in express terms require that a transaction be both out of the ordinary course of trade and in bulk to come within their scope.[10] Although some of the statutes in that general group

7. ALA. CODE tit. 20, § 10 (Supp. 1952); DEL. CODE ANN. tit. 6, § 2101 (1953); IDAHO CODE ANN. § 64-701 (1948); MINN. STAT. ANN. § 513.18 (West 1947); MISS. CODE ANN. § 274 (1942); OKLA. STAT. ANN. tit. 24, § 71 (1937); TENN. CODE ANN. § 7283 (Williams 1934); UTAH CODE ANN. § 25-2-1 (1953).

8. ALA. CODE tit. 20, § 10 (Supp. 1952); DEL. CODE ANN. tit. 6, § 2101 (1953); IDAHO CODE ANN. § 64-701 (1948); MISS. CODE ANN. § 274 (1942); OKLA. STAT. ANN. tit. 24, § 71 (1937); TENN. CODE ANN. § 7283 (Williams 1934). Although there is some difficulty in reconciling the seemingly inconsistent sections of the Nevada statute, it apparently provides that all sales of any part of the merchandise are interdicted if they are "in bulk" and "otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business. . . ," but that only a sale of "substantially all" of the fixtures is interdicted. NEV. COMP. LAWS §§ 6816 to 6820 (Supp. 1949).

9. D. C. CODE ANN. § 28-1703 (1951); FLA. STAT. ANN. § 726.05 (1944); GA. CODE ANN. § 28-206 (1952); MD. ANN. CODE GEN. LAWS art. 83, § 99 (1951); ORE. REV. STAT. § 79.040 (1953); WASH. REV. CODE § 63.08.010 (1951). In addition the Kentucky statute defines a bulk sale as "any sale . . . of the whole or a large part . . . in bulk, by auction or otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business ." KY. REV. STAT. § 377.010 (1953). There is an apparent conflict between the language of different sections of the Utah statute; *compare* UTAH CODE ANN. § 25-2-1 (1953) (providing that all sales must be "in bulk" except sales of specified kinds of property of specified businesses, and that all sales must be out of ordinary course except a sale of an entire stock of merchandise, which need merely be "in bulk") *with* UTAH CODE ANN. § 25-2-4 (1953) (providing that all out of ordinary course sales are included with no mention of "in bulk," but that if entire stock is sold it must be "in bulk").

10. ARK. STAT. ANN. § 68-1501 (1947); CAL. CIV. CODE § 3440.1 (Supp. 1953); COLO. STAT. ANN. c. 27, § 1 (Supp. 1952); CONN. GEN. STAT. § 6705 (1949); ILL. ANN. STAT. c. 121 1/2, § 78 (Supp. 1952); IND. ANN. STAT. § 33-201 (Burns 1949); IOWA CODE ANN. c. 555, § 555.1 (1950); 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); NEB. REV. STAT. § 36-501 (1952); NEV. COMP. LAWS §§ 6816 to 6820 (Supp. 1949) (at least as to merchandise); N.H. REV. LAWS c. 262, § 43 (1942); N.J. STAT. ANN. § 46:29-1 (1940); N.Y. PERS. PROP. LAW § 44; N.C. GEN. STAT. § 39-23 (1950); N.D. REV. CODE § 51-0202 (1943); OHIO GEN. CODE ANN. § 11102 (1938); TEX. REV. CIV. STAT. ANN. art. 4001 (1945); VT. REV. STAT. § 7846 (1947); VA. CODE § 55-83 (1950); W. VA. CODE ANN. § 4001 (1949); WIS. STAT. § 241.18 (1951); WYO. COMP. STAT. ANN. § 41-701 (1945).

provide merely that any part of the goods is enough if the two stated requirements are met,[11] others impose an additional requirement, that some specified proportion of the total goods be sold.[12] It is in the latter group of statutes that we find the clearest intrinsic indication of a legislative purpose to impose three separate and distinct conditions to any transaction's falling within the scope of a bulk sales statute. Whether the specified proportion has been sold is essentially a quantitative question, the answer to which is ordinarily a matter of evidence only, and the meaning of "out of the ordinary course of trade" is not too difficult to discover, although the application of that meaning to certain factual situations may prove to be anything but simple. It clearly has a qualitative connotation—was this *how* the seller ordinarily conducted his business?

But when attention is directed to the meaning of the second requirement, that the transfer be "in bulk," the answer is not so clear. Resort to dictionary definitions reveals two quite different meanings: (1) "bulk" is a word with quantitative connotations; thus it means "a mass or aggregate, esp. one of large size," or "[t]he main mass or body; the largest or major portion; as, the *bulk* of one's property."[13] "In bulk," however, carries a quite different meaning. Thus it means "[i]n a mass; not enclosed in separate packages or divided into parts; in such shape that any desired quantity may be removed; as, goods shipped or sold *in bulk*."[14] It is in that sense, of course, qualitative; it answers the question "how," and not the question "how much."

In no jurisdiction whose statute contains all three requirements[15] has a case been found which throws any direct light on the question of the meaning of the phrase "in bulk." It is not insignificant, however, that in several of the cases which raised issues of whether a

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11. 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); 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); NEB. REV. STAT. § 36-501 (1952); N.H. REV. LAWS c. 262, § 43 (1942); N.Y. PERS. PROP. LAW § 44; N.D. REV. CODE § 51-0202 (1943); OHIO GEN. CODE ANN. § 11102 (1938); TEX. REV. CIV. STAT. ANN. art. 4001 (1945); VT. REV. STAT. § 7846 (1947); VA. CODE § 55-83 (1950); W. VA. CODE ANN. § 4001 (1949); WIS. STAT. § 241.18 (1951); WYO. COMP. STAT. ANN. § 41-701 (1945). In addition the Nevada statute apparently requires that a sale of merchandise must be both out of the ordinary course of trade and in bulk in order to fall within the statute, but that a sale of substantially all of the fixtures need be out of ordinary course but not in bulk. However, it is possible that in the amendment process in Nevada, some inconsistencies may have been overlooked. NEV. COMP. LAWS §§ 6816 to 6820 (Supp. 1949).

12. CAL. CIV. CODE § 3440.1 (Supp. 1953); CONN. GEN. STAT. § 6705 (1949); ILL. ANN. STAT. c. 121 1/2, § 78 (Supp. 1952); N.J. STAT. ANN. § 46:29-1 (1940); N.C. GEN. STAT. § 39-23 (1950).

13. WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1934).

14. *Ibid.*

15. See note 12 *supra.*

particular transaction was out of the ordinary course of trade, or whether it was a transfer of a "major part," "substantial part," or "large part," no consideration has been given to the "in bulk" requirement except to characterize the particular transaction as being or not being "in bulk."[16] Since it is clearly unreasonable as a matter of common-sense interpretation of language to conclude that "in bulk" has quantitative connotations under such a statute, the phrase must have a qualitative meaning. And its qualitative connotation must somehow be different from that accorded the out of the ordinary course of trade language. The only alternative to acceptance of the last two statements is the conclusion that the legislature inserted meaningless words into the statute, certainly the least preferred explanation of all.

An examination of the cases decided under such statutes, however, leads to the conclusion that the courts which have decided them have either not considered the "in bulk" language as imposing a requirement in addition to the other two, or have not made explicit what that third requirement might be, perhaps on the assumption that its meaning is so obvious as to necessitate no explanation.[17] In any event no specific inquiry has been directed to the meaning of the words in question in any of those cases, the requirement, if indeed the words were regarded as imposing one, being regarded as satisfied each time the transaction met the specific quantitative test and the "out of the ordinary course of trade" test.

But when the cases decided under the other sub-class of the group of statutes under discussion, *i.e.*, those which provide that any part is a sufficient proportion to bring the transaction within them provided that it be out of the ordinary course of trade and in bulk,[18] are

16. In the following cases there was presented either the question of whether a sufficient quantity of the total goods was sold to meet the specific quantitative requirement, or the question of whether the transfer was out of the ordinary course of trade. In none of the cases did the court indicate any awareness that the statutory language demands the fulfillment of three and not merely two requirements. In some of them the matter was complicated by the fact that parts of a business or separate businesses owned by the same persons were sold to different purchasers, but even in those cases, the courts seemed to derive no aid from the "in bulk" requirement in reaching their conclusions. Jubas v. Sampsell, 185 F.2d 333 (9th Cir. 1950) (California statute); Markwell & Co. v. Lynch, 114 F.2d 373 (9th Cir. 1940) (California statute); Main v. Hall, 41 F.2d 715 (7th Cir. 1930) (Illinois statute); Schainman v. Dean, 24 F.2d 475 (9th Cir. 1928) (California statute); American Trust & Savings Bank of Kankakee v. Durham, 298 Fed. 304 (7th Cir. 1924) (Illinois statute); Swern v. Liggett, 51 F. 2d 821 (E.D. Ill. 1931) (Illinois statute); *In re* Lipman, 201 Fed. 169 (D.C. N.J. 1912) (New Jersey statute); Shasta Lumber Co. v. McCoy, 85 Cal. App. 468, 259 Pac. 965 (1927); Corrigan v. Miller, 338 Ill. App. 212, 86 N.E.2d 853 (1949); Frieling v. Emling, 248 Ill. App. 475 (1928); Ogden Avenue State Bank v. Cherry, 225 Ill. App. 201 (1922); Larson v. Judd, 200 Ill. App. 420 (1916); Armfield Co. v. Saleeby, 178 N.C. 298, 100 S.E. 611 (1919).

17. See note 16 *supra*.

18. 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

considered, it becomes immediately apparent that at least one court has felt the need for ascribing some independent meaning to the "in bulk" language, although it must be admitted that the attempt has not been entirely satisfactory. The first case in which a conscious attempt was made to give some meaning of a qualitative nature to the "in bulk" requirement is *Feldstein v. Fusco*.[19] There it was said that

> [t]he meaning of the words "in bulk" may probably be best understood by saying that sales in "parcels," "packages" and "barrels" are not sales in bulk. A sale in bulk is made where separating, counting, measuring, weighing or dividing in parcels, packages or barrels does not take place but where the mass and the heap are sold as one.[20]

That definition is, of course, consistent with one of the dictionary definitions quoted earlier,[21] and upon superficial examination seems a sensible meaning to give to the language in question. But upon further reflection it is readily perceived that its adoption would give rise to an intolerable situation, one perhaps best illustrated by the case of *Mott v. Reeves*.[22] There the articles sold had been put up in packages, partly for convenience and partly for their preservation. After a detailed inventory of the various articles was made for the purpose of determining the total price to be paid, the articles were delivered to the purchaser in the original bundles. The purchaser contended that because of the separation into packages, the taking of the inventory and the setting of the price on the basis of that inventory, the sale was not in bulk. In rejecting that contention the court referred to the *Feldstein* definition but went on to say:

> Concededly a purchaser might buy a large part of one's stock of goods, by selecting a certain number of one article and a definite amount of another, and not be said to have made a bulk or mass sale.
>
> But here the undisputed evidence is that the bargain was that defendant should purchase all the material and articles used . . . [by sellers] in the contracting branch of their business. Defendant took it all, whatever it was. It was a mass sale. The listing was made not for the purpose of the sale itself, but to fix the

(1950); 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); NEB. REV. STAT. § 36-501 (1952); N.H. REV. LAWS c. 262, § 43 (1942); N.Y. PERS. PROP. LAW § 44; N.D. REV. CODE § 51-0202 (1943); OHIO GEN. CODE ANN. § 11102 (1938); S.D. CODE § 54.0301 (1939); TEX. REV. CIV. STAT. ANN. art. 4001 (1945); VT. REV. STAT. § 7846 (1947); VA. CODE § 55-83 (1950); W. VA. CODE ANN. § 4001 (1949); WIS. STAT. § 241.18 (1951); WYO. COMP. STAT. ANN. § 41-701 (1945).

19. 205 App. Div. 806, 201 N.Y. Supp. 4 (3d Dep't 1923), *rev'd on other grounds*, 238 N.Y. 58, 143 N.E. 790 (1924).

20. 205 App. Div. at 809, 201 N.Y. Supp. at 6.

21. Text at note 14 *supra*.

22. 125 Misc. 511, 211 N.Y. Supp. 375 (Sup. Ct. 1925), *aff'd without opinion*, 217 App. Div. 718, 215 N.Y. Supp. 889 (4th Dep't 1926), *aff'd mem.*, 246 N.Y. 567, 159 N.E. 654 (1927).

> price of the whole. The delivery was made in packages for convenience and preservation of the goods. I think it must be held that this was a sale in bulk.[23]

It is to be noted that a new element was thus introduced, an element difficult of precise definition, a "mental" element. Thus it appears that the fact that separating and counting took place will prevent the transaction from being in bulk only in those cases where there cannot be found a general intention to purchase, as a unit, the total amount of goods which comprise the subject-matter of the transaction.

Although the report is scanty, apparently the same contention as was made in the *Mott* case was raised in *Sternberg v. Rubenstein.*[24] There one-sixth of the stock of a shoe retailer was sold to one person without compliance with the bulk sales statute; the number of shoes were counted. The Appellate Division found the *Feldstein* definition

> . . . adequate for the facts in that case but too narrow to be applied generally, or the intent and purpose of the statute would be destroyed. To say that a retail shoe dealer may take the transaction out of the language and intent of the statute by "separating" and "counting" the number of shoes he sells to another dealer, when the sale constitutes a large percentage of his stock, would permit any seller and purchaser to defeat its purpose.[25]

No reference was made to the *Mott* case, so it is uncertain whether the mental requirement imposed by that decision still obtains.[26]

The most recent development took place in a case decided by the United States Court of Appeals for the Second Circuit.[27] There, a chattel mortgage, given to secure a demand note for $6,000, covered thirty-four specifically described articles, which constituted almost one-half in quantity and value of the mortgagor's entire stock of merchandise. The articles were selected so that their total value would approximate $7,500, apparently the figure considered proper by the parties as the value of the collateral to secure the note. Again the mortgagee urged the *Feldstein* definition as controlling on the issue of whether the mortgage was in bulk, asserting that since the mortgage was on specifically enumerated items, it was not in bulk. Re-

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23. 125 Misc. at 516, 211 N.Y. Supp. at 380.

24. 279 App. Div. 30, 108 N.Y.S.2d 218 (4th Dep't 1951), *rev'd on other grounds*, 305 N.Y. 235, 112 N.E.2d 210 (1953).

25. *Id.* at 31, 108 N.Y.2d at 219.

26. In Tupper v. Barnett, 233 Mass. 565, 124 N.E. 427 (1919), the court found a preconceived intention on the part of the seller to sell his entire stock of merchandise controlling on the issue of whether the sale of part of it in pursuance of that intention was a sale in bulk. For holdings that an auction sale is not in bulk, see Goetz v. Michael Tauber & Co., 282 Fed. 869 (7th Cir. 1922). See also, Schwartz v. King Realty & Investment Co., 93 N.J.L. 111, 107 Atl. 60 (Sup. Ct. 1919); Lowe v. Fairberg, 245 App. Div. 731, 280 N.Y. Supp. 615 (2d Dep't 1935).

27. Davis v. Lawrence-Cedarhurst Bank, 204 F.2d 431 (2d Cir. 1953), *motion for recall of mandate and for leave to petition for rehearing denied*, 206 F.2d 388 (2d Cir. 1953), *cert. denied*, 346 U.S. 877 (1953).

jecting that contention and relying on the *Sternberg* case, Judge Swan said:

> The appellant relies on definitions which declare that "bulk" refers only to merchandise which is neither counted, weighed nor measured. It argues that its mortgage falls outside such definition because the mortgaged articles were separated, counted and identified by the trade name of the article or the name of the manufacturer, the model number and the serial number where required. If such listing could avoid the impact of the Bulk Mortgage Act or the Bulk Sales Act, it would easily be possible for a retail dealer to dispose of his entire stock of merchandise without the giving of the notices which the statutes require for the protection of creditors. Sternberg v. Rubenstein . . . expressly disapproved the definition of "in bulk" in Feldstein v. Fusco . . . as too narrow to be applied generally. We believe the Sternberg case represents the correct interpretation of the statute and think it decisive of the case at bar. *When the mortgage covers a substantial part, in quantity and value, of the mortgagor's stock of merchandise, we cannot doubt that it is a mortgage "in bulk."* To hold otherwise would create a significant loophole in the operation of the Act.[28] [Italics added.]

Several observations seem pertinent at this point. In the first place, the language of the bulk mortgages act differs from that of the bulk sales act, and the difference may be of some significance in the evaluation of the decisions. The bulk sales act clearly imposes but two requirements, *i.e.*, that the sale be "in bulk" and that it be "out of the ordinary course of trade," and states further that the transfer of "any part" is within the statute if those two requirements are met.[29] The bulk mortgages statute, on the other hand, reads as follows:

> Every mortgage or conveyance intended to operate as a mortgage upon a stock of merchandise in bulk or any part thereof . . . shall be void. . . .[30]

It is arguable that "in bulk" and "any part" are alternative quantitative requirement under that wording, rather than that "a stock" (meaning the whole stock) and "any part" are the alternative quantitative requirements, which is clearly the situation under the language of the bulk sales act. Although the distinction was not adverted to, Judge Galston placed the suggested interpretation on the language of the bulk mortgage act in the district court decision[31] in the *Davis* case. Apparently in response to the contention of the trustee in bankruptcy that the bulk mortgages act

> . . . covers not only "bulk" assignments of merchandise, but also transactions in which a substantial part of the entire merchan-

28. 204 F.2d at 433.
29. N.Y. PERS. PROP. LAW § 44.
30. N.Y. LIEN LAW § 230a.
31. *In re* Arrow Home Appliances, Inc., 107 F. Supp. 914 (E.D.N.Y. 1952).

> dise inventory of the mortgagor is placed under the lien of the mortgage,[32]

he stated:

> I think it is clear that there was no sale in bulk as contemplated by the statute. Certainly not if "bulk" means the whole of the merchandise, i.e., all of it. On the other hand, the statute does apply to "any part" of the merchandise. Carried to its logical ad absurdum, any part, fractionally, might be one item, but so to construe it would not fall within the manifest object of the Act, which is to prevent the perpetration of a fraud on creditors. . . .[33]

After reviewing some of the cases and noting that the bulk mortgages act is *in pari materia* with the bulk sales act,[34] Judge Galston, relying primarily on the opinion of the Appellate Division in the *Sternberg* case, stated that there was some authority for the proposition that the bulk mortgages act covers "a transaction in which a substantial part of the merchandise . . ."[35] is disposed of. Presumably the conclusion is that the latter statement is true even though the transaction is not "in bulk," for the court held the act applicable to the transaction.

Reference to the language quoted above from Judge Swan's opinion on appeal reveals, however, that he regarded the significance of the fact that a substantial part was mortgaged to be that the transfer was, therefore, one "in bulk."[36] Consequently, as is apparently the sense of all of the other cases construing the New York statutes, "in bulk" was not considered to be an alternative to "any part."

The next point of importance in evaluating the *Davis* decision is that it was handed down in ignorance of the fact that the New York Court of Appeals had reversed the Appellate Division in the *Sternberg* case.[37] When that fact came to light, certain observations of Judge Swan, in the course of an opinion denying a motion to vacate the judgment in the *Davis* case, must be observed. First, however, the significance of the opinion of the Court of Appeals in the *Sternberg* case must be assessed. By a divided court, the case was reversed on the specific ground that the Appellate Division's construction of the "out of ordinary course" language was incorrect. But Judge Fuld, writing for the majority of the court, introduced his discussion of the meaning of "out of ordinary course" by some sweeping statements as to the general applicability of the statute, and more particularly, about the relative size requirement which must be met in order for the statute to be considered applicable. He said:

32. *In re* Arrow Home Appliances, Inc., 107 F. Supp. 914 (E.D.N.Y. 1952).
33. *Id.* at 917.
34. *Ibid.*
35. *Ibid.*
36. Davis v. Lawrence-Cedarhurst Bank, 204 F.2d 431, 433 (2d Cir. 1953).
37. Sternberg v. Rubenstein, 305 N.Y. 235, 112 N.E.2d 210 (1953).

> Recognizing the onerous nature of the restrictions imposed upon transactions within its scope, this court early construed the Bulk Sales Act as being meant to apply only in "rare and irregular cases," only to the "extraordinary sale * * * such as can occur but few times in the life of a merchant". . . .
> Following this guide, our courts have limited the reach of this statutory provision to cases involving the sale of substantially an entire inventory or business.[38]

In support of the latter statement Judge Fuld cited *Mott v. Reeves*,[39] *Ben Bimberg & Co., Inc. v. Unity Coat & Apron Co., Inc.*,[40] *Texas Co. v. Drexelius*,[41] and referred to *New York Credit Men's Ass'n. v. Domestic Broadtail Producers*.[42] It is true that in each of the cited cases, all of which construe the New York statute, all or substantially all of the business was transferred, but it is also true that the relative size of the transfer was not the issue in any of them.

Several considerations must be weighed in any analysis of the impact of the statement on New York law as well as of its intrinsic soundness. First of all, Judge Fuld's statement is a *dictum* in no way

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38. Sternberg v. Rubenstein, 305 N.Y. 235, 122 N.E.2d 210 (1953).

39. 125 Misc. 511, 211 N.Y. Supp. 375 (Sup. Ct. 1925), *aff'd without opinion*, 217 App. Div. 718, 215 N.Y. Supp. 889 (4th Dep't 1926), *aff'd mem.*, 246 N.Y. 567, 159 N.E. 654 (1927). The issues in that case were three: (1) the right of the trustee in bankruptcy to bring the action, (2) whether the items sold constituted merchandise, and (3) whether the sale was "in bulk." But it must be noted that the more particular inquiry thought determinative of whether the sale was "in bulk" related to the applicability of the *Feldstein* requirement that no separating or counting take place, *i.e.*, there was no dispute in the case as to whether a sufficient quantity had been sold, the only inquiry on that point being whether the way in which it was sold kept the transaction outside the statute. The court resolved all issues against the purchaser. See text at note 23 *supra*.

40. 150 Misc. 836, 270 N.Y. Supp. 580 (Sup. Ct. 1934), *aff'd*, 244 App. Div. 777, 280 N.Y. Supp. 220 (1st Dep't 1935). The issue in the case was whether the sale of laundered coats, aprons, linens, etc. belonging to a business which rented them to customers was the sale of merchandise. Again there was no dispute as to whether enough had been sold.

41. 176 Misc. 371, 27 N.Y.S.2d 503 (Sup. Ct. 1941). The only issue in the case was whether a partnership operating several enterprises should have listed all of the partnership creditors in complying with the statute in selling one of the enterprises, or merely those creditors who had extended credit because of the conduct of the particular business sold. The court held that all partnership creditors had to be listed.

42. 61 F. Supp. 102 (S.D.N.Y. 1945). The decision here was that the transfer in question was not out of the ordinary course of trade. The case clearly states that whether the sale was "in bulk" did not have to be decided, but the judge went on to point out that there are no New York decisions of an authoritative nature as to the meaning of the phrase. That the judge thought of the "in bulk" language as imposing some kind of quantitative requirement is indicated by the following language:

> There seem to be no authoritative decisions in New York which directly define a bulk sale. In all the cases that have come to my attention, the entire stock, or substantially the entire stock, of the merchant was transferred. But the phrase "any part or the whole" is certainly subject to the interpretation that the size of the transfer is insignificant.

Id. at 105. Attention is directed to the fact, however, that Judge Conger recognized clearly the difficulty of conceiving the "in bulk" language as imposing a quantitative requirement and at the same time giving effect to the "any part" language.

necessary to the decision in the case, but, on the other hand, the Court of Appeals has so rarely in recent years considered a bulk sales case to be of sufficient importance to warrant the writing of an opinion, that the mere fact that two opinions were written entitle the case to unusual consideration. Secondly, the language in question appears to fly directly in the teeth of the statute. The New York Bulk Sales statute[43] states clearly that a transaction is covered by it if *any part* is sold, provided that the transfer be both "in bulk" and "out of the ordinary course of trade." There is no suggestion in Judge Fuld's opinion that "out of ordinary course of trade" has quantitative connotations, although it is arguable that it does.[44] But even assuming, *arguendo,* that quantitative connotations are to be found in the "out of ordinary course" language, they would be limitations of a much smaller magnitude than those described by Judge Fuld. Thus the only specific part of the statute which could be relied on to supply the missing factor is the "in bulk" language; but no reference was made to that language as the basis for the statement. Instead, Judge Fuld chose to view the statute as a whole, including the need in response to which it was enacted[45] as well as the onerous conditions it imposes,[46] and on that basis considered that it had no application to transactions which varied but slightly from the routine.[47] Although Judge Fuld's position may be, and probably is, sound as a matter of policy judgment, yet the language of the statute reflects a different judgment on the point, a judgment made by the organ of government entrusted with making it, at least in the first instance and to the extent that it is able to express that judgment unambiguously in statutory language. Although the giving of some quantitative connotation to the "in bulk" language may be justified as a matter of resolving ambiguous language, certainly it is not a tenable argument to say that the statute states, as cumulative requirements, both that the sale may be of any part and must be of practically all. Yet that is the result of the reasoning in the majority opinion, although the avoidance of reference to the specific language of the statute renders the unsatisfactory nature of the resolution of the conundrum less patent than would otherwise be the case. In effect, the Court of Appeals has stricken from the statute the "any part" language, and has substituted therefor a requirement that the transfer be of substantially all of the business or of substantially an entire inventory thereof, perhaps by utilizing the "in bulk" language, perhaps not.

43. N.Y. PERS. PROP. LAW § 44.
44. See text at Section IIa *infra.*
45. Sternberg v. Rubenstein, 305 N.Y. 235, 238, 112 N.E.2d 210, 211 (1953).
46. *Id.* at 239, 112 N.E.2d at 212.
47. *Ibid.*

Turning again to the *Davis* ligitation, we find Judge Swan denying a motion to vacate the judgment in the case.[48] The motion was bottomed on the idea that his earlier opinion had rested primarily on a decision of an intermediate appellate court, reversed in fact by the highest court of the state prior to the rendition of the decision in the federal case. Judge Swan's denial of the motion was based on the ground that the state reversal had been for a reason unconnected with the part of the intermediate appellate court's opinion on which the federal court relied.[49] That Judge Swan was on sound ground in so interpreting the Court of Appeals *holding* in the *Sternberg* case is clear, for no mention was made of the *Feldstein* test as being either satisfactory or unsatisfactory in that opinion. It is possible, however, that under the broad *dictum* as to the amount which must be included found in the *Sternberg* opinion, the *Davis* case was incorrectly decided.[50] And to the extent that the *dictum* was somehow based on the idea that it resulted from the requirement that the transfer be "in bulk," the two opinions may be inconsistent. For certainly Judge Swan regards the "in bulk" language as imposing, as a maximum, a requirement that a substantial part be disposed of, whereas Judge Fuld regards the statute (whether or not because of the "in bulk" requirement) as applicable only to transactions in which substantially the entire business or an entire inventory is disposed of.

Several possibilities are thus presented by this confusing and contradictory handling of statutory language. One possibility is that the original qualitative definition given the "in bulk" language in the *Feldstein* case, even as limited by the *Mott* refinement (that it is applicable only where there was no preconceived intention to sell whatever part was sold as an aggregate, with the counting and separating being a mere matter of convenience in determining the price), no longer has any importance. If that be the correct interpretation, then it becomes necessary to determine whether there is any vitality left in the "in bulk" language, and, if so, what its nature is. One possibility is that suggested in the *Davis* case, *i.e.*, that a sale is "in bulk" if it is of a substantial part; another is that the broad *dictum* in the *Sternberg* opinion in the Court of Appeals is controlling and that it is based on the "in bulk" language. Still another possibility is that the "in bulk" language in the bulk sales statute has a different meaning from that in the bulk mortgages statutes. The latter conclusion is implicit in the opinion of the district judge in

48. Davis v. Lawrence-Cedarhurst Bank, 206 F.2d 388 (1953), *cert. denied*, 346 U.S. 877 (1953).

49. *Id.* at 389.

50. It should be noted that Judge Fuld's language would require the disposal of substantially the entire stock or substantially an entire inventory, whereas on the facts of the *Davis* case, it appears that less than one-half of the stock was subject to the chattel mortgage.

the *Davis* litigation. Finally it is possible that the *Feldstein* case, as modified by the *Mott* case, is still law in New York. But it is dubious that the situation which it apparently contemplates could arise as a matter of commercial practice.

By way of critique of the cases interpreting the New York statutes, it may be admitted that the original definition, in its unmodified form, is not acceptable, for it would truly nullify the effectiveness of the statute. Although the gloss added by the *Mott* case is an appealing one, yet it is not only difficult of precise proof, but it also contemplates a situation not likely to arise as a matter of commercial practice. But the alternative, in the thinking of the courts, is to give the "in bulk" language a quantitative meaning under a statute which in so many words states that there is no minimum requirement. Furthermore, assuming, *arguendo*, that "in bulk" has a dictionary meaning which is quantitative in nature as well as one which is qualitative in nature, the quantitative meaning is not a half-way one. Used quantitatively, "in bulk" means all or practically all. To give the meaning "all or substantially all" to the language (which I believe Judge Fuld to have done) is unjustifiable in view of the "any part" language; but to give it the "substantial part" meaning attributed to it by Judge Swan is to give it a meaning which is not in accord with either of the standard English meanings of the words. When the fact that "out of ordinary course," although basically a qualitative term, has necessary quantitative overtones (as will be pointed out)[51] which make it clear that truly insignificant sales are never included, the difficulties of assigning some sensible meaning to the "in bulk" language are increased even more.

Before the attempt is abandoned as hopeless, one more case must be considered. In *Sorrin v. Pacific Finance Corporation*,[52] separate chattel mortgages were given on various cars comprising the stock of an automobile dealer. Although the giving of the mortgages was pursuant to a general financing scheme, the mortgagor was not bound to deal exclusively with one lender, and he did in fact execute mortgages on cars to at least one other lender. In rejecting the contention that the mortgages were void for failure to comply with the bulk mortgages act, the court emphasized that they were separate mortgages on individual cars. Judge Galston stated:

> Thus neither in terms nor substance was the mortgaging of its automobiles as and when purchased on loans from different sources "a stock of merchandise in bulk or any part thereof" as contemplated by the bulk mortgages act. . . .[53]

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51. See text at notes 73 to 82 *infra*.
52. 37 F. Supp. 527 (S.D.N.Y. 1941).
53. *Id.* at 529.

Is it possible to draw any conclusion from this case as to the meaning of "in bulk?" A possible meaning is that a transfer is "in bulk" only when the requisite amount or proportion of the property (as determined by whatever the quantitative connotations of the "out of ordinary course" language may be) is sold out of ordinary course of trade to one or a group of persons who are somehow connected in interest, and within a sufficiently short period of time so that the technically separate transfers can be viewed in the eyes of the law as one transaction. That meaning would explain why, in the usual bulk sales situation, the courts have felt no need to discuss whether the transaction was "in bulk,"[54] for a sale of the requisite amount in one transaction to one person would be clearly "in bulk." The general problem of the effect of a series of transfers, either to the same or to different persons, has not been dealt with by the courts in any uniform manner, probably because the solution of the problem often is affected by other statutory requirements than the "in bulk" one. Consequently a separate section[55] of this article will be devoted to a consideration of the various problems which arise from such a fact situation.

"In bulk" has, however, been given quantitative meaning under the Massachusetts statute[56] which also provides that the sale of any part of the goods is enough, provided that the transaction be both in bulk and out of the ordinary course of trade. Although in one early federal case interpreting that statute the judge stated that he knew of ". . . no case in which the sale of less than an entire stock in trade has been so regarded,"[57] in *Tupper v. Barrett*[58] the Supreme Judicial Court of Massachusetts made it clear that the sale of something less than an entire stock in trade could be in bulk. The court, in the latter case, however, placed great weight on the fact that the seller had previously formed an intention to dispose of his entire stock of goods. Certainly the conclusion that a transaction may be in bulk under a statute proscribing the sale of any part only if it is a sale of all of the stock in trade is indefensible and in defiance of plain statutory language.

Some of the statutes define the term "in bulk" in various ways, so that instead of its being a separate requirement, it serves as a kind of collective label for a transaction in which the other statutory requirements have been met. Thus, under the statutes of the District

54. See text at notes 16 to 17 *supra.*
55. See Section II *infra.*
56. MASS. ANN. LAWS c. 106, §§ 1 and 2 (1947).
57. Carpenter v. Karnow, 193 Fed. 762, 765 (D.C. Mass. 1911).
58. 233 Mass. 565, 124 N.E. 427 (1919).

of Columbia,[59] Florida,[60] Georgia,[61] Maryland[62] and Oregon,[63] as well as an earlier Washington statute,[64] "in bulk" is separately defined so as to include all out of ordinary course sales on the one hand, and all sales of substantially the entire business (presumably whether or not out of the ordinary course of trade) on the other hand. The Kentucky statute[65] defines "in bulk" as either a large part out of the ordinary course of trade or a large part at auction, as does the Pennsylvania statute.[66] The Montana statute[67] defines a sale in bulk as one of an entire stock or an entire stock of a particular character, and the Washington statute[68] defines it as one in which all or substantially all of a stock of goods is sold out of the ordinary course of trade. No cases have been decided under any of these statutes which in any direct manner throw light on the meaning of the "in bulk" language.[69]

To recapitulate: some efforts have been made to give a particular and independent meaning to the "in bulk" language under statutes which do not contain an internal definition of the term, but the efforts have been markedly unsuccessful. Although from the earlier New York cases the idea may be derived that "in bulk" has, as a qualitative requirement, the meaning that a separating, counting or weighing will take the transfer out of the operation of the statute, provided that there is no general and pre-formed intention to sell whatever

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59. D.C. CODE ANN. § 28-1703 (1951).
60. FLA. STAT. ANN. § 726.05 (1944).
61. GA. CODE ANN. § 28-206 (1952).
62. MD. ANN. CODE GEN. LAWS art. 83, § 99 (1951).
63. ORE. REV. STAT. § 79.040 (1953).
64. Wash. Laws 1913, c. 175, § 4.
65. KY. REV. STAT. § 377.010 (1953).
66. PA. STAT. ANN. tit. 69, § 525 (1931).
67. MONT. REV. CODES ANN. § 18-204 (1947).
68. WASH. REV. CODE § 63.08.060 (1951).
69. The "in bulk" language may, however, have an indirect effect, though one not capable of being demonstrated in the cases. Thus, under statutes like the earlier Washington statute which provided that

> [a]ny sale or transfer of a stock of goods, wares, or merchandise, or all or substantially all, of the fixtures and equipment used in and about the business of the vendor, out of the usual or ordinary course of business or trade of the vendor, or whenever substantially the entire business or trade theretofore conducted by the vendor, shall be sold or conveyed . . . shall be deemed a sale and transfer in bulk in contemplation of this act. . . .

(Wash. Laws 1913, c. 175), it is arguable that the only applicable quantitative limitation is found in the alternative situation, *i.e.*, when all or substantially all is sold without regard to the out of ordinary course criterion, and that the latter criterion is the only one applicable when less than that amount is sold. That argument, however, seems not to have been convincing to the court in the following cases decided under statutes of this type, for in them the courts have rather seemed to think that the least amount which could be sold was "substantially all." Blanchard Co. v. Ward, 124 Wash. 204, 213 Pac. 929 (1923); Fudge v. Brown, 126 Wash. 475, 218 Pac. 251 (1923). And see Long Cigar and Grocery Co. v. Harvey, 33 Ga. App. 236, 125 S.E. 870 (1924) *semble*. It is possible that the presence of "in bulk" language in the statutes may have had some effect on the court's attitude toward the problem. For the solution suggested earlier in the footnote, and the one believed by this writer to be the correct one, see Goldstein v. Maloney, 62 Fla. 198, 57 So. 342 (1911).

the total quantity might turn out to be as a unit or aggregate, that interpretation has been at least seriously weakened if not completely emasculated by the latest cases construing the New York statutes. The alternative suggested by those cases, *i.e.*, that "in bulk" is a quantity requirement, is a most unsatisfactory resolution of the problem in the light of the specific language of the New York bulk sales act. At least one case decided under the New York bulk mortgages act suggests a different criterion, a criterion of a qualitative nature which would resolve the difficulty created by the ambiguous statutory language. The concept of "in bulk" there suggested is that the transaction or transactions under consideration as possibly violative of the act must be related both as to time and as to purchasers in such a way that under the judicial microscope there will appear a slide which can be viewed as a unit or aggregate.

Although the Massachusetts cases contain suggestions that "in bulk" poses a definitely quantitative limitation on the applicability of the statute, it is difficult to conclude, either from the statutory language or the interpretations given to the statutes as a whole, that "in bulk" adds a quantity limit which would not otherwise be present. And this is true in spite of the fact that the transactions which gave rise to bulk sales legislation were of the type in which all or substantially all of the merchandise was disposed of in a single transaction.

Some support for my conclusion may be obtained from the fact that in many states, the legislature clearly did not conceive of the "in bulk" language as imposing a separate requirement at all; for it was thought necessary that the language be defined in the statute itself, and the definitions employed were merely summaries of the other requirements. Finally, although the language is ambiguous, it should be construed in context, and it is difficult to resolve the ambiguity by saying that "in bulk" relates primarily to the size of the transfer.[70]

II. The Meaning of "Out of the Ordinary Course of Trade"

Every bulk sales statute requires that under some circumstances a transfer must be out of the ordinary course of trade to fall within its operation;[71] most of the statutes state that only out of ordinary

70. A contrary conclusion was reached in Billig and Branch, *The Problem of Transfers under Bulk Sales Laws: A Study of Absolute Transfers and Liquidating Trusts*, 35 MICH. L. REV. 732, 739 *et seq.* (1937). In Legis., 82 U. of PA. L. REV. 856 (1934), the author considers the problem from the more general viewpoint of whether transactions of various sizes are included within the statutes without detailed consideration of whether transfers of small size are excluded by reason of a specific quantitative requirement, the "in bulk" language, or the "out of ordinary course" language. It is reasonably clear, however, from a reading of the entire note that the author conceives the "in bulk" requirement as being qualitative in nature rather than quantitative.

71. ALA. CODE tit. 20, §§ 10 to 14 (Supp. 1952); ARIZ. CODE ANN. § 58-301 (1939); ARK. STAT. ANN. §§ 68-1501 to 68-1504 (1947); CAL. CIV. CODE § 3440.1

course transfers are interdicted.[72] Although the primary meaning of the phrase would seem to be "different from the way in which things are ordinarily done," the language may provide a quantitative test as well. The principal problem which has developed in the cases, however, is the meaning of the words "seller's business" in the phrase "out of the ordinary course of the seller's business."

a. *Quantitative uses of the criterion.*

Two cases decided under statutes which have no specific quantitative limitation, *i.e.*, provide that the transfer of any part of the in-

(Supp 1953); COLO. STAT. ANN. c. 27, §§ 1 to 3 (Supp. 1952); CONN. GEN. STAT. §§ 6705 to 6707 (1949); 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); IDAHO CODE ANN. §§ 64-701 to 64-705 (1948); ILL. ANN. STAT. c. 121½, §§ 78-80a (Supp. 1952); IND. ANN. STAT. §§ 33-201 to 33-203 (Burns 1949); IOWA CODE ANN. c. 555, §§ 555.1 to 555.5 (1950); KAN. GEN. STAT. §§ 58-101 to 58-104 (1949); KY. REV. STAT. §§ 377.010 to 377.990 (1953); LA. REV. STAT. ANN. §§ 9:2961 to 9:2968 (1950); ME. REV. STAT. c. 106, §§ 6 and 7 (1944); MD. ANN. CODE GEN. LAWS art. 83, §§ 97 to 101 (1951); MASS. ANN. LAWS c. 106, §§ 1 and 2 (1947); MICH. STAT. ANN. §§ 19.361 to 19.363 (bulk sales), 19.371 to 19.373 (bulk mortgages) (1937); MINN. STAT. ANN. § 513.18 (West 1947); MISS. CODE ANN. §§ 274, 277 and 278 (1942); MO. ANN. STAT. §§ 427.010 to 427.050 (Vernon 1949); MONT. REV. CODES ANN. §§ 18-201 to 18-205 (1947); NEB. REV. STAT. §§ 36-501 to 36-502 (1952); NEV. COMP. LAWS §§ 6816 to 6820 (Supp. 1949); N.H. REV. LAWS c. 262, §§ 43 and 44 (1942); N.J. STAT. ANN. §§ 46:29-1 to 46:29-3 (1940); N.M. STAT. ANN. §§ 53-1001 to 53-1003 (1941); N.Y. PERS. PROP. LAW § 44 (bulk sales), N.Y. LIEN LAW § 230a (bulk mortgages); N.C. GEN. STAT. § 39-23 (1950); N.D. REV. CODE §§ 51-0201 to 51-0204 (1943); OHIO GEN. CODE ANN. §§ 11102 to 11103-1 (1938); OKLA. STAT. ANN. tit. 24, §§ 71 to 74 (1937); ORE. REV. STAT. §§ 79.010 to 79.040 (1953); PA. STAT. ANN. tit. 69, §§ 521 to 529 (1931) (but subsequent to July 1, 1954 Article 6 of the UNIFORM COMMERCIAL CODE will govern the law of bulk tranfers in Pennsylvania); R.I. GEN. LAWS c. 483, §§ 1 and 2 (1938); S.C. CODE §§ 11-201 to 11-206 (1952); S.D. CODE §§ 54.0301 to 54.0308 and 55.9901 (1939); TENN. CODE ANN. §§ 7283 to 7285 (Williams 1934); TEX. REV. CIV. STAT. ANN. arts. 4001 to 4003 (1945); UTAH CODE ANN. §§ 25-2-1 to 25-2-5 (1953); VT. REV. STAT. §§ 7846 and 7847 (1947); VA. CODE §§ 55-83 to 55-86 (1950); WASH. REV. CODE §§ 63.08.010 to 63.08.060 (1951); W. VA. CODE ANN. §§ 4001 to 4006 (1949); WIS. STAT. §§ 241.18 to 241.21 (1951); WYO. COMP. STAT. ANN. §§ 41-701 to 41-703 (1945).

72. ARIZ. CODE ANN. § 58-301 (1939); ARK. STAT. ANN. §§ 68-1501 to 68-1504 (1947); CAL. CIV. CODE § 3440.1 (Supp. 1953); COLO. STAT. ANN. c. 27, §§ 1 to 3 (Supp. 1952); CONN. GEN. STAT. §§ 6705 to 6707 (1949); ILL. ANN. STAT. c. 121½, §§ 70 to 80a (Supp. 1952); IND. ANN. STAT. §§ 33-201 to 22-203 (Burns 1949); IOWA CODE ANN. c. 555, §§ 555.1 to 555.5 (1950); KAN. GEN. STAT. §§ 58-101 to 58-104 (1949); LA. REV. STAT. ANN. §§ 9:2961 to 9:2968 (1950); ME. REV. STAT. c. 106, §§ 6 and 7 (1944); MASS. ANN. LAWS c. 106, §§ 1 and 2 (1947); MICH. STAT. ANN. §§ 19.361 to 19.363 (bulk sales), 19.371 to 19.373 (bulk mortgages) (1937); MO. ANN. STAT. §§ 427.010 to 427.050 (Vernon 1949); MONT. REV. CODES ANN. §§ 18-201 to 18-205 (1947); NEB. REV. STAT. §§ 36-501 to 36-502 (1952); N.H. REV. LAWS c. 262, §§ 43 and 44 (1942); N.J. STAT. ANN. §§ 46:29-1 to 46:29-3 (1940); N.Y. PERS. PROP. LAW § 44 (bulk sales), N.Y. LIEN LAW § 230a (bulk mortgages); N.C. GEN. STAT. § 39-23 (1950); N.D. REV. CODE §§ 51-0201 to 51-0204 (1943); OHIO GEN. CODE ANN. §§ 11102 to 11103-1 (1938); R.I. GEN. LAWS c. 483, §§ 1 and 2 (1938); TEX. REV. CIV. STAT. ANN. arts. 4001 to 4003 (1945); VT. REV. STAT. §§ 7846 and 7847 (1947); VA. CODE §§ 55-83 to 55-86 (1950); WASH. REV. CODE §§ 63.08.010 to 63.08.060 (1951); W. VA. CODE ANN. §§ 4001 to 4006 (1949); WIS. STAT. §§ 241.18 to 241.21 (1951); WYO. COMP. STAT. ANN. §§ 41-701 to 41-703 (1945). It is not clear from seemingly inconsistent provisions of the Nevada statute whether under all circumstances a transfer must be out of ordinary course in order to come within the statute. NEV. COMP. LAWS §§ 6816 to 6820 (Supp. 1949).

cluded goods is forbidden if the transfer be in bulk and out of the ordinary course of trade, indicate that the out of ordinary course criterion serves as a substitute for a quantity minimum. Thus in *Fiske Rubber Co. v. Hayes*,[73] the Supreme Court of Arkansas held that the inclusion of from $35 to $40 worth of a stock of a retail auto parts business in the sale of a related automobile agency was no greater in volume or value than an ordinary retail sale and so did not fall within the statute. And in *Krueger v. Hammond*,[74] the Supreme Court of Kansas took a similar position. There the seller was engaged in the garage business and performed those services usually performed by garagemen. He purchased fifteen tires and sixteen tubes which he offered for sale at retail though he carried no other accessories or tubes or tires. After making some sales, he had remaining on hand four tubes and eight tires, which he sold to another retail dealer without complying with the bulk sales statute. The court held the transaction outside the scope of the statute on the ground that it was not outside the ordinary course of business, although the court was not overly-careful to distinguish between the question of whether the out of ordinary course requirement had been met and the more general question of whether the transaction somehow violated the statute. The court stated that:

> [t]he articles . . . were so few and so diminutive that a disposal of them cannot be regarded as a bulk sale. They constituted merchandise, of course, and were a part of his stock, but the things sold were so small in number and value that they cannot be regarded as within the spirit and reason of the law. Neither can it well be said that the sale of that number of articles to one perchaser was outside of the ordinary course of the trade or business of the seller. It included no more tubes than were essential to a single car, and no more casings than would be necessary to equip two cars, and *must be regarded as a small retail transaction.* [Italics added.][75]

The strongest argument that the "out of ordinary course" language was intended to serve as a qualitative measure can be made under statutes in which it is merely an alternative requirement. Of these there are two principal classes: (1) those which require that the

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73. 131 Ark. 248, 199 S.W. 96 (1917).

74. 123 Kan. 319, 255 Pac. 30 (1927).

75. *Id.* at 320, 255 Pac. at 30. It should be noted that the Kansas statute imposes no requirement that the transfer be "in bulk," though the statute is called a bulk sales statute. KAN. GEN. STAT. §§ 58-101 to 58-104 (1949). See also Ethridge, J., dissenting, in Cohen v. Calhoun, 168 Miss. 34, 41, 150 So. 198, 199 (1933), for an indication that the out of ordinary course requirement is at least in part quantitative in nature. In Shasta Lumber Co. v. McCoy, 85 Cal. App. 468, 259 Pac. 965 (1927), the court held that the transfer of 123,826 feet of lumber by a sawmill company to a company operating a lumberyard was not, as a matter of law, outside the ordinary course of trade, where there was no evidence of the size of the total stock of the transferor at the time of the transfer.

transfer be either (a) out of the ordinary course of trade, or (b) of the entire stock in bulk;[76] (2) those which require that the transfer be either (a) out of the ordinary course of trade, or (b) of substantially the entire business to one or more persons.[77] In both classes of statutes, it is apparent that the single clearly quantitative requirement is imposed only in one of two alternative situations: if all or substantially all is sold, there is no out of ordinary course requirement; on the other hand, if less than that amount is sold, there is such a requirement, and it is certainly tenable to argue that the out of ordinary course language in that branch of the alternatives has a quantitative connotation. Although there are no holdings based on such a rationale in cases decided under those statutes, there is language in one Georgia case which suggests it.[78]

It should not be thought, however, that all transfers of a large proportion of the stock of a business are necessarily out of the ordinary course of trade. In *Hart v. Brierly*,[79] a biscuit manufacturing company entered into a contract to sell to one person a quantity of its product already manufactured and, in addition, the entire output of its bakery for a period of at least three months following. The Supreme Judicial Court of Massachusetts held that although the business was an included one, the transfer in question was not out of the ordinary course of trade. The court said:

> Where a going mercantile business is so conducted that to be profitable large quantities of goods must be sold to different customers, even to the extent of exhausting the entire stock which may be on hand at any stated time, such a sale is not voidable although all the stock in the seller's possession at the time may be delivered to a single buyer.
>
> The statutory test is whether the sale was made in the usual way in which a merchant owing debts conducts his business, or whether he takes an unusual method of disposing of his property in order to get the money for his own use, leaving his creditors unpaid. This inquiry is essentially an issue of fact depending upon the nature of the seller's business, his ordinary method of making sales, and his indebtedness. A sale of his entire stock by one trader might not be uncommon, while such a sale if made by another would be extraordinary and within the statute.[80]

76. ALA. CODE tit. 20, § 10 (Supp. 1952); DEL. CODE ANN. tit. 6, § 2101 (1953); IDAHO CODE ANN. § 64-701 (1948); MISS. CODE ANN. § 274 (1942); OKLA. STAT. ANN. tit. 24, § 71 (1937); TENN. CODE ANN. § 7823 (Williams 1934); UTAH CODE ANN. § 25-2-1 (1953).

77. D.C. CODE ANN. §§ 28-1703 (1951); FLA. STAT. ANN. § 726.05 (1944); GA. CODE ANN. § 28-206 (1952); MD. ANN. CODE GEN. LAWS art. 83, § 99 (1951); ORE. REV. STAT. § 79.040 (1953). In addition, MINN. STAT. ANN. § 513.18 (West 1947), provides that "[e]very sale of a portion of stock of merchandise, otherwise than in the ordinary course of the seller's business, and every sale of an entire stock of merchandise, shall be presumed fraudulent. . . ."

78. Goodman v. Clarkson, 39 Ga. App. 383, 147 S.E. 183 (1928).

79. 189 Mass. 598, 76 N.E. 286 (1905).

80. *Id.* at 601, 76 N.E. at 287. It must be noted, however, that no little stress was placed on the fact that a perishable commodity was the subject matter of

b. *Qualitative uses of the criterion.*

As suggested earlier,[81] if out of ordinary course is to be used as a qualitative criterion it should pose a question of the "how" type. Was the manner in which the seller went about disposing of his inventory, or part of it, a method of disposal which was usual or unusual? Several elements might be considered relevant in the resolution of such a question.[82] Thus, the state of mind of the seller as well as his solvency might be considered important: and so might the question of the effect of the transfer on the ability of the seller to continue his business in substantially the same manner as before the transfer and that of the adequacy of the consideration. In fact, such elements have received but scant attention in the cases, probably for the reason that they involve inquiries which, of necessity, have a tendency to complicate the determination of a question which, from the viewpoint of commercial practice, should be simple and certain. One of the major initial reasons for the passage of bulk sales legislation was to avoid the difficulty of proving that the purchaser had a fraudulent state of mind; and to reintroduce a mental element into the determination of whether a particular transfer fell within the statute would tend to cause the original difficulty to reappear, though perhaps in somewhat different form.

Adequacy of consideration, solvency of the seller, ability to continue business, and an improper state of mind would be factors of great importance under those statutes which merely raise a rebuttable presumption of fraud in case of failure to comply with the statute.[83] They are of no demonstrable significance, on the other hand, in cases decided under statutes which provide that a transfer not in compliance with the statute is void as to creditors.[84] For, in spite of the occasional statements referred to in the previous footnote, it is of great significance that in the hundreds of decided cases almost no

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the transaction in the case. Quaere, whether the same result would obtain if the entire supply of steel rails on hand of a large steel mill were sold to one person in the absence of an established pattern of similar sales?

81. See Section I *supra*.

82. For a discussion of this problem, the conclusions of which are in agreement with those reached herein, see Billig and Branch, *supra* note 70, at 735-738.

83. *E.g.*, under an earlier New York statute, a sale not in compliance merely gave rise to a rebuttable presumption of fraud. N.Y. Laws 1907, c. 722. In Wallach v. Baumryter, 170 App. Div. 618, 156 N.Y. Supp. 497 (1st Dep't 1915), *aff'd mem.*, 224 N.Y. 652, 121 N.E. 896 (1918), the facts that there were full consideration, solvency at the time of the transfer and an absence of evidence to support any finding that the transfer was made with intent to hinder, delay or defraud creditors, served to rebut the presumption arising from non-compliance with that statute.

84. *Dicta* in two cases are opposed to each other on the point. In Kirkholder & Rausch Co. v. Bridgland, 120 Misc. 565, 199 N.Y. Supp. 113 (Sup. Ct. 1923), *aff'd mem.*, 211 App. Div. 838, 206 N.Y. Supp. 923 (4th Dep't 1924), decided under a later New York statute which made all transfers not in compliance therewith conclusively fraudulent (N.Y. Laws 1914, c. 507), the court rejected a contention that because full value was paid and the money applied to the

reference has been made to any of those elements as factors influencing decision.[85]

What, then, have been the elements which have been convincing to courts on the issue of whether a transfer was or was not out of ordinary course of trade? Certainly most of the cases have been concerned with whether the purchaser fell into the class of customers with whom the seller usually dealt. To illustrate: a retailer usually sells in small quantities to persons who buy for their own consumption or use rather than for resale; so a sale by one retailer to another in the same business is regarded, prima facie, as out of the ordinary course of trade.[86]

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payment of the seller's debts, the act was inapplicable. However, the court, citing the *Wallach* case, note 83 *supra*, went on to say:

> If . . . [seller] had been solvent at the time of the transfer, if he received full value for the goods and applied the proceeds to the payment of his debts, then it is possible that the transfer might not have been held invalid.

120 Misc. at 566, 199 N.Y. Supp. at 114. The court goes on to point out, however, that the statute was changed since the decision in the *Wallach* case. Yet it remains true that the statement quoted would suggest that not only adequacy of consideration, but also solvency of the seller would be factors in determining the applicability of the statute.

On the other hand, the Massachusetts court in Merchants Discount Co. v. Esther Abselon, Inc., 297 Mass. 517, 9 N.E.2d 528 (1937), stated that solvency of the seller was completely immaterial under the bulk sales statute.

Language may be found in a few cases which suggests that the state of mind of the seller may be important. Part of the test of whether the transfer is out of ordinary course was stated to be whether the seller ". . . takes an unusual method of disposing of his property in *order to get the money for his own use* . . . ."[talics added.] Hart v. Brierly, 189 Mass. 598, 601, 76 N.E. 286, 287 (1905). And in Tupper v. Barrett, 233 Mass. 565, 569, 124 N.E. 427, 428 (1919), the court said:

> . . . it also could have been found that when the sale to the plaintiff was made . . . [seller] had formed the intention of selling his entire stock of merchandise, and that the sale to the plaintiff was in pursuance of that intention and was a 'sale in bulk' of part of a stock of merchandise, *rather than in the ordinary course of trade in the regular and usual prosecution of the seller's business*. . . . [Italics added.]

It is, of course, impossible to tell whether the state of mind discussed made the sale "in bulk" or "out of ordinary course" or even whether they were regarded by the court as separate requirements. Finally in Sternberg v. Rubenstein, 305 N.Y. 235, 112 N.E.2d 210 (1953), *reversing* 279 App. Div. 30, 108 N.Y.S.2d 218 (4th Dep't 1951), it seems clear that the fact that the sale was made in order to enable the seller to remain in business rather than as a means of discontinuing it was of prime importance. See also Slaughter v. Cooper Corporation, No. 2, 20 Tenn. App. 241, 97 S.W.2d 648 (1936); Henry King & Co. v. Arnett Bros., 7 Tenn. App. 410 (1928).

85. In fact, in Sabin v. Horenstein, 260 Fed. 754 (9th Cir. 1919), the court, in a determination of whether the transfers in question were out of ordinary course, found that whether seller made them with intent to hinder, delay and defraud creditors was immaterial, so long as there was no showing that buyer joined in that fraudulent intent. This case demonstrates, that while the purpose of the legislation was to avoid the necessity of proving that a purchaser concurred in a seller's fraudulent intent in order to avoid a transaction, the method adopted in drafting the legislation was not, in the final analysis, designed to establish a conclusive presumption of such concurrence and thus convert what would not otherwise be a fraudulent conveyance into one, but rather was to render such concurrence of intent legally immaterial and to substitute for it certain specific requirements which bore no necessary relationship to the existence of fraud in fact.

86. See Billig and Branch, *supra* note 70 at 737.

It is, of course, incidentally true that sales in the latter group will almost invariably be larger than the seller's usual transactions,[87] and usually it is not possible to separate these factors and evaluate them independently of one another. It has already been shown that, under some circumstances, the out of ordinary course language serves as a relative quantitative minimum,[88] but it has also been pointed out that very large transactions may sometimes be regarded as normal ones.[89] It is not insignificant, however, that in cases presenting the latter situation, the transfers were to people who were within the usual class of customers of the particular seller.[90]

The problem can best be made clear by first examining particular statutory language. Nearly all of the statutes contain language which more closely defines the business out of whose ordinary course the transaction must be to fall within the purview of those statutes. Although the language is not identical in these statutes, yet they all provide in substance that the transaction must be out of the ordinary course of trade and not in the regular and usual prosecution of the *seller's business*.[91] It is the presence of the word "seller's," or its equivalent, in the statutes which is responsible for the difficulty in a substantial number of cases, for upon the interpretation given to the phrase "seller's business" depends the answer as to whether custom in the trade, apart from what the particular seller has done in the past, may be considered in establishing whether the transaction was unusual. Stated differently, the problem is whether that language means the general line of business in which the seller is engaged, or, instead, the particular business establishment, regarded as a business entity, which the seller owns.

The answer regularly given to that question has been that it is the way in which this particular seller did business, quite apart from custom in the industry, which controls.[92] But it should not be assumed that the courts have made explicit the reasoning process involved in solving the problem in all of the cases. The first step, however, in any determination of whether a particular transaction is or is not in the ordinary course of the seller's business must, of necessity, be an inquiry into just what that business is, or indeed, whether there is any

87. See Billig and Branch, *supra* note 70 at 737, n.19.
88. See text at notes 73 to 78 *supra*.
89. See text at notes 79 to 80 *supra*.
90. Shasta Lumber Co. v. McCoy, 85 Cal. App. 468, 259 Pac. 965 (1927); Hart v. Brierly, 189 Mass. 598, 76 N.E. 286 (1905).
91. Every bulk sales statute except those of Arizona and South Dakota contains substantially equivalent language.
92. Jubas v. Sampsell, 185 F.2d 333 (9th Cir. 1950); Irving Trust Co. v. Rosenwasser, 5 F. Supp. 1016 (S.D.N.Y. 1934); Cohen v. Calhoun, 168 Miss. 34, 150 So. 198 (1933); *cf.* Keller v. Fowler Bros. & Cox, 148 Tenn. 571, 256 S.W. 879 (1923); *see* Conquest v. Atkins, 123 Me. 327, 330, 122 Atl. 858, 859 (1923).

evidence to support a finding that there was any previously established course of trade.

In *Vacuum Oil Co. v. The Wichita Independent Consolidated Companies*,[93] the seller was engaged in the business of selling lubricating oils and greases in addition to motorcycles, bicycles and their accessories. Under the terms of a contract between himself and the plaintiff, the seller obtained his year's supply of oil, about one hundred barrels, at a reduced price. Since both his place of business and his sales were small, the latter usually by the gallon, he normally received delivery in lots of a few barrels. This method of doing business continued for several years. In 1917, seller changed his mode of taking delivery, getting an entire year's supply consisting of ninety barrels in one shipment. He stored about five barrels on his premises, as was his custom, and placed the remainder in a public warehouse. Although a salesman was hired who took a few orders in pursuance of a plan to sell by the barrel, those orders were not filled. Instead, seller sold the entire eighty-five barrels to the defendant without complying with the bulk sales statute. In the action brought by the creditor against the non-complying purchaser, it was contended that the former course of selling by the gallon had been abandoned and so this transaction was not out of the ordinary course of any established method of doing business: in short, that this was the very first transaction in what had not yet become an established mode of doing business. The court rejected that contention. Assuming that the old course of trade, *i.e.*, selling by the gallon, had been abandoned, the court felt that a new method, selling by the barrel, had been established. That method then became the ordinary course of trade of this seller, and the transaction in question was in fact a departure from it and so within the scope of the statute. Since no sales were actually made in pursuance of the new mode of doing business, it is evident that to establish a course of trade, very little has to be done in pursuance of a plan to operate in a certain fashion. On the facts of this case it seems very doubtful to this writer that enough was done. In fact, the evidence shows clearly that no oil was actually sold by the barrel, and in the face of that evidence it is difficult to conclude that a course of *trade* had been established.[94] It is arguable, however, that

93. 110 Kan. 245, 203 Pac. 915 (1922).

94. Although based on a different rationale, Feldstein v. Fusco, 238 N.Y. 58, 143 N.E. 790 (1924), *reversing* 205 App. Div. 806, 201 N.Y. Supp. 4 (3d Dep't 1923), should be considered at this time. There, after he had disposed of a place of business which he had previously operated as shoe repair shop, the alleged bulk seller fraudulently obtained a truckload of leather which he caused to be shipped to one place, not his place of business because he then had no place of business, picked it up in a truck and transported it to another place where he sold it as a truckload lot. The report is not clear on this point, but the sale of the truckload may have been an unprecedented one, *i.e.*, it is not improbable that seller had previously parceled out and sold parts of other truckloads. The Court

the previous course of trade had never been abandoned, an argument the acceptance of which would be a more satisfactory reason for the court's conclusion than the one offered.

Under some circumstances a businessman may have an established mode of operation which includes several quite different means of disposing of his goods: for example, he might sell at both wholesale and retail. Special problems are raised by such facts. Two cases need consideration on that point. In both of them the seller, in addition to selling men's furnishings at retail, had done some selling in job lots. In *Osterweil v. Crean*,[95] the seller had made a practice of buying one hundred to two hundred suits at a time. During the following two or three days, he would sell as many of them as possible from his home at retail. Thereafter he would dispose of the balance as a job lot to auction houses. Because of financial pressure, he purchased some lots which he sold immediately to defendant, who was not an auction house, without any effort to dispose of any of the suits at retail. There were about ten such transactions within a period of one month, and it is those transactions which were subjected to attack on the ground that they fell within the purview of the bulk sales statute.

In *Sabin v. Horenstein*,[96] the seller had, for a period of several years, sold in job lots in addition to the sales he made as a retail merchant. Just prior to the seller's bankruptcy, the number of job lot sales increased substantially. It was contended that the job lot sales made within the few months immediately preceding the bankruptcy, when taken collectively, constituted a sale in bulk out of the ordinary course of business, reliance being placed on the greater frequency of the sales during that period to prove the departure from the usual. In both of the cases, the courts held that the departures from the ordinary were not sufficiently great to come within the statutes. Here is a clear recognition that a businessman may have more than one established mode of conducting his business, and that a transaction will be invalidated under the bulk sales statutes only if it falls outside any method of disposal established by a seller as his way of operating.

But that rule is not without its limits. In *Keller v. Fowler Bros. & Cox*,[97] the seller was a corporation which operated a chain of grocery stores and which had a ". . . sort of wholesale house, which

of Appeals held that the truckload in question had never become part of a mercantile stock because never placed in a regular place of business of the seller. Therefore, the statute was inapplicable. It should be noted that the factual similarity between the *Feldstein* and *Vacuum Oil Company* cases is a marked one, although, of course, the courts viewed the problems quite differently.

95. 344 Pa. 465, 26 A.2d 307 (1942).

96. 260 Fed. 754 (9th Cir. 1919).

97. 148 Tenn. 571, 256 S.W. 879 (1923).

served as a depot, where a large stock was assembled from which the wants of the retail stores were supplied."[98] Whenever one of the retail stores proved unsuccessful financially, it was sold as a matter of course. The transaction in question was the sale of the stock of groceries kept in the wholesale depot without compliance with the bulk sales statute. In a suit brought by the seller's trustee in bankruptcy to recover from the purchaser the value of the stock of goods so sold, it was contended that the transfer was not out of the ordinary course of trade because the seller had regularly disposed of unprofitable retail stores. In rejecting that contention the court said:

> A sale does not have to be unprecedented to be out of the ordinary course of trade. An individual operating an individual store might sell out. He might buy another store and sell it out, and repeat the process several times, but each of these sales would be governed by the Bulk Sales Law. The business of . . . [seller] was that of retailing groceries, not selling grocery stores. A sale by it of a grocery store was out of the ordinary course of trade, and it is immaterial that it may have made several such sales.[99]

The criterion is not simple to state. There can be no doubt that if a corporation were organized for the purpose of buying and selling retail grocery stores, a sale of one of the stores would clearly be in the ordinary course of trade. But the mere fact that a particular transaction, the sale of an unprofitable store, has been occasionally engaged in by an enterprise, the substantial function of which is to sell not grocery stores but groceries, is not enough to make the sale of one of the stores a transaction in the ordinary course of trade of that enterprise. The distinction between the *Keller* case and cases like *Sabin v. Horenstein* and *Osterweil v. Crean* is not merely one of degree, however, but one of kind. In the latter cases it cannot be said that the business enterprise was ever disposed of, while in the former, what may fairly be regarded, under the circumstances, as a unit of a business of sufficient scope to be considered an enterprise in itself was disposed of from time to time. Clearly the disposition of substantial mercantile enterprises is within the purview of all bulk sales statutes.

Somewhat like the *Sabin* and *Osterweil* cases, but conceptually more closely akin to the *Keller* case, is the situation in which the seller has more or less regularly disposed of odds and ends, shop-worn merchandise, discontinued lines and the like. The closer kinship to the *Keller* case is due to the fact that the times and frequency of such transactions are dictated by considerations of expediency which themselves occur irregularly. As a result of that irregularity it is difficult to ascribe to the transactions themselves the kind of regularity or usualness which the phrase, "ordinary course of trade," connotes.

98. 148 TENN. 571, 256 S.W. 879 (1923).
99. *Id.* at 576, 256 S.W. at 880.

There is, however, a possible inference to be drawn from some of the cases that should a seller be able to establish a pattern of disposition of shop-worn or otherwise unsalable-at-retail merchandise, a transaction of that type would be in the regular prosecution of his business. The inference arises from the fact that in several cases statements have been made that an industry custom of this kind, apart from what the seller in question usually did, was not controlling. There is a possible negative inference that should such a practice on the part of the particular seller be established, the transaction would fall outside the purview of the statute.[100]

The case closest in point, however, seems to cast considerable doubt on the correctness of such a rule. In *Irving Trust Co. v. Rosenwasser*,[101] the seller attempted to show on the witness stand that he regularly made sales of "close-outs," apparently odds and ends that he could not dispose of in the ordinary retail manner. Because the trial judge apparently disbelieved the witness in any event, the reaction of the judge to the argument that should such a state of facts be established the sale was outside the scope of the statute, must be regarded as a *dictum*. That reaction, however, bears on the point under consideration. Judge Woolsey said:

> . . . I think that the most which possibly could be said with regard to the sale of "close-outs" by . . . [seller] was that it might have been an incident, and, no doubt, a convenient incident of their business—perhaps of any retail business—but it was not, properly speaking, in the ordinary course of any retail trade or the regular prosecution of such retail business.[102]

Clearly the judge had some reservations as to whether the fact of periodicity in such transactions would be relevant in any case.

There remain for consideration the not inconsiderable number of cases which have been concerned with the question of the relevance of an established industry custom to the out of ordinary course problem. It should be remembered, however, that there is no substantial authority that transactions of the kind involved in the *Rosenwasser* case are taken out of the operation of bulk sales statutes even though the particular seller regularly engaged in them.[103]

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100. See text at notes 105 to 107 *infra*, for a discussion of those cases.

101. 5 F. Supp. 1016 (S.D.N.Y. 1934).

102. *Id.* at 1017.

103 In New York Credit Men's Ass'n., Inc. v. Domestic Broadtail Producers, Inc., 61 F. Supp. 102 (S.D.N.Y. 1945), one wholesale dealer in furs purchased furs from another wholesale dealer. The original purchaser then entered into a transaction the legal effect of which was a resale of some of the furs to the original seller. The court held that the resale was not outside the ordinary course of the re-sellers trade, primarily because the parties had had previous dealings of the same nature. The extent or regularity of those prior dealings is not disclosed. In Geiger v. Louis Yasser, Inc., 178 Misc. 526, 35 N.Y.S.2d 221 (Sup. Ct. 1942), *aff'd without opinion*, 265 App. Div. 1046, 40 N.Y.S.2d 332 (1st Dep't 1943), the court stated that a return of goods to the seller thereof by their purchaser fell within the scope of the statute.

As indicated earlier, nearly all of the cases which have discussed the point have taken the position that industry custom is irrelevant in determining whether a transfer is out of the ordinary course of trade.[104]

A recent important case is *Jubas v. Sampsell.*[105] There the seller, a retail shoe merchant, had in stock 1,240 broken pairs of shoes which had cost him between $5.25 and $8.25 a pair. These shoes constituted 25% of his total stock in volume and 15% in value. After making all reasonable attempts to sell them at retail without success, the seller sold the lot at one dollar per pair, their fair value, without complying with the bulk sales statute of California. Although the seller was solvent at the time of the sale, he shortly thereafter became bankrupt and plaintiff was appointed his trustee in bankruptcy. In an action against the purchaser for the value of the 1,240 pairs of shoes, the court held for the plaintiff. After first holding that the subject matter of the transaction was a "substantial part" of the seller's business within the meaning of that term in the statute,[106] the court went on to state that:

> [t]he "regular and usual practice and method of business of the vendor" cannot be measured by a prevalent custom of merchants which the vendor followed. The vendors herein were retail shoe merchants whose regular and usual practice and method of business was selling shoes to those who came into the store to buy from the stock in trade for wear.
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> The plain meaning of the statute is that when a storekeeper disposes of a substantial part of his stock in trade in bulk, and selling in bulk sales is not the usual and ordinary way in which he conducts his business from day to day, the sale falls within the statute.[107]

On the other side of the argument is the most recent decision of the New York Court of Appeals.[108] Again the seller was a retail shoe merchant. In the spring of the year, when his total inventory was worth about $19,000, the seller found himself with a large number of fall and winter style shoes on hand. He sold 1,294 pairs of them in one lot to a purchaser whose regular business was the purchase of lots of off-season shoes from retailers. Although the 1,294 pairs did

104. Jubas v. Sampsell, 185 F.2d 333 (9th Cir. 1950); Irving Trust Co. v. Rosenwasser, 5 F. Supp. 1016 (S.D.N.Y. 1934); Cohen v. Calhoun, 168 Miss. 34, 150 So. 198 (1933); *cf.* Keller v. Fowler Bros. & Cox, 148 Tenn. 571, 256 S.W. 880 (1923); *see* Conquest v. Atkins, 123 Me. 327, 330, 122 Atl. 858, 859 (1923).

105. 185 F.2d 333 (9th Cir. 1950).

106. CAL. CIV. CODE § 3440.1 (Supp. 1953) provides in part, "The sale . . . of a stock in trade . . . or a substantial part thereof. . . ."

107. 185 F.2d 333, 334 (9th Cir. 1950). See also, Cohen v. Calhoun, 168 Miss. 34, 150 So. 198 (1933); *cf.* Keller v. Fowler Bros. & Cox, 148 Tenn. 571, 256 S.W. 879 (1923); *see* Conquest v. Atkins, 123 Me. 327, 330, 122 Atl. 858, 859 (1923).

108. Sternberg v. Rubenstein, 305 N.Y. 235, 112 N.E.2d 210(1953), *reversing* 279 App. Div. 30, 108 N.Y.S.2d 218 (4th Dep't 1951).

not constitute his entire stock of off-season shoes, nevertheless, they amounted to about one-sixth of his total stock of shoes in value. There was no indication that the price was not a fair one, nor was there any indication that the sale was part of a plan to discontinue business. The evidence disclosed that such a disposition was a standard practice among small shoe dealers, primarily for the reason that to attempt to sell the off-season shoes in the regular retail manner would be to place them in competition with the other shoes in the store and thus endanger the financial position of the entire enterprise. Declining to follow the *Jubas* case, the Court of Appeals reversed a decision of the Appellate Division and held the transfer outside the scope of the statute. Because this is the only case taking such a position, and because Judge Fuld states the reasons underlying it clearly and strongly, it is worthy of quotation at length. After some preliminary statements directed toward showing the general inapplicability of the statute to all but the most unusual transactions, Judge Fuld went on to say:

> The record here shows that in the business of shoe retailing the sale of "off-season" wares is no rare and irregular occurrence, but rather an established operating pattern, no attempt to defraud creditors, but rather an inevitable incident to the conduct of business. Shoe styles may vary sharply from season to season and year to year, with the result that last year's "rage" may clog this season's shelves. As seasons change, a merchant seeks to clear his store, and as rapidly as possible, of shoes still unsold. Larger stores may resort to much publicized "clearance sales" or operate their own "special outlet" stores. But the smaller, independent retailer, lacking the means for extensive advertising or a separate store, must, of necessity, rely on dealers specializing in unseasonable obsolete shoes. Thus, as the record reveals. . . [purchaser] alone regularly dealt with as many as "several hundred" retailers in "smaller towns * * * throughout northern and western New York."
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> Such recurring sales, vital as they may be to the operation of the smaller independent retailer, must be regarded, in the words of the statute, as sales made "in the ordinary course of trade and in the regular prosecution of said business." Indeed, to subject such transactions to the requirements prescribed by . . . [the bulk sales statute] would tell creditors little more than they already know. They are forewarned, by industry and trade custom, that "off season" sales are regular occurrences and, entirely apart from the Bulk Sales Act, they may anticipate usual sales of obsolete leftovers and scrutinize such transactions beforehand. And, if fraud or covert advantage is later unearthed, a creditor may set it aside as a fraudulent conveyance under state law . . . or as a preference or fraudulent conveyance under federal statute. . . .
>
> In point of fact, to hold that these frequently repeated transactions are controlled by . . . [the bulk sales law] might, contrary

> to the aim of the statute, render the creditor's lot more hazardous. Even if a dealer could be found to purchase "off-season" stock on the terms prescribed by the statute, the prices realized would almost certainly be lower. Small retailers might, therefore, be forced to rely upon markdown sales or below-cost clearances—which as one expert testified at the trial, "would" make it "difficult * * * to sell the same customers other shoes at the list price." The result, it is easy to see, might well be to curtail the retailer's business and thus endanger prompt payment to his creditors.[109]

It is of primary importance to realize that this decision resolves, not one, but two of the problems in this area. In the first place it assumes that had the seller engaged in close-out sales over a period of time with regularity, such sales would be in the ordinary course of trade. Thus, it appears to be at variance with the inference I drew from the language of the *Rosenwasser* case.[110] Secondly, it recognizes, implicitly to be sure, that there is no basis for distinguishing between the first sale of close-outs and the tenth sale of close-outs. It should be recalled that there is a negative inference in some of the cases refusing to admit evidence of a custom in the industry that, should it be established that the seller in question had regularly engaged in this sort of transaction as well as his regular retail sales, the transaction would be regarded as falling outside the scope of the statute.[111] It is unrealistic to find the first in a series of such transactions within the statute and to find the tenth outside it. The first is neither more nor less out of ordinary course than the tenth. Although the soundness of the value judgment seems clear, there yet remains the question of whether the statutory language is susceptible of this interpretation. With respect to that point, recognition must be given to the fact that courts have great flexibility in interpreting statutory language; perhaps they assume more power in some instances than can be justified.[112] In my opinion, however, this is not such an instance. This is an example of statutory language which can be interpreted in two different ways. The meaning is not plain. On the other hand there is relatively little in the way of specific extrinsic sources which might be utilized to solve the ambiguity. Judge Fuld sought out and found such evidence in terms of the overall purpose of bulk sales legislation—protection of creditors. He concluded that, as a practical matter, a contrary holding would probably diminish rather than increase creditor protection. In so concluding he

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109. 305 N.Y. at 240, 241, 112 N.E.2d at 212, 213.
110. Irving Trust Co. v. Rosenwasser, 5 F. Supp. 1016 (S.D.N.Y. 1934).
111. See text at note 100 *supra*.
112. The reader is referred to text at notes 37 to 48 and 51 to 55 *supra*, for a discussion of an instance in which I feel that the interpretation is outside the limits placed on the court by the statutory language. I refer, of course, to the earlier part of Judge Fuld's opinion in the *Sternberg* case where he, in effect, emasculates the "any part" language of the statute.

gave proper weight to the facts of commercial life. The decision is a land-mark one and was long overdue.[113]

To recapitulate: In a few instances the "out of ordinary course" language has been utilized as a quantitative criterion under statutes containing no specific quantitative requirement, though it is not true that all very large transfers are out of the ordinary course of trade. Although there are no decisions so holding, several of the statutes are so phrased that the "out of ordinary course" language seems to be an alternative quantity limitation when less than all or substantially all of the business is sold. On the other hand, most of the cases have treated the phrase as imposing a qualitative limitation, a limitation which means that transfers need not be made in compliance with the statute unless made in a certain way. In general it is a fair conclusion to say that the most important factor is whether the sale was to a person who was in the general class of purchasers from this seller. A more specific analysis, however, reveals several sub-problems. It is necessary first to find a regular course in order to determine whether a particular transaction was outside it. In some instances the business in question might have more than one regular method of disposing of its merchandise, and if that be the case, the transfer falls outside the statute if it is within any of those regularly-engaged-in methods. On the other hand, there is a limit to that proposition. It is not necessary that a transfer be entirely unprecedented to fall within the statutes. This question has arisen most frequently in cases in which the seller in question disposed of some property in a way not regular with him but consistent with an industry practice. Although nearly all of the cases have held such transfers to fall within the statutes, the latest decision of the New York Court of Appeals on the question seems clearly more consistent with commercial necessity and reality in admitting such evidence and finding it conclusive on the point in issue. In so doing that court has given a different interpretation to the statutory language, "out of the ordinary course of trade and of the regular and usual prosecution of the seller's business," than had previously been given. To the New York Court of Appeals, the "business" referred to in the statute was the line of business in which the seller was engaged rather than the particular business enterprise which he controlled.

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113. An earlier recognition of the commercial realties of the situation may be found in Judge Ethridge's dissenting opinion in the *Cohen* case, where he says:

> The ordinary course of trade, of course, means the ordinary course of trade in the particular line of business in the locality where the transaction occurs, or such as is generally or usually done in pursuit of such business.

Cohen v. Calhoun, 168 Miss. 34, 41, 150 So. 198, 199 (1933).

III. Additional Quantitative Requirements Problems

Many of the statutes contain quantitative requirements applicable to all situations or applicable only to some. Thus the statutes of Connecticut,[114] Illinois,[115] Missouri,[116] Rhode Island[117] and South Carolina[118] are under no circumstances applicable to transfers of less than the major part of the included property. The California statute[119] requires compliance only if a "substantial part" is disposed of, and the statutes of Kentucky,[120] New Jersey,[121] North Carolina[122] and Pennsylvania[123] only if a "large part" is included. The Arizona statute[124] applies only to transfers of 75% or more of the stock in trade. In addition, many other statutes[125] require compliance, if the transfer is not out of the ordinary course of trade, only if all or substantially all of the stock is sold.

The words "major part" have been construed to mean more than 50% of the included property, an interpretation which is certainly accurate in a literal sense.[126] "Substantial part" and "large part" are not terms having such a specific meaning, and consequently the courts have been called upon more frequently to decide whether a particular

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114. CONN. GEN. STAT. § 6705 (1949).
115. ILL. ANN. STAT. c. 121½, § 78 (Supp. 1953).
116. MO. ANN. STAT. § 427.020 (Vernon 1949).
117. R.I. GEN. LAWS c. 483, § 1 (1938).
118. S.C. CODE § 11-201 (1952).
119. CAL. CIV. CODE § 3440.1 (Supp. 1953).
120. KY. REV. STAT. § 377.010 (1953).
121. N.J. STAT. ANN. § 46:29-1 (1940).
122. N.C. GEN. STAT. § 39-23 (1950).
123. PA. STAT. ANN. tit. 69, § 525 (1931).
124. ARIZ. CODE ANN. § 58-301 (1939).
125. ALA. CODE tit. 20, § 10 (Supp. 1951); DEL. CODE ANN. tit. 6, § 2101 (1953); D.C. CODE ANN. § 28-1703 (1951); FLA. STAT. ANN. § 726.05 (1944); GA. CODE ANN. § 28-206 (1952); IDAHO CODE ANN. § 64-702 (1948); MD. ANN. CODE GEN. LAWS art. 83, § 99 (1951); MINN. STAT. ANN. § 513.18 (West 1947); MISS. CODE ANN. § 274 (1942); N.M. STAT. ANN. § 53-1001 (1941); OKLA. STAT. ANN. tit. 24, § 71 (1937); ORE. REV. STAT. § 79.040 (1953); TENN. CODE ANN. § 7283 (Williams 1934); UTAH CODE ANN. § 25-2-1 (1953). In addition the Montana statute requires that all included transactions be in bulk and defines as being in bulk ". . . any sale in one transaction of an entire stock of goods, wares, merchandise or trade fixtures, or personal property, or of an entire stock of a particular character of goods, wares, merchandise or trade fixtures, or personal property of the vendor's business. . . ." MONT. REV. CODE ANN. § 18-204 (1947). The Washington statute applies to all or substantially all of the stock or all or substantially all of the fixtures. WASH. REV. CODE § 63.08.010 (1951). If only fixtures are sold, the statutes of Louisiana, Nevada and Ohio are applicable only if all or substantially all of them are sold. LA. REV. STAT. ANN. § 9:2961 (1950); NEV. COMP. LAWS § 6816 (Supp. 1949); OHIO GEN. CODE ANN. § 11102 (1938) *semble*.
126. Zenith Radio Distributing Corporation v. Mateer, 311 Ill. App. 263, 35 N.E.2d 815 (1941). A one-half interest in a business was sold for the purpose of forming a partnership. Refusing to hold that the transfer of an undivided interest for the purpose of creating a partnership was not a disposition covered by the statute, the court found the accepted meaning of the word "major" to be "greater" or "larger" and so refused to include a transfer of but 50%. Although the decision was criticized in Comment, 30 ILL. B.J. 298 (1942), it is clearly a correct interpretation of unambiguous language.

transaction fell within the statutes containing such language. The cases construing the California statute,[127] which applies to transfers of a "substantial part," indicate clearly that much less than one-half of the total property will be regarded as a substantial part of it. Thus the sale of between one-fifth and one-sixth of a stock of merchandise,[128] a pledge of $600 worth of merchandise out of a total stock valued at $9,500 to secure a loan of new money in the amount of $300,[129] and a sale of 25% of the stock in volume and 15% in value,[130] have all been held to be transfers of substantial parts within the meaning of that language in the California statute.[131]

Frequently the meaning of the quantitative requirement of a bulk sales statute comes up in connection with the disposal of a branch or other more or less separable part of a business, but that problem will be discussed in a later part of the article. Only one case has been found which contained no problem of the disposal of a possibly separate part of a business and which has construed the "large part" language. In *Armfield Co. v. Saleeby*,[132] the seller was a retail fruit dealer having a normal inventory of between $1,500 and $5,000. As Christmas approached, the stock was increased in size. The seller purchased 179 barrels of apples in two lots of 79 and 100 barrels. He then resold them from the cars in the same quantities without complying with the statute. The total value of both lots was about $450. In an action brought by a creditor of the seller, the defendant purchaser requested an instruction to the effect that if the sale of either lot consisted of 10% or less of the total stock, compliance with the statute was not necessary. This instruction was refused, and the jury returned a verdict for the plaintiff creditor. The Supreme Court of North Carolina reversed on the ground that the refusal of the requested instruction was error. The court took the position that a sale of 10% of a stock was not of a "large part" within the meaning of that term in the statute, stating that "[i]t should be something more than that or nearer a half of the stock to come under the condemnation of the statute."[133]

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127. CAL. CIV. CODE § 3440.1 (Supp. 1953).
128. Schainman v. Dean, 24 F.2d 475 (9th Cir. 1928).
129. Markwell & Co. v. Lynch, 114 F.2d 373 (9th Cir. 1940).
130. Jubas v. Sampsell, 185 F.2d 333 (9th Cir. 1950).
131. That the mere fact that a sale is a large one is not enough to bring it within the statute, if it is not also out of the ordinary course of trade, see, Shasta Lumber Co. v. McCoy, 85 Cal. App. 468, 259 Pac. 965 (1927).
132. 178 N.C. 298, 100 S.E. 611 (1919). In Sproul v. Gambone, 43 F. Supp. 575 (W.D. Pa. 1942), a case involving the disposition of a part of the property used in the retail end of a combination wholesale and retail tobacco and candy business, the court held the transaction to be an included one on a finding (1) that the subject matter of it constituted 82½% of the seller's fixed assets, and the means of accomplishing 22½% of the entire business of the seller, and (2) the retail end of the business was entirely disposed of.
133. Armfield Co. v. Saleeby, 178 N.C. 298, 301, 100 S.E. 611, 612 (1919).

Two cases[134] in point were decided under an earlier Washington statute. That statute required compliance in the case of

> [a]ny sale . . . of a stock of goods, wares or merchandise, or all or substantially all, of the fixtures and equipment . . . or whenever substantially the entire business or trade . . . shall be sold . . . or whenever an interest in . . . the business . . . is sold. . . .[135]

Although differing from the present Washington statute which expressly applies to the sale of ". . . all or substantially all of a stock of goods . . . ,"[136] the earlier statute was, nevertheless, interpreted by the Washington court to mean that all or substantially all of the stock of goods must be sold to bring the transaction within its purview.[137] The only case interpreting the present statute indicates that a transfer of two-thirds of the included property would be sufficient to require compliance.[138]

Several cases have been decided which seem to impose quantity requirements under statutes which have no specific quantitative criterion, at least under the facts of the case in question.[139] It has been said, for example, that for a transaction to be included under an "any part" statute, it must be of a "material portion."[140] And in *Sternberg v. Rubenstein*,[141] as has already been indicated,[142] the New York Court of Appeals recently stated that only transfers of ". . . substantially an entire inventory or business"[143] fall within the statute.

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134. Fudge v. Brown, 126 Wash. 475, 218 Pac. 251 (1923); Blanchard Co. v. Ward, 124 Wash. 204, 213 Pac. 929 (1923).

135. Wash. Laws 1913, c. 175, § 4.

136. WASH. REV. CODE § 63.08.010 (1951).

137. In Blanchard Co. v. Ward, 124 Wash. 204, 213 Pac. 929 (1923), the court held the statute inapplicable to the sale of the sheet music department of a general retail piano store and music house. The value of the stock sold was about 5 to 7% of the value of the total stock. The court concluded that the statute did not ". . . prohibit the sale of a portion of the stock. . . ." *Id.* at 208, 213 Pac. at 930. Although the portion sold was small, yet the court's language is sufficiently broad to indicate applicability to the disposition of much larger proportions. No explanation of the meaning of the "interest in" language was offered. The same position was taken in Fudge v. Brown, 126 Wash. 475, 218 Pac. 251 (1923), with principal reliance being placed on the *Blanchard Co.* case. It should be noted that in the *Fudge* case, somewhere between 7% and 25% of the total stock was sold. The court did not think it material what the exact proportion was because, in any event, it was the sale of a portion only.

138. Minder v. Gurley, 37 Wash. 2d 123, 222 P.2d 185 (1950).

139. The reference is to those statutes cited in note 125 *supra*, which impose a specific quantitative requirement only if the sale is not out of ordinary course.

140. Fiske Rubber Co. v. Hayes, 131 Ark. 248, 199 S.W. 96 (1917). In Huckins v. Smith, 29 F.2d 907 (8th Cir. 1928), the court held that a transfer of the fixtures of a business of which the value of the fixtures was about one-half of the total value of the stock and fixtures, was a transfer of a material part. Illustrative of the reliance by courts of one state on cases decided under an entirely different statute is Armfield Co. v. Saleeby, 178 N.C. 298, 100 S.E. 611 (1919), decided under a "large part" statute. The North Carolina court relied principally on the *Fiske Rubber Co.* case which was, of course, decided under an "any part" statute.

141. 305 N.Y. 235, 112 N.E.2d 210 (1953), *reversing* 279 App. Div. 30, 108 N.Y.S.2d 218 (4th Dep't 1951).

142. See text at notes 37 *et seq. supra*.

143. Sternberg v. Rubenstein, 305 N.Y. 235, 239, 112 N.E.2d 210, 212 (1953).

Elsewhere, cases may be found which hold that certain transfers fall within the scope of such a statute even though their subject matter constitutes much less than substantially all of the business.[144] It is, of course, true that some of the courts which have given quantitative meaning to the "in bulk" or "out of ordinary course" language have excluded transfers on quantity grounds, but those cases have already been discussed.[145] It seems clear under statutes of this class that the legislature intended to impose no specific quantitative limitations; that small transfers may otherwise be sufficiently unusual to justify including them in the coverage of such statutes; and that those courts which have seemingly imposed quantity requirements, either generally or by so interpreting the "in bulk" and "out of ordinary course" requirements, have added requirements judicially to those imposed legislatively.

Because of the fact that some of the statutes, either because of express language or because of judicial interpretation leading to the same result, impose independent quantity requirements, the question has occasionally arisen as to whether a business may be divided into units for the purpose of determining whether a sufficient quantity has been transferred to cause the transaction to fall within the scope of the statute. It is clear that if what is sold may be classified as the includible property of a separate business unit, it will be so regarded for the purpose of determining whether the quantitative requirement for inclusion has been met. All of the cases directly in point, and in which the question has been explicitly determined, have arisen under statutes which contain express language requiring that either a "major part" or a "large part" of the business be sold to bring the transaction within them.[146]

144. Goldstein v. Maloney, 62 Fla. 198, 57 So. 342 (1911); Virginia-Carolina Chemical Co. v. Bouchelle, 12 Ga. App. 661, 78 S.E. 51 (1913); Vacuum Oil Co. v. The Wichita Independent Consolidated Companies, 110 Kan. 245, 203 Pac. 915 (1922); Norton-Berger Shoe Company v. J.B. Rideau, 1 La. App. 244 (1924); Tupper v. Barrett, 233 Mass. 565, 124 N.E. 427 (1919); Cohen v. Calhoun, 168 Miss. 34, 150 So. 198 (1933); Mahoney-Jones Co. v. Sams Bros., 128 Tenn. 207, 159 S.W. 1094 (1913); Slaughter v. Cooper Corporation, No. 2, 20 Tenn. App. 241, 97 S.W.2d 648 (1936); Henry King & Co. v. Arnett Brothers, 7 Tenn. App. 410 (1928). *Compare* Goodman v. Clarkson, 39 Ga. App. 383, 147 S.E. 183 (1928), *with* Long Cigar and Grocery Co. v. Harvey, 33 Ga. App. 236, 125 S.E. 870 (1924). *Contra:* Splain v. B.F. Goodrich Rubber Co., 290 Fed. 275 (D.C. Cir. 1923). In The Citizens State of Hiawatha v. Rogers, 155 Kan. 478, 126 P.2d 214 (1942), decided under an "any part" statute, the court held a mortgage of all the fixtures of a business to fall within the statute but said:

> The bulk sales law was designed to prevent defrauding of creditors by the secret sale or disposal in bulk of *substantially all* of a merchant's stock of goods or fixtures pertaining thereto. [Italics added.]

Id. at 479, 126 P.2d at 215.

145. See Sections I and II *supra.*

146. *In re* Lipman, 201 Fed. 169 (D.C.N.J. 1912); Young v. Lemieux, 79 Conn. 434, 65 Atl. 437 (1906); Frieling v. Emling, 248 Ill. App. 475 (1928); Ogden Avenue State Bank v. Cherry, 225 Ill. App. 201 (1922). See also Goodman v. Clarkson, 39 Ga. App. 383, 147 S.E. 183 (1928); Gwinn Brothers & Co. v.

There are, however, several other cases which might have turned on the question of whether the stock sold was that of a separate business, but which did not in fact do so. Many of them were decided under "any part" statutes which raised no quantity problems,[147] and, in another, a quantity sufficient to constitute a large part was sold even when all parts of the business were considered together for purposes of deciding what proportion of the total includible property was sold.[148] And in one of the cases the fact that both parts of the business were sold as substantially part of the same transaction, though to different people, served as the basis for a decision that there was, in effect, but one sale of the entire enterprise.[149] In *Blanchard Co. v. Ward*,[150] the court took no notice of the fact that the subject matter of the transaction comprised the whole of the sheet music department of a general retail piano store and music house, and held that an insufficient quantity of the total stock of the entire enterprise was disposed of to bring the transaction within the Washington statute.

In a number of cases the transfers attacked consisted of a series of technically separate transfers, either all to the same person but at different times, or to different persons. In addition, there are three forms of language related to the problem, one or more of which occur in some of the statutes. The Arizona [151] and Montana[152] statutes cover only sales in a single transaction. The Missouri and Rhode Island statutes are applicable to transfers ". . . in one or more parcels or to one or more persons, provided the transfer is all part of substantially one transaction or proceeding or occurs substantially at one time. . . ."[153] The statutes of the District of Columbia,[154] Florida,[155] Georgia,[156] Maryland[157] and Oregon[158] contain no "single transaction"

Peoples General Store, 269 Ky. 813, 108 S.W.2d 1001 (1937). In Roberts v. Kaemmerer, 220 Mo. App. 582, 287 S.W. 1057 (1926), defendant contracted to sell one of the two retail florists shops which he owned. He later agreed to supply a list of merchandise creditors of the store he sold but not of the other store. Purchaser insisted on a complete list of creditors and refused to complete the transaction when defendant declined to furnish such a list. In the ensuing action for breach of contract, the court assumed that compliance with the statute was necessary without any direct inquiry into the value of each store, though the Missouri statute (MO. ANN. STAT. § 427.020 [Vernon 1949]) requires compliance only if the sale is of a major part of the includible property.

147. Conquest v. Atkins, 123 Me. 327, 122 Atl. 858 (1923); Conquest v. Goldman, 121 Me. 335, 119 Atl. 528 (1922); Mott v. Reeves, 125 Misc. 511, 211 N.Y. Supp. 375 (Sup. Ct. 1925), *aff'd without opinion*, 217 App. Div. 718, 215 N.Y. Supp. 889 (4th Dep't 1926), *aff'd mem.*, 246 N.Y. 567, 159 N.E. 654 (1927); Kirkholder & Rausch Co. v. Bridgland, 120 Misc. 565, 199 N.Y. Supp. 113 (Sup. Ct. 1923), *aff'd without opinion*, 211 App. Div. 838, 206 N.Y. Supp. 923 (4th Dep't 1923); Keller v. Fowler Bros. & Cox, 148 Tenn. 571, 256 S.W. 880 (1923); State Bank of Viroqua v. Jackson, 261 Wis. 538, 53 N.W.2d 433 (1952).

148. Sproul v. Gambone, 43 F. Supp. 575 (W.D. Pa. 1942).

149. Corrigan v. Miller, 338 Ill. App. 212, 86 N.E.2d 853 (1949).

150. 124 Wash. 204, 213 Pac. 929 (1923).

151. ARIZ. CODE ANN. § 58-301 (1939).

152. MONT. REV. CODES ANN. § 18-204 (1947).

153. MO. ANN. STAT. § 427.020 (Vernon 1949); R.I. GEN. LAWS c. 483, § 1 (1938).

language, and make it immaterial whether the transfer is to one or more persons. The purpose of this section is to determine whether courts have treated a series of such transfers as a single transfer for any purpose in bulk sales cases.

The simplest situation is that posed by a series of sales to a single individual within a relatively short period of time. In *Slaughter v. Cooper Corporation No. 2*,[159] the court viewed a series of six purchases made within a period of six days as one transaction for the purpose of determining whether a sufficient quantity of goods had been sold to require compliance with the statute. *Dicta* to the same effect may be found in other cases.[160]

If, on the other hand, the separate transfers have been to different persons, additional difficulty is encountered. The problems may arise in several ways. It will be recalled that the Illinois bulk sales statute applies only to transfers of a "major part" of the included property.[161] In *Larson v. Judd*,[162] the seller was a dairy farmer who sold milk at retail. His property fell into three principal groups: (a) twenty-one head of cattle, which constituted the major part in value of his property; (b) five horses, two wagons, some harness and a corn planter, all with a value of $650; and (c) sundry small articles, including household furniture, of a total value of $250. Because seller's lease had an expiration date of March 1, he decided to dispose of his property late in February. On February 28, he sold part (a) to one Aiken who was not a party to the controversy. On March 2, he sold part (b) to defendant, who was in no way connected with the purchaser of part (a). In the enusing action the court held the statute inapplicable to the second transaction. The court said:

> The major part of those goods and chattels (the cattle) were sold to Aiken before the purchase by . . . [defendant] of the horses and other items in group "b," therefore . . . [defendant] did not buy the major part of the goods and chattels. There is

154. D.C. CODE ANN. § 28-1703 (1951).
155. FLA. STAT. ANN. § 726.05 (1944).
156. GA. CODE ANN. § 28-206 (1952).
157. MD. ANN. CODE GEN. LAWS art. 83, § 99 (1951).
158. ORE. REV. STAT. § 79.040 (1953).
159. 20 Tenn. App. 241, 97 S.W.2d 648 (1936).
160. Sabin v. Horenstein, 260 Fed. 754, 755 (9th Cir. 1919); Thorndike & Hix Lobster Co. v. Hall, 223 App. Div. 576, 578, 229 N.Y. Supp. 225, 227 (3d Dep't 1928). In Osterweil v. Crean, 344 Pa. 465, 26 A.2d 307 (1942), the court assumed that a series of sales to one person could be considered together for the purpose of determining whether enough was sold, but held the transfer to be in the ordinary course of trade. In Carpenter v. Karnow, 193 Fed. 762 (D.C. Mass. 1911), the court stated that even though a series of five transfers were to be regarded as one transaction, they were nevertheless not in bulk because not all of the stock was disposed of. In Conquest v. Atkins, 123 Me. 327, 122 Atl. 858 (1923), each transfer in the series was of sufficient quantity to come within an "any part" statute.
161. ILL. ANN. STAT. c. 121½, § 78 (Supp. 1953).
162. 200 Ill. App. 420 (1916).

> no ground for connecting . . . [defendant] in any way with the vendor's sale to Aiken of the major part of his property, therefore we are not called upon to say what might be the effect of the purchase by different vendees acting in concert of the whole or major part of such goods and chattels, no one vendee buying the major part thereof. If . . . [defendant] had purchased the goods in item "c" before the sale to Aiken of the major part of the property, he would not have been within the prohibition of the statute because he would not have purchased the major part of the goods and chattels, and his purchase could not have been invalidated by some subsquent action of his vendor and some third person with which he had no connection.
>
> We do not think the vendor's property left after the sale of the cows can be regarded as the goods and chattels of his business within the meaning of the statute, in determining what was the major part of his property that . . . [defendant] was prohibited from buying except under the conditions imposed by the statute.[163]

Thus it is evident that the court regarded the subject matter of the two sales as one unit for the purpose of determining the parts of the property to consider in deciding whether one of the sales constituted the required fraction, but declined to conclude that there was only one transaction because there was in fact no connection between the two purchasers.

In *Main v. Hall*,[164] on the other hand, the court reached an opposite conclusion. There a farmer leased his farm with the intention of not returning to farming. He sold off parts of his property from time to time, each sale being less than a major part of his total property. Finally, he sold all the cattle on the place to one Main. The cattle constituted a major part in value of the personal property the seller then owned, but less than a major part of the original property before any of the sales. The court did not cite the *Larson* case,[165] and in answer to the contention that less than a major part was sold, said that the seller

> . . . may not evade the act by properly selling some of his property, and then dealing with all or a major part of what is left contrary to the provisions of the act, and thereby defraud his creditors. If the laudable purposes of the act could be thus evaded, its practical usefulness would be slight . . . .[166]

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163. 200 Ill. App. 423 (1916).

164. 41 F.2d 715 (7th Cir. 1930), *affirming sub nom.* Hall v. Main, 34 F.2d 528 (E.D. Ill. 1929).

165. The reason given by the lower court for not following the *Larson* case was an Illinois statutory provision, Ill. Laws 1877, p. 69, § 17, part of which follows:

> Provided, That such opinion [that of one of the intermediate appellate courts] shall not be of binding authority in any cause or proceeding, other than in that in which they [sic] may be filed.

The proviso was eliminated by Ill. Laws 1935, p. 696, § 1. See 30 ILL. L. REV. 386 (1935).

166. Main v. Hall, 41 F.2d 715, 718 (7th Cir. 1930).

The cases are, of course, diametrically opposed on the point, for in the *Main* case the court considered the transactions as entirely separate for both the purpose of determining the base unit and, incidentally, for the purpose of determining what constituted the subject matter of the transaction under attack. To state it differently: the statute requires that more than one-half be sold; that suggests a fraction with, of course, a numerator and a denominator; with respect to a particular set of facts, the numerator must be the value of the property sold and the denominator the value of the total property of the vendor's business; the question is what may be included in the numerator and what may be included in the denominator. In the *Larson* case, the subject matter of separate transactions was added together to determine the denominator, but was not added together to determine the numerator, and in the *Main* case the subject matter of the transactions was not added together for either purpose.[167]

In *Corrigan v. Miller*,[168] a third possible answer was given:[169] the subject matter of the sales was added together for both purposes, with the result that the transaction, viewed as a whole, was included.[170] There, seller conducted both a marble contracting business and a Tile-Tex business. He sold to one Adame the materials and equipment used in the marble contracting business for approximately $1,800. As part of the same agreement, Corrigan bought the property used in the Tile-Tex business for approximately $800. The issue presented in the case was whether the sale of the property of the Tile-Tex business fell within the statute. The court held that it did, saying:

> The fact that appellee purchased the smaller part and Adame the larger part of the vendor's goods and chattels does not take the sale out of the provisions of the Bulk Sales Act. Between them, appellee and Adame purchased *in a single transaction* substantially the whole of the stock of goods and chattels and equipment used by . . . [seller] in his Tile-Tex and marble contracting business. Appellee purchasing all of the stock of merchandise and equipment used in the Tile-Tex part of his business, and

167. In Fitz Henry v. Munter, 33 Wash. 629, 74 Pac. 1003 (1903), the court held that the sale of what remained after part of a stock of goods was sold at auction was covered by the Washington statute, a statute later interpreted to be applicable only in the situation where all or substantially all of the goods were sold.

168. 338 Ill. App. 212, 86 N.E.2d 853 (1949).

169. Logically, of course, there must be a fourth possible answer, since there are two questions which can be answered independently, and since we are considering the results of the various possible combinations of the answers to the two questions. Thus, it would be theoretically possible to combine the separate transactions for the purpose of determining the numerator but not for the purpose of determining the denominator, but such a result would be absurd.

170. It should be noted that if the two transactions are not added together for the purpose of determining the denominator, whether they are added together for the purpose of determining the numerator is immaterial. Conversely, if the two transactions are added together for the purpose of determining the numerator, it matters not whether they are also added together to determine the denominator, although the failure to do so would be strange indeed.

> Adame substantially all of the merchandise and equipment used in the marble part of his contracting business. [Italics added.][171]

It is clear that if all transfers are added together for both the purpose of determining the numerator and the purpose of determining the denominator, or if the transfers are not added together for either purpose, the result will be the same: the statute will be considered applicable. But if, on the other hand, the transfers are added together for the purpose of determining the denominator but not for the purpose of determining the numerator, compliance with the statute will be considered unnecessary, as illustrated by the *Larson* case.

By way of critique, it seems clear that the *Corrigan* case is correct, but that the choice between the *Larson* and *Main* cases is not so obvious. On the whole, however, it seems improper to combine the transactions for one purpose and not the other—improper not merely from the viewpoint of logical consistency but more importantly from that of desirability of result. Under the *Larson* rule, circumvention of the statute would be a simple matter indeed. It is important to note, however, that the rationale of the *Corrigan* case is useful only in the situations in which there is a real connection between the various purchasers, and, of course, it should be used in such a situation. Absent that situation, however, the desired result may be obtained only through an application of the *Main* rule.

Another case explicitly raising the issue of whether sales to more than one person may be considered as a single transaction for bulk sales purposes presents that problem in a quite different context. In *Hughes-Curry Packing Co. v. Sprague*,[172] the seller sold his fixtures to defendant, and, on the same day, sold his stock in trade to persons unknown. In an action brought by a creditor of the seller to have defendant declared a receiver of the fixtures, the court held that there was no connection shown to exist between the purchaser of the fixtures and the purchaser of the merchandise; that, therefore, the transactions had to be considered separately; that under the Indiana statute the sale of fixtures alone is not an included transaction; that, therefore, the statute had no application to the transfer before the court.

There remains for consideration the question of whether a relationship or concert of action between two purchasers should be considered essential to a holding that there has been but one transaction. If the problem is examined strictly from the viewpoint of what the seller has done, it is an easy conclusion to reach that the various

171. Corrigan v. Miller, 338 Ill. App. 212, 217, 86 N.E.2d 853, 856 (1949). In Landers Frary & Clark v. Vischer Products Co., 201 F.2d 319 (7th Cir. 1953), the court considered both the transfer of the tangible assets of a corporation to another corporation and the transfer of the intangibles to the stockholders of the transferring corporation to be covered by the Illinois statute.

172. 200 Ind. 540, 165 N.E. 318 (1929).

transfers should be combined for the purpose of holding the statute applicable.[173] But there is another group of persons involved, the purchasers. If there is in fact no concert of action between them, certainly if there is no awareness of the details of a scheme of disposition, it is manifestly unfair to hold them liable twice for the value of goods purchased in good faith and under circumstances where the statutory language indicates that no need for compliance exists. Thus, the result of the Indiana case seems sound, and if, in the *Corrigan* case, there had been entirely separate transactions and the smaller part of the property had been sold first, there would seem to be no basis for holding the first purchaser responsible under the statute. On the other hand, the *Larson* case seems clearly wrong, for there is no reason to excuse the purchaser from determining the amount of goods and chattels *on hand at the time of his purchase.*[174]

The contention might be made that the language found in some of the statutes precludes the necessity for showing a concert of action between purchasers. Although that contention seems unsound if the statute does no more than make immaterial the fact that the transfer is to more than one person,[175] for the same basic element of unfairness discussed above would be present there, quite a different situation would seem to obtain under the Rhode Island[176] and Missouri[177] statutes. Those statutes make the fact that there is more than one purchaser immaterial only if ". . . the transfer is all part of substantially one transaction or proceeding or occurs substantially at one time. . . ." That language suggests that even though it is not a single transaction, the transfers will be included provided there is but little time between them. Although no decisions on the point have been found, it is at least arguable that a different interpretation is preferable. Thus it

173. See 3 IND. L.J. 565 (1928), for a favorable comment on the decision of the intermediate appellate court which reached the opposite conclusion. Hughes-Curry Packing Co. v. Sprague, 159 N.E. 434 (Ind. App. 1928), *rev'd*, 200 Ind. 540, 165 N.E. 318 (1929).

174. Although in other cases a stock of goods was sold out in a series of sales to different persons, in each of them the sale under attack alone constituted a disposal of sufficient quantity to bring it within the statute. Schainman v. Dean, 24 F.2d 475 (9th Cir. 1928); Cohen v. Calhoun, 168 Miss. 34, 150 So. 198 (1933); Henry King & Co. v. Arnett Brothers, 7 Tenn. App. 410 (1928). See also Tupper v. Barrett, 233 Mass. 565, 124 N.E. 427 (1919); State Bank of Viroqua v. Jackson, 261 Wis. 538, 53 N.W.2d 433 (1952). In Conquest v. Atkins, 123 Me. 327, 122 Atl. 858 (1923), seller owned two businesses which he carried on in adjoining premises, one a small retail grocery business, the other a small retail paint and paper business. He sold substantially all of his stock of paper to defendant for cash, then he sold his grocery business to a third party, and finally sold his stock of paint to defendant. The court considered the sales separately, and found both sales to the defendant to be bulk sales, and so within the statute. In Conquest v. Goldman, 121 Me. 335, 119 Atl. 528 (1922), the court held what was apparently the sale of the stock of the grocery store within the statute.

175. See notes 154-159 *supra.*

176. R.I. GEN. LAWS c. 483, § 1 (1938).

177. MO. ANN. STAT. § 427.020 (Vernon 1949).

might be said that even though there can be no requirement of any real concert of action between the purchasers, yet successive transfers to different individuals should be joined together for this purpose only if there is shown to be knowledge on the part of each of them that other sales are known to have been made or that the making of such other sales is contemplated.[178]

IV. The Uniform Commercial Code Solution[179]

Section 6 - 102 of the Uniform Commercial Code defines a bulk transfer as ". . . any transfer in bulk and not in the ordinary course of the transferor's business of a major part of the . . . inventory of an enterprise subject . . ." to the article, but includes within the definition "[a] transfer of a substantial part of the equipment . . . if it is made in connection with a bulk transfer of inventory, but not otherwise." Thus, it is apparent that all three of the usual requirements, "in bulk," "out of ordinary course," and a quantity requirement must be met before a transfer is included. Neither "in bulk" nor "not in the ordinary course of the transferor's business" is further defined in the Article, so it would appear that the same interpretation problems which have given rise to the difficulties described in this article will still be with the courts and lawyers should the Code be adopted. But the fact that a specific quantitative requirement has been imposed lessens greatly the import of these problems. Under such a statute the "not in ordinary course" criterion usually will be automatically satisfied if a major part is sold, for the circumstances are uncommon in which one-half of the chattels of a business are sold in the ordinary course of trade. Still the language is necessary in order to exclude the rare business in which it is not unusual to sell that much. The "in bulk" language can best be utilized to include a series of transfers which, when viewed collectively, constitute a major part of the included property; in fact, it would seem to have no other possible purpose in the Code. The selection of a specific quantitative criterion of a substantial nature represents a recognition on the part of the draftsman that the truly serious bulk sales risks are inherent only in transfers which enable the seller to pocket the proceeds of a business and disappear, but that, on the other hand, a requirement that the entire business must be sold would open the door to evasion.

178. For a discussion of the possibility that under some statutes the "in bulk" language should be interpreted to require a relationship between the transfers, see text at note 54 *supra*.

179. 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.

CONCLUSION

Bulk sales statutes invariably contain certain phrases the purpose of which is to distinguish routine commercial transactions from those to which the statutes are designed to apply. Some of the requirements are basically quantitative, others qualitative. Yet some of them, the "in bulk" and "out of ordinary course" requirements, have been interpreted by some courts as imposing quantitative requirements, by others as imposing qualitative requirements. Partly because there is a close relationship between the various requirements, it has not proven feasible to differentiate them completely. However, "out of ordinary course" is basically a qualitative requirement, although in a limited number of instances the giving of a quantitative meaning to it is justified. It is difficult, however, to regard the "in bulk" language as quantitative in nature. This is because it occurs in statutes which also contain either one of two basic types of language: (1) that the sale of "any part" is included, (2) that only the sale of a certain quantity comes within the statute. In the former situation, the legislature has apparently not seen fit to impose any quantitative limit: certainly it is not the function of the court to utilize the "in bulk" language for that purpose. In the latter situation, the legislature has seen fit to impose a quantity minimum, but it has selected what that minimum will be. Again the courts cannot, with propriety, use the "in bulk" language to impose an additional quantity limit. I have suggested that the "in bulk" language can be utilized without incurring those difficulties only by regarding it as a device for connecting what are technically separate transfers. Although courts have chosen so to connect transfers under limited circumstances, they have not usually relied on the "in bulk" language for that purpose.

The striking failure of the courts to examine closely the language of the statute controlling a particular case is more apparent in this area than in any other considered. There is indeed in this area a remarkable uniformity of interpretation of the bulk sales statutes, but in some instances the uniformity is unjustified: the statutes contain language so dissimilar that uniformity of result can suggest only error in construction rather than a basically sound concurrence as to the meaning of words. But I do not mean to suggest that the results of a larger number of the cases should differ from jurisdiction to jurisdiction. As a practical matter most of the transactions subjected to attack would qualify for inclusion under any of the statutory language considered here. It is apparently for that reason that the failure of the courts to distinguish cases based on statutory language, seemingly so different as to force another conclusion in the comparatively small percentage of instances where that situation obtains, has been overlooked.

Although the Uniform Commercial Code solution represents the best ideas of the present statutes, it is, nevertheless, less satisfactory here than in the other areas considered. Although many of the problems discussed in this chapter are unlikely to arise under the Uniform Commercial Code section because of the "major part" requirement, there remain, nevertheless, some unanswered questions. The first of them is what meaning should be assigned to the "in bulk" language. I believe that the only proper meaning of the phrase in the context of a statute such as this is the one I have suggested above. Are the circumstances such that the series of technically separate transfers subjected to attack should be considered as an entity to satisfy the major part requirement? If given that meaning, the "in bulk" language can serve a useful purpose. It would have been better, however, to spell out that meaning in the statute. The other unanswered question is whether evidence, showing a custom in the seller's line of business to dispose of shop-worn goods, odds and ends, unseasonable merchandise and the like, is admissible to determine whether the transfer under attack is in the regular prosecution of the seller's business. On that point, I believe that the evidence should be admitted on the basis of the reasons suggested by Judge Fuld in the *Sternberg* case,[180] and that, therefore, the Code should have so provided. Considered as a whole, however, I believe that the section will provide little difficulty in most cases.

180. Sternberg v. Rubenstein, 305 N.Y. 235, 112 N.E.2d 210 (1953), *reversing* 279 App. Div. 30, 108 N.Y.S.2d 218 (4th Dep't 1951).

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WASHINGTON UNIVERSITY
LAW QUARTERLY

Member, National Conference of Law Reviews

Volume 1954 June, 1954 Number 3

Edited by the Undergraduates of Washington University School of Law, St. Louis.
Published in February, April, June and December at
Washington University, St. Louis, Mo.

Subcription Price $4.00; Per Current Copy, $1.25. A subscriber desiring to discontinue his subscription should send notice to that effect. In the absence of such notice, the subscription will be continued.