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## BULK SALES LAWS: BUSINESSES INCLUDED\*

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### I. INTRODUCTION

If, at common law, a stock of goods was sold out of the ordinary course of trade, the purchaser took the goods free and clear of any claims of the seller's unsecured creditors, provided only that he did not share any fraudulent intent which the seller might have had.<sup>1</sup> Although such a sale was under some circumstances affixed with a "badge of fraud" by some courts,<sup>2</sup> this procedural advantage was denied creditors by other courts.<sup>3</sup> As the practice of selling one's stock of goods quickly, usually at a below-fair-value price, and departing with the proceeds became commonplace in the 1890s, creditors found themselves deprived of the very items which served as the basis for their extension of credit, as well as of the debtor himself, for it was not often that the purchaser failed to overcome the presumption of fraud raised against him, if indeed any existed.<sup>4</sup>

Conceived by the National Association of Credit Men at the turn of the century in response to the wave of dissatisfaction which grew out of such a state of affairs,<sup>5</sup> bulk sales statutes are now a part of the

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\* This is the first 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: Property Included*, and *Bulk Sales Laws: Meaning to be Attached to the Quantitative and Qualitative Requirements Phrases of the Statutes*, will appear in the April and June, 1954, issues of the WASHINGTON UNIVERSITY LAW QUARTERLY, respectively.

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1. See the excellent discussion of the common law situation just prior to the adoption of bulk sales statutes in Billig, *Bulk Sales Laws: A Study in Economic Adjustment*, 77 U. of PA. L. REV. 72, 75 *et. seq.* (1928).

2. *E.g.*, Pennell v. Robinson, 164 N.C. 257, 80 S.E. 417 (1913). 1 GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 309 (Rev. ed. 1940) states that this is the common law rule.

3. Hart v. Roney, 93 Md. 432, 49 Atl. 661 (1901). And see Note, 72 CENT. L.J. 300 (1911).

4. Billig, *supra* note 1, at 75-80.

5. *Id.* at 81-85.

law of every state<sup>6</sup> and the District of Columbia.<sup>7</sup> In brief the statutes provide either that a sale of the type proscribed may be avoided by existing creditors of the seller if the statute is not complied with, or that a presumption of fraud is raised by non-compliance. Compliance usually takes the form of the preparation of an inventory, the securing of a list of the seller's creditors, and notification of those creditors in some specified way a certain number of days prior to the consummation of the transaction.<sup>8</sup> The purpose of the statutes is to give advance notice to creditors so that they can survey the situation, determine whether there are any legal steps available to them, and, if there are, take those steps.<sup>9</sup>

It seems to have been commonly assumed, however, that the various statutes are sufficiently homogeneous to warrant treatment of them as a class, and, more importantly, that reasonably accurate generalizations may be stated about their operation and effect, *i.e.*, that bulk

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6. ALA. CODE tit. 20, §§ 10-14 (Supp. 1952); 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, §§ 1-3 (Supp. 1952); CONN. GEN. STAT. §§ 6705-6707 (1949); DEL. CODE ANN. tit. 6, §§ 2101-2104 (1953); FLA. STAT. ANN. §§ 726.02-726.06 (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, §§ 6-7 (1944); MD. ANN. CODE GEN. LAWS art. 83, §§ 97-101 (1951); MASS. ANN. LAWS c. 106, §§ 1-2 (1947); MICH. STAT. ANN. §§ 19.361-19.363 (bulk sales), 19.371-19.373 (bulk mortgages) (1937); MINN. STAT. ANN. § 513.18 (West 1947); MISS. CODE ANN. §§ 274, 277 and 278 (1942); MO. ANN. STAT. §§ 427.010-427.050 (Vernon 1950); MONT. REV. CODES ANN. §§ 18-201 to 18-205 (1947); NEB. REV. STAT. §§ 36-501 to 36-502 (1952); NEV. COMP. LAWS §§ 6816-6820 (Supp. 1949); N.H. REV. LAWS c. 262, §§ 43-44 (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, §§ 71-74 (1937); Ore. Laws 1949, c. 435; PA. STAT. ANN. tit. 69, §§ 521-529 (1931) (but subsequent to July 1, 1954 Article 6 of the UNIFORM COMMERCIAL CODE will govern the law of bulk transfers in Pennsylvania); R.I. GEN. LAWS c. 483, §§ 1-2 (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. §§ 7283-7285 (Williams 1934); TEX. REV. CIV. STAT. ANN. arts 4001-4003 (1945); UTAH CODE ANN. §§ 25-2-1 to 25-2-5 (1953); VT. REV. STAT. §§ 7846-7847 (1947); VA. CODE §§ 55-83 to 55-86 (1950); WASH. REV. CODE §§ 63.08.010 to 63.08.060 (1951); W. VA. CODE ANN. §§ 4001-4006 (1949); WIS. STAT. §§ 241.18 to 241.21 (1951); WYO. COMP. STAT. ANN. §§ 41-701 to 41-703 (1945).

7. D.C. CODE ANN. §§ 28-1701 to 28-1705 (1951).

8. In addition, several of the statutes impose on the purchaser the duty of making certain that the proceeds are applied to the payment of the seller's debts. IDAHO CODE ANN. § 64-702 (1948); KY. REV. STAT. § 377.040 (1953); LA. REV. STAT. ANN. § 9:2963 (1950); MD. ANN. CODE GEN. LAWS art. 83, § 98 (1951); MONT. REV. CODES ANN. § 18-202 (1947); NEV. COMP. LAWS § 6817 (Supp. 1949); PA. STAT. ANN. tit. 69, § 523 (1931); UTAH CODE ANN. § 25-2-2 (1953); WASH. REV. CODE § 63.08.050 (1951).

9. See, Harris, *The Bulk Sale as a Vehicle for Effecting Out-of-Court Settlements with Creditors*, 55 COM. L.J. 317 (1950), for a good discussion of the alternatives available to the creditors if the bulk sales statute has been complied with.

sales statutes and the decisions under them lend themselves to synthesis in the same manner that a group of common law cases do.<sup>10</sup> It is the thesis of this and other articles in this series that the conclusions which may be drawn from a consideration of the statutes and cases *as a homogeneous group*, while not inaccurate in a technical sense, must of necessity be so general as to be nearly valueless in solving the specific problems which arise under the statutes. Furthermore, the value of such generalizations to an understanding of how well the legislatures and courts acting together have solved a specific problem of sufficient importance to stimulate legislation on it by all state legislatures within a short span of years is likewise doubted.

Implicit in these statements is the idea that the variations, even within the traditional grouping of the statutes, are more marked than seems generally to have been recognized.<sup>11</sup> Particularly is that assumption justified in a consideration of the general problem of the kinds and quantity of goods, and the kinds of businesses covered by them, and it is the purpose of this series of articles to examine in detail that general problem. Every effort will be made to illustrate the thesis set out above. In the instant article consideration of the general problem will be confined to that part of it relating to businesses covered.

It is important to keep uppermost in mind the fact that this analysis is of necessity concerned with the effect of the superimposition of a statutory scheme on the common law. Thus attention must first be directed to the statutory construction aspects of the problem, and more particularly to the part, if any, played by the so-called canons of statutory interpretation.

The idea that courts cannot avoid the responsibility of distinguishing the variant elements in a relatively complex legislative scheme can be illustrated in no better manner than by examining the results and techniques of litigation which has arisen under bulk sales statutes. The problem, basically, is one of resolving a conflict of interests between the buyer on the one hand and the creditors of the seller on the other, between security of acquisitions and security of contracts.<sup>12</sup> Professor Vold has said that the conflict is reflected in the variance in the decisions on whether the statutes are to be liberally or strictly construed.<sup>13</sup> But a study of the cases supports the thesis that generali-

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10. Beyond the now traditional breakdown into the so-called "four forms," there seems to have been little attempt made to emphasize the numerous variants in the statutes. The breakdown is into the forms of the statutes in New York, Pennsylvania, Montana and Connecticut, although by reason of amendment the classification is no longer accurate. See, Llewellyn, *CASES AND MATERIALS ON SALES* 905 *et seq.* (1930).

11. See note 10 *supra*.

12. VOLD, *HANDBOOK ON THE LAW OF SALES* 404 (1931).

13. *Id.* at 407-8.

zation is not helpful. The purpose of this part of the article is to demonstrate the soundness of the thesis by representative illustration.

Of the courts which have apparently adopted an attitude toward the bulk sales statutes of their states which may be described as "friendly," and have been fairly consistent in their treatment of the statutes through a series of cases, the Supreme Court of Michigan stands out. In *Watkins v. Angus*,<sup>14</sup> at a time when he was indebted to the plaintiff, Angus sold a one-half interest in his retail coal business to the garnishee defendant who thus became his (Angus') partner. About one and one-half years later, Angus sold his remaining one-half interest to the garnishee defendant. The court held that both transactions were within the purview of the Michigan bulk sales statute, stating that since the statute was remedial in character, it should be given that construction which will effectuate its clear purpose.

The problem in *Patmos v. Grand Rapids Dairy Co.*<sup>15</sup> was whether the sale of the entire business of a dairy cooperative engaged in obtaining, pasteurizing, and peddling out or selling at its retail store milk, cream and butter, was a business covered by the bulk sales statute. The court reiterated its statement that the statute was remedial and ". . . should be construed so as to cure the evil at which it was aimed, defrauding creditors by secret bulk sales, . . ." holding that the sale of such a business was within the statute. The sale of fixtures alone of a grocery store was held within the statute in *Elliott Grocer Co. v. Field's Pure Food Market, Inc.*,<sup>17</sup> the court again adhering to its rule of liberal construction.

These examples were selected because they represent situations in which there is a wide conflict in the case-law. Courts have been in disagreement as to whether a partner's interest in a stock of goods is a "part" or "portion" of the goods because of the limited nature of a partner's interest in the partnership property. Again, what constitutes a "stock of merchandise" has been answered in a multitude of ways by courts. The same may be said of the question of whether the sale of fixtures, particularly when they are not sold as a part of a transaction also involving the sale of merchandise, is within the statute. The point is simply that in all three cases the decisions reflected an attitude more friendly to the statute and to the creditors of the seller than would be the attitude of many courts on the same facts. Other Michigan cases, not nominally controlled by any rule of construction, support this conclusion.<sup>18</sup>

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14. 241 Mich. 690, 217 N.W. 894 (1928).

15. 243 Mich. 417, 220 N.W. 724 (1928).

16. *Id.* at 420, 220 N.W. at 725.

17. 286 Mich. 112, 281 N.W. 557 (1938).

18. *National Grocery Co. v. Plotler*, 167 Mich. 626, 133 N.W. 493 (1911)

But in 1947 the Michigan court was called upon to decide whether a tool, die, fixture, nut and gauge manufacturing business was covered by the statute, and the court held that it was not.<sup>19</sup> The court still purported to be following its rule of liberal construction, but it indicated that any further extension of the act would have to come from the legislature. Although this decision may be proper and not inconsistent with earlier Michigan cases, yet it should be noted that at least one court has included a manufacturing business among those covered by its statute.<sup>20</sup>

It may be contended that this means no more than that Michigan is retreating from its traditional role as the leader of those courts which are friendly to bulk sales statutes. I suggest, however, that it rather means that on this particular point—what businesses are covered—the court is not convinced that there are frequent instances, outside the exclusively mercantile businesses, where creditors are defrauded by secret sales. Consequently *the court does not think* that such a transfer should be treated in the same way as transfers of the goods of a retail grocer, for example. It is not a question of “discovering meaning”; it is the making of a value judgment where evidence of the legislative intent with respect to this particular point is lacking.<sup>21</sup> We may generalize from this that even the court most consistently friendly towards bulk sales statutes will, in some instances,

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(subrogation denied); *Interstate Shirt & Collar Co. v. Windham*, 165 Mich. 648, 131 N.W. 102 (1911) (affidavit must clearly state that there are no creditors in order to satisfy requirements); *People's Saving Bank v. Van Allsburg*, 165 Mich 524, 131 N.W. 101 (1911) (sale of undertaking establishment, which sold caskets as well, within the statute); *Hannah v. Hurley*, 162 Mich. 601, 127 N.W. 710 (1910) (contingent liability within statute); *Marquette County Savings Bank v. Koivisto*, 162 Mich 554, 127 N.W. 680 (1910) (finding of no estoppel on disputed facts); *Porter v. Goudzwaard*, 162 Mich. 158, 127 N.W. 295 (1910) (same); *Musselman Grocer Co. v. Kidd, Dater & Price Co.*, 151 Mich. 478, 115 N.W. 409 (1908) (garnishment is a proper remedy in case of a sale in violation of the bulk sale statute). Compare *J. L. Hudson Co. v. No-Name Hat Co.*, 174 Mich. 109, 140 N.W. 507 (1913) (purchaser cannot take advantage of fact that property purchased was exempt in hands of seller), with *McCormick v. Kistler*, 175 Mich. 422, 141 N.W. 593 (1913). In the latter case the court distinguished the *Hudson* case on the ground that there the total goods sold exceeded in value the \$250 exemption, whereas in the instant case, they did not. Examples of a strict construction are not lacking, however. See, e.g., *Symons Bros. Co. v. Brink*, 187 Mich. 43, 153 N.W. 359 (1915), holding that a chattel mortgage on a stock of goods is not a sale or assignment within the statute. The court followed the earlier case of *Hannah & Hogg v. Richter Brewing Company*, 149 Mich. 220, 112 N.W. 713 (1907).

19. *Frederick v. Dettary Engineering Co.*, 318 Mich. 252, 28 N.W.2d 94 (1947).

20. *Root Refineries v. Gay Oil Co.*, 171 Ark. 129, 284 S.W. 26 (1926). It should be noted, however, that the court was careful to point out that the sale of the manufactured products was not merely incidental to the manufacturing business, for in the latter situation the court had already held that such a business is outside the scope of the statute. See, *Ramey-Milburn Co. v. Sevick*, 159 Ark. 358, 252 S.W. 20 (1923). See *infra*, Section 2, b., for a discussion of the cases relating to manufacturing businesses.

21. Note, 20 IOWA L. REV. 815 (1935). See, generally, Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930) for a brilliant treatment of the problem.

stop short of rendering a construction as favorable to the creditors as could be justified. No more can be said than that as the problem presented reaches the outer limit of the area of permissible construction, the court's judgment as to what "ought to be" the stopping point manifests itself sufficiently so that the members of the court are no longer willing to favor the creditor, and this is true despite the fact that the language of the statute is sufficiently broad to give the court a clear choice in the matter.

On the other hand a majority of the courts have announced a rule of strict construction based on an application of the rule that statutes in derogation of the common law are to be strictly construed. Among the supporting reasons for applying the rule are (1) that the statutes tend to restrict the right to alienate property freely,<sup>22</sup> (2) that they tend to restrict the right to enter into contracts of sale and purchase,<sup>23</sup> (3) that the statutes are penal in nature,<sup>24</sup> and (4) that they are "stringent"<sup>25</sup> and "drastic."<sup>26</sup> Here, however, even less consistency within any given jurisdiction can be found.

The Indiana cases, while perhaps the best for illustrative purposes, are not unrepresentative. In *Fairfield Shoe Co. v. Olds*,<sup>27</sup> one partner sold his interest in the partnership to another partner. The Supreme Court of Indiana said that since the bulk sales statute is in derogation of the common law, it is to be strictly construed. Therefore, the transfer of an interest in a partnership, not being expressly covered by the words of the statute, falls outside its scope. Thirteen years later the

22. *Boise Assn. of Credit Men v. Ellis*, 26 Idaho 438, 144 Pac. 6 (1914); *St. Mathews Motor Co. v. Schnepf*, 306 Ky. 823, 209 S.W.2d 481 (1948); *Balter and Miller v. Crum*, 199 Mo. App. 380, 203 S.W. 506 (1918) [The case is of dubious validity as a precedent, however, since in *Turner v. Drees Hardware & Furniture Co.*, 207 Mo. App. 567, 227 S.W. 1085 (1921), the Springfield Court of Appeals said that the Mo. Laws 1917, p. 324, providing that no statute shall be limited in its scope or effect for the reason that the same may be in derogation of the common law, but such acts shall be liberally construed so as to effectuate their true intent and meaning, was controlling. It is worthy of note, however, that "liberal construction" in the *Turner* case resulted in a construction *in favor of the purchaser, not the creditor*. The St. Louis Court of Appeals adopted a rule of "reasonable construction" when the two cases were called to its attention. *Rothenheber v. Pulitzer Publishing Co.*, 262 S.W. 48 (Mo. App. 1924).]; *Brown v. Frank*, 121 Ore. 482, 256 Pac. 190 (1927); *Gitt v. Hoke*, 301 Pa. 31, 151 Atl. 585 (1930); *York v. Ambrose*, 156 Tenn. 314, 300 S.W. 586 (1927); *O'Connor v. Smith*, 188 Va. 214, 49 S.E.2d 310 (1948); *Blanchard Co. v. Ward*, 124 Wash. 204, 213 Pac. 929 (1923).

23. *Meier Electric and Machine Co. v. Dixon*, 81 Ind. App. 400, 143 N.E. 363 (1924); *United Sales Promotion Co. v. Anderson*, 100 Ohio St. 58, 125 N.E. 107 (1919).

24. *Gitt v. Hoke*, 301 Pa. 31, 151 Atl. 585 (1930); *York v. Ambrose*, 156 Tenn. 314, 300 S.W. 586 (1927) [*contra*, *Daly v. Sumpter Drug Co.*, 127 Tenn. 412, 155 S.W. 167 (1912)]; *Nichols, North Buse Co. v. Belgium Cannery*, 188 Wis. 115, 205 N.W. 804 (1925); *Missos v. Spyros*, 182 Wis. 631, 197 N.W. 196 (1924).

25. *Aristo Hosiery Co., Inc. v. Ramshotom*, 46 R.I. 505, 129 Atl. 503 (1925).

26. *Schwartz v. King Realty & Investment Co.*, 93 N.J.L. 111, 107 Atl. 60 (Sup. Ct. 1919); *Muller v. Hubschman*, 84 N.J. Eq. 30, 96 Atl. 189 (Ch. 1914).

27. 176 Ind. 526, 96 N.E. 592 (1911).

Indiana Court of Appeals held that the sale of a hotel and sanitarium, including furniture, fixtures, dishes, cutlery and stoves, was not within the statute. The Court said:

Any statute which attempts to restrict this right [privilege of entering into or making contracts] is in derogation of the common law and must be strictly construed; it will not be extended by implication or construction to classes of persons not fairly within the letter of the statute.<sup>28</sup>

But when we turn to *Wright v. Haley*,<sup>29</sup> decided in 1935 by the Supreme Court of Indiana, we find that the lessor of the bulk seller was considered a creditor within the meaning of that term in the bulk sales statute on the following facts. The seller had no creditors except his landlord, under whom the seller was a lessee for a term of years. At the time of the sale the rent was not in default. Again, the decision may be sound, but it is, nevertheless, a "liberal" one.

The Indiana cases lead to the conclusion that the announced rule of strict construction is merely a convenient way of rationalizing a desired result. The presence of the rule certainly does not mean that the Indiana courts will hold for the purchaser in every situation where the statutory language will bear that construction, although it may indicate a general attitude on the whole less friendly toward its statute than the attitude of the Michigan court.

Examples might be multiplied, but such duplication would serve no useful purpose at this point. The same problems presented above, *i.e.*, (1) who is a creditor, (2) what businesses are covered, (3) what kinds of transfers are covered, (4) what kinds of goods are covered, as well as many others, have arisen over and over again in cases where there has been no specific reliance placed on any rule of statutory construction. The answers to such problems are controlled by considerations other than a rule of construction.<sup>30</sup> At most the announced rule bol-

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28. *Meier Electric and Machine Co. v. Dixon*, 81 Ind App. 400, 402, 143 N.E. 363, 364 (1924).

29. 208 Ind. 46, 194 N.E. 637 (1935).

30. It is of course possible to take the position that the original tendency to construe bulk sales statutes strictly is giving way to a rule of liberal construction because the courts have become more familiar with and, consequently, less distrustful of such legislation. Professor Vold so says (Vold, *op. cit. supra* note 12, at 404) and there is evidence to bear him out. See the Missouri cases discussed *supra* note 22. Compare *Apex Leasing Co. v. Litke*, 173 App. Div. 323, 159 N.Y. Supp. 707 (1st Dep't 1916), with *Himmelstein v. Bach*, 261 App. Div. 57, 24 N.Y.S.2d 696 (3d Dep't 1941); see also, *Preferred Oil Co. v. Ansonia Management Corp.*, 257 App. Div. 830, 11 N.Y.S.2d 998 (2d Dep't 1939). See also, *Billig and Smith, Bulk Sales Laws: A Study in Statutory Interpretation*, 38 W. VA. L.Q. 309 (1932); comment, 35 COL. L. REV. 795 (1935). It is also true that the passage of general statutes instructing courts to construe statutes liberally in order to effectuate their purposes, and thus eliminating the derogation rule, either expressly or by implication, has already changed the rule in one jurisdiction. See the Missouri cases discussed *supra*, note 22, and see also, *Peterson Co. v. Freburn*, 204 Iowa 644, 215 N.W. 746 (1927). Mr. Justice Walling took cognizance of a tendency toward liberal construction in *Broad Street National*

sters the court's otherwise-arrived-at conclusion in any given case. By grouping the cases with reference to the particular problem raised by them, it is possible to arrive at some general conclusions as to whether the courts have given a "strict-in-fact" or "liberal-in-fact" construction to the statutes for the purpose of deciding one kind of bulk sales case.

But even within those arbitrary limits there is the danger of overlooking the significant dissimilarities between the statutes.

## II. THE PRESENT STATUTES

Two major obstacles stand in the way of any non-parochial discussion of what businesses are covered by bulk sales statutes: (1) a fact that has already been adverted to, *i.e.*, the language of the statutes varies greatly, which makes generalization difficult, though by no means impossible, and (2) the fact that the problem cannot be isolated entirely from the problem of what kinds of goods are covered. The latter problem will be treated separately,<sup>31</sup> however, because the considerations which underlie it are somewhat different from those which underlie the instant problem.

While it is possible to classify the kinds of businesses covered or not covered on several different bases (*e.g.*, the statutes might be grouped, with each type of statute considered in relation to each possible kind of business), both logic and preference dictate a classification based on seven kinds of businesses to which bulk sales acts might be applied and to which an attempt has been made to apply at least one of them. In addition to those businesses which fall within the seven principal groups, there are a substantial number of businesses to which bulk sales acts might be applied, but which in fact have characteristics common to more than one of the principal groups which, therefore, prevent their classification exclusively within any of the seven groups.

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Bank v. Lit Bros., 306 Pa. 85, 158 Atl. 866 (1932), but refused to use it to extend coverage of the statute to a manufacturing business.

It has also been stated in the cases that even though the statute viewed as a whole is to be constructed strictly, its *remedial portions* should be liberally construed. See the dissenting opinion in Adams-Flanigan Co. v. DiDonato, 180 App. Div. 342, 346, 167 N.Y. Supp. 948, 950 (1917). In Hughes-Curry Packing Co. v. Sprague, 200 Ind. 540, 165 N.E. 313 (1929), the court announced the derogation rule as being applicable ". . . except under certain conditions as to notice to creditors. . . ." *Id.* at 542, 165 N.E. at 319.

I do not disagree with these conclusions. In fact I will point out in subsequent sections of this and other articles in the series that courts have frequently given a "liberal-in-fact" construction to certain problems arising under these statutes even though the same courts purport to be operating under the derogation rule generally. My position is simply that generalizations of this nature are of no value, and that, in any event, a further investigation must be made each time one of the recurring problems arises as to what the courts have done *with that kind of problem*. See also, Billig and Branch, *supra*, this footnote.

31. See Miller, *Bulk Sale Laws: Property Included*, to be published in the April, 1954 issue of the Washington University Law Quarterly.



The latter businesses will be treated miscellaneously, not because they are unimportant, for they present some of the most difficult problems of all, but merely for convenience of organization and treatment.

The classification adopted is not necessarily that discussed in any of the cases *eo nomine*, but the sense of the cases considered collectively will support its use. It follows:

- a. Retail mercantile businesses.
- b. Wholesale mercantile businesses.
- c. Manufacturing businesses.
- d. Repair shops.
- e. Restaurants and saloons.
- f. Farmers.
- g. Businesses in which *only* services are sold.
- h. Miscellaneous.

Two further observations seem pertinent at this point. The cases covered abound in language which suggests that at least a large number of them are *controlled* by rules of statutory construction, but upon close examination it is clear that far from being controlling, the rules of construction are of little import, serving in most instances only to bolster up basic value judgments arrived at on other grounds. The second point is that in many cases which are concerned with the problem of whether a particular statute is applicable to a particular business, the result is clearly controlled by express statutory language not common to most of the statutes.

a. *Retail mercantile businesses.*

It has already been stated that bulk sales statutes derived their principal impetus from the concerted efforts of Credit Men's Associations.<sup>32</sup> The primary interest of the members of those Associations was the protection of persons or firms who sold to the retail merchant on credit. Furthermore, most of the abuses sought to be remedied by the statutes were perpetrated by retail merchants. Thus it was with respect to secret sales of a retail stock that the alleged defect in the law of fraudulent conveyances discussed above was most glaring. On the basis of these extrinsic facts it is probable that the statutes, at least in their early forms, were enacted for the primary purpose of protecting the creditors of retail merchants.

It is clear from the cases that every statute enacted to date is applicable to sales in bulk by retail merchants. Not only does a study of the decided cases lead to that conclusion,<sup>33</sup> but a study of the language

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32. Billig, *supra* note 1, at 81-88.

33. Jubas v. Sampson, 185 F.2d 333 (9th Cir. 1950); Woodruff v. Laugharn, 50 F.2d 532 (9th Cir. 1931); Sabin v. Horenstein, 260 Fed. 754 (9th Cir. 1919); Sproul v. Gambone, 43 F. Supp. 575 (W.D. Pa. 1942); Laugharn v. Zimmelman,

of the statutes themselves compels the drawing of it. Such phrases as "merchandise,"<sup>34</sup> "goods, wares and merchandise,"<sup>35</sup> "mercantile

28 F. Supp. 348 (S.D. Cal. 1939); Terry v. McCall Co., 203 Ala. 141, 82 So. 171 (1919); Gretzinger v. Wynne Wholesale Grocer Co., 183 Ark. 303, 35 S.W.2d 604 (1931); North American Provision Co. v. Fischer Lime & Cement Co., 168 Ark. 106, 269 S.W. 993 (1925); Morris-Morton Drug Co. v. Glenwood Drug Co., 127 Ark. 296, 192 S.W. 224 (1917); Stuart v. Elk Horn Bank and Trust Co., 123 Ark. 285, 185 S.W. 263 (1916); Walp v. Moorar, 76 Conn. 515, 57 Atl. 277 (1904); Martin v. Taylor, 24 Ga. App. 598, 101 S.E. 690 (1919); Boise Assn. of Credit Men v. Glenns F.M. Co., 48 Idaho 600, 283 Pac. 1038 (1930); Luthy & Co. v. Paradis, 299 Ill. 380, 132 N.E. 556 (1921); Ogden Avenue State Bank v. Cherry, 225 Ill. App. 201 (1922); Wright v. Haley, 208 Ind. 46, 194 N.E. 637 (1935); Hughes-Curry Packing Co. v. Sprague, 200 Ind. 540, 165 N.E. 318 (1929); Iowa State Savings Bank of Malvern v. Young, 214 Iowa 1287, 244 N.W. 271 (1932); Hronik v. Warty, 205 Iowa 1111, 217 N.W. 449 (1928); Des Moines Packing Co. v. Uncaphor, 174 Iowa 39, 156 N.W. 171 (1916); Richards-Conover Hardware Co. v. Sharp, 150 Kan. 506, 95 P.2d 360 (1939); Lemen v. Leffringhouse, 127 Kan. 501, 274 Pac. 215 (1929); Holt v. Richardson & Tarbet, 116 Kan. 47, 225 Pac. 1086 (1924); Trego County State Bank v. Hillman, 104 Kan. 264, 178 Pac. 420 (1919); Burnett v. Trimmell, 103 Kan. 130, 173 Pac. 6 (1918); Gwinn Bros. & Co. v. Peoples General Store, 269 Ky. 813, 108 S.W.2d 1001 (1937); Riedling v. Ross and Zeitz, 213 Ky. 187, 280 S.W. 923 (1926); Tupper v. Barrett, 233 Mass. 565, 124 N.E. 427 (1919); Mills v. Sullivan, 222 Mass. 587, 111 N.E. 605 (1916); Adams v. Young, 200 Mass. 588, 86 N.E. 942 (1909); Kelly-Buckley Co. v. Cohen, 195 Mass. 585, 81 N.E. 297 (1907); Gallus v. Elmer, 193 Mass. 106, 78 N.E. 772 (1906); Union Guardian Trust Co. v. Detroit Creamery Co., 265 Mich. 636, 251 N.W. 797 (1933); Hoja v. Motoc, 235 Mich. 258, 209 N.W. 66 (1926); Gilbert v. Gonyea, 103 Minn. 459, 115 N.W. 640 (1908); Grant Motors, Inc. v. Federal Credit Co., 183 Miss. 872, 185 So. 196 (1938); Cohen v. Calhoun, 168 Miss. 34, 150 So. 198 (1933); Whittington v. Yazoo Delta Mortgage Co., 148 Miss. 861, 114 So. 752 (1927); Moore Dry Goods Co. v. Rowe, 97 Miss. 775, 53 So. 626 (1910); Roberts v. Kaemmerer, 220 Mo. App. 582, 287 S.W. 1057 (1926); Cech v. Costello, 117 Neb. 224, 220 N.W. 236 (1928); Niklaus v. Lessenhop, 99 Neb. 803, 157 N.W. 1019 (1916); Appel Mercantile Co. v. Barker, 92 Neb. 669, 138 N.W. 1133 (1912); J. Goldman & Co. v. Crank, 200 N.C. 384, 156 S.E. 919 (1931); Armfield Co. v. Saleeby, 178 N.C. 298, 100 S.E. 611 (1919); McMillen v. Nelson, 47 N.D. 284, 181 N.W. 618 (1921); Oregon Mill & Grain Co. v. Hyde, 87 Ore. 163, 169 Pac. 791 (1918); Rice v. West, 80 Ore. 640, 157 Pac. 1105 (1916); Osterweil v. Crean, 344 Pa. 465, 26 A.2d 307 (1942); George H. West Shoe Co. v. Lemish, 279 Pa. 414, 124 Atl. 87 (1924); Smith v. Boyer, 119 S.C. 176, 112 S.E. 71 (1921); Cudahy Packing Co. v. Mylan, 56 S.D. 275, 228 N.W. 374 (1929); Larson v. Becker, 47 S.D. 477, 199 N.W. 470 (1924); Keller v. Fowler Bros. & Cox, 148 Tenn. 571, 256 S.W. 879 (1923); Daly v. Sumpter Drug Co., 127 Tenn. 412, 155 S.W. 167 (1912); 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); Butler Bros. v. Sinkin, 129 Tex. 331, 104 S.W.2d 14 (1937); Nash Hardware Co. v. Morris, 105 Tex. 217, 146 S.W. 874 (1912); Texas Bank & Trust Co. v. Teich, 283 S.W. 552 (Tex. Civ. App. 1926); Blanchard Co. v. Ward, 124 Wash. 204, 213 Pac. 929 (1923); Continental Distributing Co. v. Swanson, 79 Wash. 128, 139 Pac. 865 (1914); Marlow v. Ringer, 79 W. Va. 568, 91 S.E. 386 (1917); State Bank of Viroqua v. Jackson, 261 Wis. 538, 53 N.W.2d 433 (1952).

34. The following statutes have as their key phrase "a stock of merchandise." ALA. CODE tit. 20, § 10 (Supp. 1952); ARK. STAT. ANN. § 68-1501 (1947); COLO. STAT. ANN. c. 27, § 1 (Supp. 1952); CONN. GEN. STAT. § 6705 (1949); DEL. CODE ANN. tit. 6, § 2101 (1953); ILL. ANN. STAT. c. 121½, § 78 (Supp. 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); MINN. STAT. ANN. § 513.18 (West 1947); MISS. CODE ANN. § 274 (1942); MO. REV. STAT. § 427.020 (Vernon 1950); NEB. REV. STAT. § 36-501 (1952); NEV. COMP. LAWS § 6816 (Supp. 1949); N.H. REV. LAWS c. 262, § 43 (1942); N.J. STAT. ANN. § 46:29-1 (1940); N.M. STAT. ANN. § 53-1001 (1941); N.Y. PERS. PROP. LAW § 44; N.C. GEN. STAT. § 39-23 (1950); N.D. REV.

business," "stock in trade," "person in the business of buying commodities and selling the same in small quantities, for purposes of profit," recur in the statutes. The only problem presenting any difficulty is whether any business other than a retail mercantile business falls within the statutes. It would appear that only the Arizona statute<sup>35</sup> is so narrowly drafted as to lead to the conclusion that only retail merchants are included. That statute applies only to "person[s] in the business of buying commodities and selling the same in small quantities. . . ." Interestingly enough, however, in *Nolte v. Winstanley*,<sup>36</sup> without any discussion of the problem posed by the statutory language, the Supreme Court of Arizona held that the sale of a bakery and confectionary business was within the Arizona bulk sales statute, except the fixtures, wagons, teams and *implements of manufacture* used in the trade and *not daily exposed to sale*. Thus, a business in which labor in a substantial quantity is added to raw materials in order to convert them into salable form is within the purview of the statute at least to the extent of the finished products if they are offered for sale at retail.

An earlier Connecticut statute<sup>37</sup> contained the same language presently found only in the Arizona statute. The Supreme Court of Errors of Connecticut held in a case arising under that statute that a stone-cutting business did not fall within its purview,<sup>38</sup> but the decision was rested on two grounds, one of which was not present in the *Nolte* case. The facts were these. The business consisted of purchasing stone slabs which were cut into smaller pieces, tooled, dressed and polished. In most instances they were prepared to fill special orders (the factor not present in the *Nolte* case) but occasionally the finished products were completed without special order and sold without the addition of further labor. The court said that neither an exclusively manufacturing nor an exclusively wholesale business came within the statute, but that where the end products are in part at least sold at

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CODE § 51-0202 (1943); OHIO GEN. CODE ANN. § 11102 (1938); R.I. GEN. LAWS c. 483, § 1 (1938); S.D. CODE § 54.0301 (1939); TENN. CODE ANN. § 7283 (Williams 1934); TEX. REV. CIV. STAT. ANN. art. 4001 (1945); VT. REV. STAT. § 7846 (1947); VA. CODE § 55-83 (1950); WYO. COMP. STAT. ANN. § 41-701 (1945).

35. D.C. CODE ANN. § 28-1701 (1951); FLA. STAT. ANN. § 726.02 (1944); GA. CODE ANN. § 28-203 (1952); IDAHO CODE ANN. § 64-701 (1948); MD. ANN. CODE GEN. LAWS art. 83, § 97 (1951); MONT. REV. CODES ANN. § 18-201 (1947); OKLA. STAT. ANN. tit. 24, § 71 (1937); Ore. Laws 1949, c. 435 § 1; PA. STAT. ANN. tit. 69, § 521 (1931); UTAH CODE ANN. § 25-2-1 (1953); WASH. REV. CODE § 63.08.010 (1952); W.VA. CODE ANN. § 4001 (1949); WIS. STAT. § 241.18 (1951).

36. S.C. CODE § 11-201 (1952).

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

38. ARIZ. CODE ANN. § 58-301 (1939).

39. *Ibid.*

40. 16 Ariz. 327, 145 Pac. 246 (1914).

41. Conn. Laws 1909, c. 21.

42. Connecticut Steam Brown Stone Co. v. Lewis, 86 Conn. 386, 85 Atl. 534 (1912).

retail, a case by case determination must be made in order to discover whether the particular business falls within the statute. Here the court found that the sales at retail of products finished without special order were relatively few, that because of the great difference between the unfinished slab and the finished product, labor and not material was the most important ingredient of the product being sold, and consequently that the people engaged in the business were not making it their business "to buy commodities and sell the same in small quantities." The two cases are clearly distinguishable on their facts, and it is not at all certain that the Connecticut court would have disagreed in result with the Arizona court had a bakery, selling its output at retail and not filling special orders almost exclusively, been involved.

It appears to the writer that the clear language of the statute compels a different conclusion. The key words are "of buying commodities and selling *the same*" (Italics added). In cases where a substantial part of the commodity sold at retail is labor, especially labor other than that normally involved in the mere distribution and marketing of goods, the "same" commodity is not being sold as was originally purchased by the owner of the business. Consequently those businesses in which more is done than merely breaking packages or otherwise changing the size or quantity to suit the needs of customers, which is certainly the situation when either a stone-cutter or baker is involved, should be held to fall outside the scope of a statute like that of Arizona.<sup>43</sup> In any event it is apparent that a "liberal-in-fact" interpretation has been given in these cases, although neither court has ever announced a rule of construction in a bulk sales case.

Conversely, a few cases decided under statutes much less restrictive in their terms than the Arizona statute contain language which could be interpreted as meaning that those statutes apply exclusively to retail merchants. That language takes two principal forms: (1) a statement that the purpose of the bulk sales statute is ". . . to protect creditors of retail merchants against fraudulent sales by the debtors

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43. See also, *The Farmers & Drovers National Bank v. Hannaman*, 115 Kan. 370, 223 Pac. 478 (1924) (restaurant not within act because goods not in same form when sold); *Swift & Co. v. Tempelos*, 178 N.C. 487, 101 S.E. 8 (1919) (statute contemplates a "stock of goods which has been bought for resale in a substantially unchanged condition.") See also, *Bolanovich v. Peter Hauptmann Tobacco Co.*, 261 S.W. 723 (Mo. App. 1924), holding a restaurant not to fall within the statute and distinguishing a saloon in that in the latter type of business many articles are resold without any change in form. The court said:

The statute was evidently intended to apply to a stock of merchandise and equipment used in connection with the business, where the merchandise is bought for resale in substantially the same form that it is originally bought, and does not apply to a restaurant keeper's business, where he or she does not undertake to resell the articles in the form purchased.

*Id.* at 724.

of their stocks and merchandise."<sup>44</sup> It should be noted, however, that while the statement may be true in the abstract, the statutory language does not demand such a restricted interpretation; in fact it seems to indicate a broader one.<sup>45</sup> Beyond that, the statement is only dictum since there was no dispute in the case as to the fact that the business considered was a retail business. The other language (2) is that:

... [T]he class of vendors embraced in the statutory provision are those whose business is the sale of stock or merchandise to intending customers who resort to the place where such stock or merchandise is kept for sale to such persons.<sup>46</sup>

It may be argued that retailers do not usually resort to the wholesale warehouse to purchase goods, and consequently that wholesalers are not covered. Such a construction seems strained, however, since in many instances ordering from the corner grocery store is done by telephone without prior inspection of the goods. Since in the case what was sold was a fleet of buses, the business was clearly one which regularly sold services only, and the possible construction suggested above was not in any sense necessary to the decision.<sup>47</sup>

It is clear that retail merchants are within the scope of every statute enacted thus far, and, further, that there are no specific holdings that any statute is confined to retail merchants.<sup>48</sup> However, the interpretation placed on the Arizona statute by its Supreme Court and that placed on the early Connecticut statute of the same type appear to be erroneous as a matter of statutory interpretation.

44. *Hronik v. Warty*, 205 Iowa 1111, 1114, 217 N.W. 449, 451 (1928); see also, *Lewis, Hubbard & Co. v. Loughran*, 85 W. Va. 235, 101 S.E. 465 (1919).

45. IOWA CODE ANN. c. 555, § 555.1 (1950) provides in part: "The sale . . . of any part . . . of a stock of merchandise and the fixtures pertaining to the conducting of said business . . . shall be void. . . ." It is true, however, that the original Iowa statute (Iowa Acts 1911, c. 150, § 1) expressly covered both retail and wholesale businesses, and the conclusion may be drawn that the change in the wording justifies the inference that the legislature no longer intended that wholesalers should be covered. For the view that the inclusiveness of the statutory language will probably override the failure to continue the express inclusion during the amending process, see Note, 20 IOWA L. REV. 815, 823 (1935).

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

47. The language quoted above was relied on in *Samuelson v. Goldberg*, 13 N.J. Misc. 204, 177 Atl. 260 (Sup. Ct. 1935), but the decision in that case was simply that a poultry farmer did not fall within the statute.

48. In *State Bank of Viroqua v. Jackson*, 261 Wis. 538, 53 N.W.2d 433 (1952), the court stated that the earlier case of *Missos v. Spyros*, 182 Wis. 631, 197 N.W. 196 (1924), held ". . . that the law applies only to merchants selling at retail and to the property held for sale at retail, and it does not apply to items that are to be processed or to which labor is to be added prior to sale." *Id.* at 541, 197 N.W. at 435. It should be pointed out that a wholesaler processes and adds labor to no greater extent than a retailer.

b. *Wholesale mercantile businesses.*

Only in *North American Provision Co. v. Fischer Lime and Cement Co.*<sup>49</sup> has a court had squarely before it the problem of whether an exclusively wholesale mercantile establishment, with no elements of manufacturing involved, is covered by the putatively applicable bulk sales statute. In that case the Supreme Court of Arkansas, speaking through Mr. Justice Hart, said:

It has been said that the practice of retail merchants in selling their stocks in bulk are [sic] the most common source of fraud with which the courts have to deal, and that such statutes were passed for the protection of wholesale merchants. A sufficient answer to this is that wholesale merchants, by selling their stocks in bulk, could practice a fraud upon manufacturers and other wholesale merchants, who are their creditors, just as successfully as retail merchants could do in the sale of their stocks in bulk. After all, the language of the statute must be the test as to what class of merchants are [sic] embraced within its scope.<sup>50</sup>

While the "sufficiency" of that "answer" is open to some question, particularly because of the usual discrepancy in size and capitalization between most retailers and most wholesalers, nevertheless it seems to reflect the attitude of nearly all of the courts which have made any reference to the problem.

In other cases the problem has been discussed, although the precise point was not in issue. It has been stated,<sup>51</sup> for example, that the existence of charter authority to engage in both retail and wholesale business was immaterial in determining the applicability of the Nebraska bulk sales statute.<sup>52</sup> Likewise, dicta may be found in two cases decided by the Supreme Court of Texas that the Texas statute covers both wholesalers and retailers.<sup>53</sup>

In addition, the failure in three cases to state, as a ground for holding particular transfers outside the applicable statute, that the wholesale aspects of a business are not covered by bulk sales statutes, lends support to the view that they are covered.<sup>54</sup> In all of the three cases,

49. 168 Ark. 106, 269 S.W. 993 (1925); cf. *Benedict & Eberle Co. v. Hollman*, 68 Pa. Super. 155, 158 (1917).

50. *North American Provision Co. v. Fischer Lime & Cement Co.*, 168 Ark. at 110, 111, 269 S.W. at 994. See also, *Gretzinger v. Wynne Wholesale Grocer Co.*, 183 Ark. 303, 35 S.W.2d 604 (1931); *Root Refineries v. Gay Oil Co.*, 171 Ark. 129, 284 S.W. 26 (1926).

51. *Niklaus v. Lessenhop*, 99 Neb. 803, 157 N.W. 1019 (1916).

52. NEB. REV. STAT. §§ 36-501 to 36-502 (1952). It should be noted, however, that the language of the Nebraska statute is such that a business in which no stock of merchandise is maintained is covered since the 1941 amendment, so it is clear that the wholesaler would certainly be included.

53. *Butler Bros. v. Sinkin*, 129 Tex. 331, 333, 104 S.W.2d 14, 15 (1937); *Nash Hardware Co. v. Morris*, 105 Tex. 217, 223, 146 S.W. 874, 876 (1912). See also, *Luthy & Co. v. Paradis*, 299 Ill. 380, 132 N.E. 556 (1921).

54. *Sabin v. Horenstein*, 260 Fed. 754 (9th Cir. 1919); *Osterweil v. Crean*, 344 Pa. 465, 26 A.2d 307 (1942); *Keller v. Fowler Bros. & Cox*, 148 Tenn. 571,

the seller sold at both retail and wholesale; in one of them<sup>55</sup> the seller owned a chain of retail grocery stores and a wholesale house or depot which was used to supply the retail outlets. The stock in the wholesale house was sold without compliance with the Tennessee bulk sales statute.<sup>56</sup> The court held that the transfer fell within the statute. In the other two cases, the sellers were doing both a retail and jobbing business in men's furnishings. In one of them,<sup>57</sup> stocks were purchased in job lots for a sale at retail and as many retail sales as possible were made within a short period. The remainder of the lot was then disposed of as a job lot to auction houses. The transfer attacked was one in which a job lot had been purchased and then resold as a job lot without any attempt to sell any part of it at retail. In the other case<sup>58</sup> the report is less detailed but it appears that while usually the seller sold both in job lots and at retail, the transfers attacked were job lot sales of greater quantity and frequency than the usual ones. In both cases the transfers were held to be outside the operation of the bulk sales laws, not on the ground that wholesalers were not covered, but rather on the ground that the particular transfers were not "out of the ordinary course of trade."

It may be argued, of course, that since the sellers were combined retailers and wholesalers, the cases lend no support to the thesis that wholesalers fall within the statutes. It is true that in clothing cases it would have been difficult to separate the retail from the wholesale elements of the businesses, but that difficulty did not exist in the *Keller* case.<sup>59</sup> While the paucity of cases, the *rationes decidendae* of which relate to the problem at hand, makes the task of making flat statements a hazardous one, confidence may be bolstered by a reading of the statutory language itself, for the language of all statutes except that of Arizona is clearly broad enough to cover wholesalers as well as retailers, although only the Florida and California statutes<sup>60</sup> expressly apply to wholesalers as well as retailers. In any event, it is certain that with respect to the problem under consideration here, the statutes have not received the strict interpretation which most writers have asserted has been given to bulk sales statutes but have rather received a "liberal-in-fact" interpretation.

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256 S.W. 880 (1923). See also, *Carpenter v. Karnow*, 193 Fed. 762 (D.C. Mass. 1911); *Martin v. Taylor*, 24 Ga. App. 598, 101 S.E. 690 (1919).

55. *Keller v. Fowler Bros. & Cox*, 148 Tenn. 571, 256 S.W. 879 (1923).

56. TENN. CODE ANN. §§ 7283-7285 (Williams, 1934).

57. *Osterweil v. Crean*, 344 Pa. 465, 26 A.2d 307 (1942).

58. *Sabin v. Horenstein*, 260 Fed. 754 (9th Cir. 1919).

59. *Keller v. Fowler Bros. & Cox*, 148 Tenn. 571, 256 S.W. 879 (1923).

60. CAL. CIV. CODE § 3440.1 (Supp. 1953); FLA. STAT. ANN. § 726.02 (1944); reference should again be made, however, to NEB. REV. STAT. § 36-501 (1952) mentioned in note 52, *supra*.

c. *Manufacturing businesses.*

Although many statements may be found in the cases which suggest generally that manufacturing businesses do not fall within the purview of bulk sales statutes,<sup>61</sup> analysis reveals that the decisions are not unanimous,<sup>62</sup> and further that in some cases holding a particular manufacturer to fall outside the statute in question, the decision is carefully guarded.<sup>63</sup> Of great significance are the fact that several distinctions have been suggested, though not often used as a basis for decision, and the fact that certain other distinctions may be inferred from language contained in other cases.

Since this is a problem in statutory construction, the question of what approach has been taken should be first examined. From that point of view the cases fall into two groups. In one of them the issue is expressed in terms of seeking legislative intention, while the other group proceeds more directly to a decision on the specific issue without reference to legislative intention. Those expressly seeking legislative intention may be further subdivided. One sub-group approaches the problem with something like a combination of the plain-meaning rule and rules requiring strict construction of penal statutes and statutes in derogation of the common law.<sup>64</sup> The result there is almost invari-

61. *Shasta Lumber Co. v. McCoy*, 85 Cal. App. 468 (1927); *Atlas Rock Co. v. Miami Beach Builders Supply Co.*, 89 Fla. 340, 103 So. 615 (1925); *Cooney, Eckstein & Co. v. Sweat*, 133 Ga. 511, 66 S.E. 257 (1909); *Frederick v. Dettary Engineering Co.*, 318 Mich. 252, 23 N.W.2d 94 (1947); *Spurr v. Travis*, 145 Mich. 721, 108 N.W. 1090 (1906); *Lee v. Gillen & Boney*, 90 Neb. 730, 134 N.W. 278 (1912); *Broad Street National Bank v. Lit Bros.*, 306 Pa. 85, 158 Atl. 866 (1932); *Gitt v. Hoke*, 301 Pa. 31, 151 Atl. 585 (1930); *Brockway Machine Bottle Co. v. Monaca Glass Co.*, 118 Pa. Super. 347, 179 Atl. 818 (1935); *Bechman v. Hershey Creamery Co.*, 30 Dauph. 371 (1927) [*contra*, *Baker v. Young*, 17 Pa. D.&C. 9 (1931)]; *Neas v. Borches*, 109 Tenn. 398, 71 S.W. 50 (1902); *Lewis Brown Co. v. Mallory*, 8 Tenn. App. 36 (1928); *Bozeman v. Naff*, 5 Tenn. App. 77 (1927); *cf. Schultz, Baujan & Co. v. Bell*, 23 Tenn. App. 258, 130 S.W.2d 149 (1939), where the court indicated that if finished products of a bakery had been sold the transaction would fall within the statute. *Tomforde v. Mitchell Const. Co.*, 91 S.W.2d 1137 (Tex. Civ. App. 1936); *American Surety Co. of New York v. M-B Ise Cream Co.*, 38 S.W.2d 118 (Tex. Civ. App. 1931); *Industrial Acceptance Corporation v. Corey*, 19 S.W.2d 365 (Tex. Civ. App. 1929); *Grimes v. Huntsville State Bank*, 12 S.W.2d 1087 (Tex. Civ. App. 1928); *Hobart Mfg. Co. v. Joyce & Mitchell*, 4 S.W.2d 185 (Tex. Civ. App. 1928). *Contra*, *Teich v. McAuley*, 212 S.W. 979 (Tex. Civ. App. 1919). See, 34 VA. L. REV. 96 (1948).

62. *In re United Traveling Goods Co.*, 297 Fed. 823 (2d Cir. 1924); *Gretzinger v. Wynne Wholesale Grocer Co.*, 183 Ark. 303, 35 S.W.2d 604 (1931); *Root Refineries v. Gay Oil Co.*, 171 Ark. 129, 284 S.W. 26 (1926); *Kranke v. American Fabrics Co.*, 112 Conn. 58, 151 Atl. 312 (1930) (interpreting the New Jersey bulk sales law). The *Kranke* case was repudiated by the New Jersey Supreme Court in *Samuelson v. Goldberg*, 13 N.J. Misc. 204, 177 Atl. 260 (Sup. Ct. 1935); *G.S. Johnson Co. v. Belosky*, 263 Ill. 363, 105 N.E. 287 (1914) (under the very broadly worded Illinois statute); *Kennedy v. Dillon*, 97 N.H. 76, 80 A.2d 394 (1951); *Mosson v. Kriser*, 212 App. Div. 282, 208 N.Y. Supp. 566 (1st Dep't 1925); *cf. Hart v. Brierley*, 189 Mass. 598, 76 N.E. 286 (1905).

63. *In re Saraw*, 91 F.2d 957 (2d Cir. 1937); *Ramey-Milburn Co. v. Sevick*, 159 Ark. 358, 252 S.W. 20 (1923).

64. *Atlas Rock Co. v. Miami Beach Builders Supply Co.*, 89 Fla. 340, 103 So. 615 (1925) (coverage will be strictly limited to that indicated in the title); *Cooney*,



ably a holding that the particular statute does not cover manufacturers. The approach used by the second sub-group is to look to the moving force behind the bulk sales statutes, the defect sought to be cured by the legislation, and so to construe and resolve in the light of whatever legislative purpose is disclosed thereby. Here too, the result is that manufacturers are held not to be covered because the evils aimed at were the sins of retailers and the statutes were the result of concerted activity on the part of retail credit men's associations.<sup>65</sup>

The second major grouping is of those cases which pass over what might be called the preliminary problem, (*i.e.*, legislative intent seeking) and proceed directly to a decision on the ultimate issue. It is in that group of cases that we find some decisions indicating that under some circumstances a manufacturer might be covered.

Two of the earliest cases which dealt with the problem, even in passing, assumed that the particular statute would not cover manufacturers and so stated.<sup>66</sup> Both cases were principally concerned with the question of the constitutionality of the statute, it having been attacked as class legislation. The contentions were that by excluding manufacturers and others from its coverage the classification was unreasonable. That reasoning convinced the Supreme Court of Illinois, and as a result the first Illinois bulk sales statute<sup>67</sup> was held invalid.<sup>68</sup> In *Spurr v. Travis*,<sup>69</sup> however, the same reasoning was rejected by the Supreme Court of Michigan which thought that a classification which excluded manufacturers was entirely reasonable and so upheld the Michigan statute.

The Illinois legislature passed another statute<sup>70</sup> in very broad form<sup>71</sup>

*Eckstein & Co. v. Sweat*, 133 Ga. 511, 66 S.E. 257 (1909) (derogation rule); *Gitt v. Hoke*, 301 Pa. 31, 151 Atl. 585 (1930) (combination of derogation rule, rule that penal statutes must be strictly construed and plain-meaning rule); *Nichols, North Buse Co. v. Belgium Cannery*, 188 Wis. 115, 205 N.W. 804 (1925) (derogation rule and rule that penal statutes must be strictly construed).

65. *Cooney, Eckstein & Co. v. Sweat*, 133 Ga. 511, 66 S.E. 257 (1909); *Gitt v. Hoke*, 301 Pa. 31, 151 Atl. 585 (1930). What is perhaps a variation of this same idea is found in *Frederick v. Dettary Engineering Co.*, 318 Mich. 252, 28 N.W.2d 94 (1947), in which the Court says:

It is well known that the business of retailing goods, wares, and merchandise is conducted largely upon credit, and furnishes an opportunity for the commission of frauds upon creditors not usual in other cases of business. *Id.* at 255, 28 N.W.2d at 95, quoting from *Spurr v. Travis*, 145 Mich. 721, 108 N.W. 1090 (1906) which in turn quoted from *McDaniels v. J.J. Connelly Shoe Co.*, 30 Wash. 549, 71 Pac. 37 (1902).

66. *Charles J. Off & Co. v. Morehead*, 235 Ill. 40, 85 N.E. 264 (1908); *Spurr v. Travis*, 145 Mich. 721, 108 N.W. 1090 (1906).

67. Ill. Laws 1905, p. 284.

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

69. 145 Mich. 721, 108 N.W. 1090 (1906).

70. Ill. Laws 1913, p. 258.

71. The statutes of several states are so worded that manufacturers could easily be held to be covered, and in some instances should be so held. *E.g.*, CAL. CIV. CODE § 3440.1 (Supp. 1953) includes "... the sale ... of the fixtures or store equipment of a ... machinist. ...". IDAHO CODE ANN. § 64-701 (1948)

which the Supreme Court of Illinois has since construed to cover manufacturers on the specific ground that it was drafted in the light of the Court's decision in *Charles J. Off & Co. v. Morehead*.<sup>72</sup> The original holding of the Michigan Supreme Court on the other hand was recently affirmed in *Frederick v. Dettary Engineering Co.*,<sup>73</sup> the Court taking the position that while it always construes the statute liberally, any further extension will have to come from the legislature. Of those courts which have made an approach characterized by the application of the usual canons or rules of construction to the statute, only the Illinois Supreme Court has held that manufacturers are included and the statement holds whether the aids used have been intrinsic or extrinsic, and whether the court otherwise has a rule of strict or liberal construction nominally applicable to problems arising under bulk sales statutes.<sup>74</sup>

On the other hand, those courts which have made a direct approach to the problem have reached varying conclusions. Some of the courts which have considered the problem have ruled that manufacturers are not covered by the statutes, and have done so in broad terms without differentiating between various parts of a manufacturing business, *i.e.*, whether raw materials, machinery, fixtures, equipment or finished products were included in the sale under attack when not all of them

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covers the sale of ". . . any portion of the property, furniture, fixtures, or equipment or supplies . . . [of] any place of business wherein the furniture, fixtures, or equipment are used in carrying on said business. . . ." LA. REV. STAT. ANN. § 9:2961 (1950) demands compliance in the case of "The transfer . . . of all or substantially all of the fixtures or equipment used or to be used in the display, manufacture, care, or delivery of any goods, wares, or merchandise including movable store and office fixtures, horses, wagons, automobile trucks and other vehicles or other goods or chattels of the business of the transferor. . . ." NEB. REV. STAT. § 36-501 (1952) applies to ". . . the sale . . . of any part . . . of a stock of fixtures, equipment or machinery by any person, firm or corporation engaged in a business in which no stock of merchandise is maintained. . . ." Ore. Laws 1949 c. 435, § 1 covers the purchase of ". . . the goods, wares and merchandise in bulk of any commercial business or establishment, including restaurants and other food dispensing establishments, or of all, or substantially all, of the furniture, fixtures, supplies, or equipment of any such business or establishment, including motor vehicles. . . ." UTAH CODE ANN. § 25-2-1 (1953) covers the ". . . purchase . . . [of] any portion of the property, furniture, fixtures, equipment or supplies of a hotel, restaurant, barbershop or other business. . . ." (Italics added.) It is true that in the latter situation the *ejusdem generis* rule might be invoked with the result that only businesses in which the sale of services predominates are included, however.

It is certainly true, however, that each of the other statutes should be construed to cover manufacturers, with the possible exception of the Oregon statute.

72. *G. S. Johnson Co. v. Belosky*, 263 Ill. 363, 105 N.E. 287 (1914). And see *Landers Frary & Clark v. Vischer Products Co.*, 201 F.2d 319 (7th Cir. 1953).

73. 318 Mich. 252, 28 N.W.2d 94 (1947).

74. *Atlas Rock Co. v. Miami Beach Builders Supply Co.*, 89 Fla. 340, 103 So. 615 (1925); *Cooney, Eckstein & Co. v. Sweat*, 133 Ga. 511, 66 S.E. 257 (1909); *Frederick v. Dettary Engineering Co.*, 318 Mich. 252, 28 N.W.2d 94 (1947); *Gitt v. Hoke*, 301 Pa. 31, 151 Atl. 585 (1930); *Nichols, North, Buse Co. v. Belgium Canery*, 188 Wis. 115, 205 N.W. 804 (1925).

were involved in the disputed transaction.<sup>75</sup> A few courts, however, have been less certain that manufacturing businesses in all of their aspects are excluded, although the transaction in the particular case under consideration was held to fall outside the scope of the statute.<sup>76</sup>

In the case of *In re Saraw*,<sup>77</sup> the owner of a plant in which cider was processed into vinegar while stored in vats, gave a chattel mortgage on the cider in the vats. It was contended that the mortgage was void because of non-compliance with the New York bulk mortgages statute,<sup>78</sup> which the court construed to be *in pari materia* with the bulk sales law.<sup>79</sup> Although the Circuit Court of Appeals for the Second Circuit held the statute inapplicable to the transaction in question, they stated:

None of the cases seems to us to require that the statute should be construed to apply to a manufacturer who sells only to the wholesale trade and in ordinary course of business places a mortgage upon a *part of the raw materials* he has acquired for the purpose of manufacturing his final product. Such materials are not held by him for sale and are not properly described as "a stock of merchandise." We cannot believe that the Legislature would have used such inappropriate language had it intended to require that notice be given to all a manufacturer's creditors before he could place a valid mortgage on any part of his raw materials. *If he were selling out his business or mortgaging everything in the plant, the transaction would be within the spirit and purpose of the bulk sales statutes and might . . . be construed to be within the phrase "merchandise and fixtures pertaining to the conduct of the business."* While the case is not quite so clear as to a mortgage upon part of a manufacturer's finished product, we believe the same conclusion should also be reached as to such a mortgage. (Italics added.)<sup>80</sup>

In so holding the federal court distinguished three previous cases on the ground that in all of them some things which could fairly be called merchandise were included in the mortgages or sales. In one of them, the Appellate Division found the sale of a woodworking business ". . . together with the goods, wares, merchandise, fixtures and machinery thereof . . ." to fall within the bulk sales statute on the ground that ". . . there is nothing in such business which would be

75. *Spurr v. Travis*, 145 Mich. 721, 108 N.W. 1090 (1906); *Lee v. Gillen & Boney*, 90 Neb. 730, 134 N.W. 278 (1912); *Broad Street National Bank v. Lit Bros.*, 306 Pa. 85, 158 Atl. 866 (1932); *Lewis Brown Co. v. Mallory*, 8 Tenn. App. 36 (1928), *cf.* *Schultz, Baujan & Co. v. Bell*, 23 Tenn. App. 258, 130 S.W.2d 149 (1939); *Tomforde v. Mitchell Const. Co.*, 91 S.W.2d 1137 (Tex. Civ. App. 1936); *American Surety Co. of New York v. M-B Ise Kream Co.*, 38 S.W.2d 118 (Tex. Civ. App. 1931); *Grimes v. Huntsville State Bank*, 12 S.W.2d 1087 (Tex. Civ. App. 1928).

76. *In re Saraw*, 91 F.2d 957 (2d Cir. 1937); *Ramey-Milburn Co. v. Sevick*, 159 Ark. 358, 252 S.W. 20 (1923); *Schultz, Baujan & Co. v. Bell*, 23 Tenn. App. 258, 130 S.W.2d 149 (1939).

77. 91 F.2d 957 (2d Cir. 1937).

78. N.Y. LIEN LAW, § 230a.

79. N.Y. PERS. PROP. LAW, § 44.

80. 91 F.2d 957, 959, 960 (2d Cir. 1937).

inconsistent with the defendant's carrying a stock of merchandise and selling and disposing of the same in connection with its business."<sup>81</sup> The court went on to illustrate its position by saying:

Indeed, it is difficult to understand how anyone engaged in the business of woodworking and cabinet work would not manufacture goods for sale, either at retail or wholesale, and it is quite reasonable to assume that when engaged in such business a stock of goods was accumulated which it afterwards disposed of to customers in the usual course of business. It seems to me that the situation is quite like that of the shoe manufacturer who purchases a large amount of leather and raw material from which shoes are made which are afterwards disposed of as merchandise. Take the case of the Aeolian Company. . . . They purchase large quantities of high-grade lumber for the manufacture of sounding boards and other parts to musical instruments, which are sold and disposed of to the public. If the Aeolian Company should sell its business in bulk, not only its fixtures but its stock of manufactured articles, could it be said that they would not be within the provisions of [the bulk sales law] . . . ?"<sup>82</sup>

In another of the three cases, *In re United Traveling Goods Co.*,<sup>83</sup> the Circuit Court of Appeals for the same circuit had held that while a mortgage which was intended to cover only the machinery, fixtures, and chattels of one engaged in the manufacture of traveling goods would fall outside the scope of the bulk mortgages law, one which was intended to cover the stock of goods and merchandise as well would be included thereunder.

The third case, *In re Laureate Co.*,<sup>84</sup> can be distinguished much less readily than the other two. The mortgagor in that case was engaged in the business of advertising novelties, printing folding boxes and selling calendars. He purchased a stock of 130,000 pictures to attach to calendars which he proposed to sell. Before any of the pictures were attached to the calendars, he gave a chattel mortgage on his job presses as well as on all goods and chattels appearing in a certain schedule. Although the court did not expressly exclude the possibility that some of the scheduled items may have been merchandise in the full sense of the word, nevertheless the fact that the court seized on the 130,000 calendars as the merchandise which brought the transaction under the statute indicates that there were no items included which were ready for sale without some further added labor. Although the process of purchasing pictures and attaching them to calendars may seem to bear little similarity to the processes used in a typical manufactory, nevertheless, it is arguable that the pictures are analogous to the raw mate-

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81. *Mosson v. Kriser*, 212 App. Div. 282, 284, 285, 208 N.Y. Supp. 566, 569 (1st Dep't 1925).

82. *Id.* at 285, 208 N.Y. Supp. at 569.

83. 297 Fed. 823 (2d Cir. 1924).

84. 294 Fed. 668 (2d Cir. 1923).

rial used in many businesses which are clearly assembly plants. Moreover, the dissimilarity between the process of attaching pictures to calendars and the process of placing cider in a vat and letting it, by the process of fermentation, become vinegar is not such a great one. It must be admitted, however, that the court in the *Saraw* case was fully justified in accepting the characterization of the pictures as merchandise.<sup>85</sup>

From these cases it would seem that we may safely conclude that in New York, a manufacturing business falls within the bulk sales and bulk mortgages statutes, and the only problem is whether the statute has been violated, *i.e.*, has merchandise (which the court has construed to mean finished products in the case of a manufacturing business), been included in the mortgage or sale? Yet in 1942 in *Matter of Sunshine Stores* the Appellate Division held that the bulk mortgages law is not applicable to a mortgage on “. . . various items of equipment, logs and lumber and manufactured products of the logs . . .” belonging to the owner or lessee of a sawmill,<sup>86</sup> relying on *In re Saraw*<sup>87</sup> and the Georgia case of *Cooney, Eckstein & Co. v. Sweat*.<sup>88</sup> The case can be distinguished from the other cases decided under the New York statutes, and it is significant that those cases were not cited at all in the *Sunshine Stores* decision. The basis for distinction is that in the *Sunshine Stores* case there was nothing to indicate that the seller resembled in any way the ordinary merchant who sells his products normally at wholesale or retail as do many other businessmen who do not manufacture their own inventory. Thus the seller did not sell merchandise as that term has been interpreted in the New York cases.

In 1934, however, the New York bulk sales statute was amended to cover the transfer of “. . . any part or the whole of a stock of merchandise or of fixtures, or merchandise and of fixtures . . . ,”<sup>89</sup> although the bulk mortgages statute remains in its original form. It is clear that under the present bulk sales statute, a transfer may be included even though no merchandise is sold, but that for a mortgage to fall within the scope of the bulk mortgages statute, some merchandise must be included.<sup>90</sup> Because there is some indication in lower

85. See also *DiGregorio v. Avanti Publishing Co.*, 129 Misc. 345, 221 N.Y. Supp. 497 (Sup. Ct. 1927) (printing business within if a stock of its manufactured products is maintained). In *Mott v. Reeves*, 125 Misc. 511, 211 N.Y. Supp. 375 (Sup. Ct. 1925), *aff'd mem.*, 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), it was recognized by way of dictum that the raw materials of a manufacturer are not merchandise within the act.

86. *Matter of Sunshine Stores, Inc.*, 264 App. Div. 930, 36 N.Y.S.2d 2 (3d Dep't 1942).

87. 91 F.2d 957 (2d Cir. 1937).

88. 133 Ga. 511, 66 S.E. 257 (1909).

89. N.Y. PERS. PROP. LAW § 44.

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

court decisions in New York that this change means not only that the sale of the fixtures alone of a merchandising business are included, but also that the sale of fixtures of businesses which have no merchandise are covered,<sup>91</sup> the value of the earlier New York precedents in construing the bulk sales statute is in doubt, though, of course they retain their vitality as interpretations which control the application of the bulk mortgages statute.<sup>92</sup>

Another line of authority takes the position that a manufacturing business is not covered by bulk sales statutes unless the usual and ordinary disposition of the finished products is not merely "incidental to the business of manufacturing." This position has been taken by the Supreme Court of Arkansas in a line of cases beginning with *Ramey-Milburn Co. v. Sevick*,<sup>93</sup> decided in 1923. The seller sold a manufacturing business consisting of several saw-mills and a veneer mill. Included in the sale were logs and lumber which the court found to be of small value when compared with the aggregate value of all the property conveyed. The court held that the sale did not fall within the statute because the sale of the product of the manufactory was merely incidental to the manufacturing business, the purpose of the bulk sales statute being only to regulate bulk sales of merchandise which are part of a stock of a mercantile establishment.

Three years later the same court held that the sale of an oil refining business fell within the statute on the ground that under the facts, the sale was not merely incidental to the manufacture of the refined oil products because, like all other merchants, the bulk seller had sold the output from day to day.<sup>94</sup> Similarly in *Gretzinger v. Wynne Wholesale Grocer Co.*,<sup>95</sup> the court held that the sale of a retail and wholesale bakery, which from the nature of the business could not have included any substantial amount of finished products, fell within the bulk sales statute because:

. . . [E]verything except the fixtures was not only for sale, but was sold every day and was constantly going out of the store or bakery and was being replaced by other goods. The principal business of the bakery was selling bread, cakes, cookies, pastries, etc.

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91. This trend in the decisions appears first in *Davignon v. Racquette River Paper Co.*, 269 App. Div. 889, 56 N.Y.S.2d 249 (3d Dep't 1945), *appeal dismissed* 295 N.Y. 569, 64 N.E.2d 279 (1945), where the word "merchandise" was given an extremely broad definition. Then in *Flushing National Bank in New York v. Abrams*, 270 App. Div. 911, 61 N.Y.S.2d 609 (2d Dep't 1946), *aff'd mem.*, 296 N.Y. 1009, 73 N.E.2d 582 (1947), a dry-cleaning establishment was held to fall within the statute. Finally in *Stumpp & Walter Co. v. Napanoch Country Club, Inc.*, 198 Misc. 600, 102 N.Y.S.2d 489 (Sup. Ct. 1950), there was a clear statement that the 1934 amendment indicated an intention to extend the scope of the statute to other businesses.

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

93. 159 Ark. 358, 252 S.W. 20 (1923).

94. *Root Refineries v. Gay Oil Co.*, 171 Ark. 129, 284 S.W. 26 (1926).

95. 183 Ark. 303, 35 S.W.2d 604 (1931).

These were sold every day, and, while the stock kept on hand was not large, it was a stock constantly kept on hand, constantly being sold, and replaced by other goods.<sup>96</sup>

The distinction thus drawn seems tenuous at best. It is inconceivable that any manufacturing business would not have as one of its integral parts some means of disposing of its products. To describe those means as merely incidental to the business is meaningful only if we may assume that the owners are indulging in a hobby or that the whole scheme is a make-work plan of some philanthropist. The sale of lumber cut from logs at a sawmill to a lumber-yard is no more incidental, nor any less, than the sale of bread baked at a small bakery to customers of that bakery, whether they be wholesale or retail customers.

The results in the Arkansas cases, however, would justify the use of the same rationale which underlies the cases decided under the New York statutes.<sup>97</sup> Although the court has not placed its decisions on such a ground, nevertheless those decisions take on meaning if we assume that the court has in mind that where the manufacturing business is typically one in which the manufacturer is not many steps removed from the ultimate user of the finished products, so that it may fairly be said that he is a merchant, *i.e.*, a retailer or wholesaler, albeit one who chooses to manufacture his own stock, it would be basically unfair to treat him differently from other merchants for this purpose. Such a rationale has the further advantage of avoiding the difficulty of opposing relatively clear statutory language.<sup>98</sup>

A closely related idea is that a manufacturing business will not be included within a bulk sales statute if the product of the business is sold to the class of persons in the chain of distribution who would normally be the purchasers of such a line of manufactured goods, but that if the manufacturer adds another step in the usual distribution process to his own business, the business will fall within the statute. To illustrate: suppose that a manufacturer of men's suits opens a chain of retail outlets, and uses those outlets to dispose of its manufactured suits. We know, of course, that in the garment business there is usually at least one independent entrepreneur interposed between the manufacturer and the ultimate wearer of the suit, so that in our hypothetical case, the manufacturer has assumed functions usually performed by someone else in that line of business.

In the case of *In re Saraw*,<sup>99</sup> *supra*, although the statement was made

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96. *Gretzinger v. Wynne Wholesale Grocer Co.*, 183 Ark. 303, 308, 35 S.W.2d 604, 606 (1931).

97. Note, 2 BROOKLYN L. REV. 247, 250 (1933).

98. The Arkansas cases are discussed in Trammell, *The Arkansas Bulk Sales Act—A Study in Construction*, 1 ARK. L. REV. 248, 252 (1947).

99. 91 F.2d 957 (2d Cir. 1937).

as in the Arkansas cases that the sales of the vinegar were merely incidental to the manufacturing business, it is reasonably clear from a reading of the entire opinion and the handling of the precedents discussed in it, that the phrase "merely incidental to the manufacturing business," has a somewhat different meaning from that contemplated in the Arkansas cases. The court stated that:

None of the cases [the New York precedents discussed, *supra*] seems to us to require that the statute should be construed to apply to a manufacturer *who sells only to the wholesale trade* and in the ordinary course of business places a mortgage upon a part of the raw materials he has acquired for the purpose of manufacturing his final product. (Italics added.)<sup>100</sup>

It seems clear that absent the controlling New York precedents which the court felt would require a holding that the sale of an entire business would be within the statute, the fact that the particular manufacturer customarily disposed of his products in the manner usual in that line of business would prevent his falling within the statute.

Finally there is a suggestion in two cases which merits real consideration. One-half of the existing statutes<sup>101</sup> require that the inventory prepared by the seller include the cost price of the merchandise to be sold. In both the *Saraw* case<sup>102</sup> and in *Cooney, Eckstein & Co. v. Sweat*,<sup>103</sup> the use of italics and quotation marks around that particular language is a slight indication that the courts may have been influenced by the fact that in a manufacturing business the finished products, *i.e.*, the "merchandise to be sold," does not have a cost price in the sense in which those words were used in the context of the bulk sales statutes. It is not arguable, however, that in either case this was the stated basis for decision.

Although it is clear that the courts have not chosen to interpret bulk sales statutes so as to include manufacturers in the vast majority of cases, there are many indications that under some circumstances some courts will include them. Viewed primarily as a matter of determining legislative intention in the orthodox meaning of that phrase, two things tend to support the conclusions of those courts which have

100. *In re Saraw*, 91 F.2d 957, 959 (2d Cir. 1937).

101. ALA. CODE tit. 20, § 10 (Supp. 1952); ARK. STAT. ANN. § 68-1501 (1947); COLO. STAT. ANN. c. 27, § 1 (Supp. 1952); DEL. CODE ANN. tit. 6, § 2101 (1953); GA. CODE ANN. § 28-203 (1952); IND. ANN. STAT. § 33-201 (Burns 1949); IOWA CODE ANN. c. 555, § 555.1 (1) (1950); LA. REV. STAT. ANN. § 9:2962 (1950); ME. REV. STAT. c. 106, § 6 (1944); MASS. ANN. LAWS c. 106, § 1 (1947); MICH. STAT. ANN. § 19.361 (1937); MINN. STAT. ANN. § 513.18 (West 1947); MISS. CODE ANN. § 274 (1942); NEB. REV. STAT. § 36-501 (1952); N.M. STAT. ANN. § 53-1001 (1941); N.Y. PERS. PROP. LAW § 44; N.C. GEN. STAT. § 39-23 (1950); N.D. REV. CODE § 51-0202 (1943); TENN. CODE ANN. § 7283 (Williams 1934); 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).

102. *In re Saraw*, 91 F.2d 957 (2d Cir. 1937).

103. 133 Ga. 511, 66 S.E. 257 (1909).



excluded manufacturers. First of all is the language of the statutes. Most of the statutes refer to merchandise or merchants, and in that context the requirement that the cost price of items sold be given in the inventory which must accompany the list of creditors, carries with it a strong inference that the legislature contemplated only the sale of things which are sold in substantially the same form in which they were purchased, *i.e.*, not items to which the seller has added labor. Second is the fact that retail credit men's associations were the primary instigators of this legislation, and it may fairly be assumed that the only businesses actually in the contemplation of the legislature were retail mercantile businesses.

If, however, we choose to ignore these construction aids, as many of the courts have done, other considerations may bear on the soundness of the result. The following idea, not completely formulated in the cases, may be gleaned from a study of them. First, the relationship between the manufacturing aspects and the selling aspects of the businesses may become important. This has found expression in the language that the sales aspect must be "merely incidental to" the manufacturing in order that business escape the operation of the statute. Although nowhere clearly stated in the cases, some contain a suggestion that a manufacturer who integrates an extra step in the marketing process beyond that usually found in his line of business may have thus brought himself within the statute. Again there is considerable basis for stating that although a business is a manufacturing business, if in its nature it must sell in such a way as to have many characteristics of the ordinary wholesaler or retailer, it is preferable for this purpose to treat it like wholesalers and retailers. Perhaps that is the true rationale of the cases which speak of sales being merely incidental to manufacturing. The New York cases also seem in effect to adopt the rationale that if the finished product of the manufacturer is ordinarily sold at retail, and perhaps if sold at wholesale, the business falls within the statute so long as some merchandise, *i.e.*, finished products, are included in the sale under attack.

By way of critique it may be said that although the evidence of a legislative intention to exclude manufacturers is quite convincing, especially the requirement that the cost price of the articles be stated, it is not so conclusive as to render further interpretation arbitrary judicial conduct. Apart from the cost price language the evidence is quite consistent with what I believe to be the true rationale of the New York and Arkansas cases, *i.e.*, that while some businesses may be classified as manufacturing businesses, they may also fairly be classified as retail or wholesale mercantile businesses, and that the framers of the legislation did not intend to exclude any retail or wholesale merchants.

#### d. *Repair Shops*

In a later section of this article<sup>104</sup> the conclusion is reached that establishments which sell services exclusively are almost never held to be covered by bulk sales statutes. Thus it is clear that a sale in bulk of a repair shop in which the owner has tools with which to make repairs, but where the repairs are of such a nature as to not require the addition of new parts, nor to demand the using up of material supplied by the proprietor, could be made without need for compliance with a bulk sales statute. However, the usual repair shop is one in which a stock of repair parts, or at least material used up in making repairs, is maintained. In a sense, in such an establishment some goods are sold along with services, and the charges ordinarily include some items for labor and other items for parts. Thus the question becomes whether the fact that goods are sold in connection with labor makes the sale of such a business, or of the stock of parts of such a business, one which falls within the purview of bulk sales statutes.

The cases which have considered the question are unanimous in holding that, on those facts alone, compliance with the bulk sales statutes is unnecessary.<sup>105</sup> In holding that an automobile repair business did not fall within the Arkansas bulk sales statute, the Supreme Court of that state said:

A merchant ordinarily sells his stock of goods in substantially the same condition as he receives them, and the value of his stock is not ordinarily enhanced by any act of the merchant while the goods are in his possession; while here it was contemplated that some service should be rendered the purchaser of any part of what is called the stock on hand.<sup>106</sup>

On the other hand, many repair shops keep on hand a stock of goods which is sold at retail as well as used in the repair business itself. The parts department of a garage may regularly sell certain automobile parts at retail not in connection with the sale of services,<sup>107</sup> or an electrical repair shop may keep a regular line of electrical appliances for ordinary sale at retail.<sup>108</sup> In such a situation, it is clear that merely

104. *Infra*, Section 2, g. Reference should be made, however, to certain broadly-worded statutes which suggest that businesses of the type under consideration as well as strictly service establishments will be included. See, note 71, *supra*, for quotations from the applicable provisions of some of those statutes.

105. *Yeager v. Powell*, 219 Ark. 713, 244 S.W.2d 141 (1951); *Wellston Radio Corp. v. Culberson*, 175 Ark. 921, 300 S.W. 443 (1927); *Fisk Rubber Co. v. Hinson Auto Co.*, 168 Ark. 418, 270 S.W. 605 (1925); *Harris v. Kilgore*, 56 Ga. App. 516, 193 S.E. 179 (1937); *Rothenheber v. Pulitzer Pub. Co.*, 262 S.W. 48 (Mo. App. 1924); *Cross v. Inge*, 105 Okla. 145, 231 Pac. 1066 (1924); *Swanson v. De Vine*, 49 Utah 1, 160 Pac. 872 (1916); *State Bank of Viroqua v. Jackson*, 261 Wis. 538, 53 N.W.2d 433 (1952).

106. *Fisk Rubber Co. v. Hinson Auto Co.*, 168 Ark. 418, 422, 270 S.W. 605, 606 (1925).

107. This apparently was the situation in *Yeager v. Powell*, 219 Ark. 713, 244 S.W.2d 141 (1951).

108. This was apparently the situation in *Texas Hide & Leather Co. v. Bonds*, 155 Okla. 3, 8 P.2d (1932).

because the business is in part a service establishment, it is not, therefore, automatically outside the scope of a bulk sales statute.<sup>109</sup> Thus in *Yeager v. Powell*,<sup>110</sup> the Supreme Court of Arkansas held the mortgage of the "entire parts stock and accessories" of a combination automobile sales agency, repair shop and supplies department thereof to fall within the statute. There was conflicting testimony as to the amount of parts sold at retail over the counter, the mortgagee testifying that less than five per cent were sold independently of a sale of services, while the opposing evidence apparently<sup>111</sup> showed a higher percentage. In addition the agency was one for the sale of Nash cars, and the evidence disclosed that more than one-half of the parts in stock were for cars other than Nash cars.<sup>112</sup> The court concluded that ". . . the evidence preponderates in favor of the conclusion that these parts and supplies were merchandise . . ." <sup>113</sup> within the meaning of the statute.

It does not follow, however, that merely because occasional over the counter sales are made from a stock usually kept for repair purposes, the business will fall within the statute.<sup>114</sup> The leading case on this point is *Swanson v. De Vine*,<sup>115</sup> in which the Supreme Court of Utah held that the sale of a cobbler's shop did not fall within the Utah bulk sales law merely because the cobbler made occasional sales of shoe laces, polish, shoe brushes and inner soles from the stock which he carried for repair purposes, where such sales averaged about five dollars per month. The criterion seems to be a relative quantitative one, *i.e.*, the over the counter sales must be mere incidents of the regular repair business and not a substantial part thereof.<sup>116</sup>

In this area the decisions are sound. The statutes were not enacted to cover businesses in which a substantial amount of labor is neces-

109. *State Bank of Viroqua v. Jackson*, 261 Wis. 538, 53 N.W.2d 433 (1952); *cf. Cornish v. Nance Motor Co.*, 13 S.W.2d 139 (Tex. Civ. App. 1928).

110. 219 Ark. 713, 244 S.W.2d 141 (1951).

111. While the court merely states that "[a] number of witnesses testified regarding the extent of purchases independently made. . ." (*Id.* at 717, 244 S.W.2d at 143.), the inference is clear that such testimony showed that it was more than the five percent claimed by the seller.

112. The author is at a loss to determine the relevancy of this fact, since many garages hold themselves out to, and do in fact, repair many cars other than those sold by a connected sales agency.

113. *Yeager v. Powell*, 219 Ark. 713, 717, 244 S.W.2d 141, 143 (1951).

114. *Wellston Radio Corp. v. Culberson*, 175 Ark. 921, 300 S.W. 443 (1927); *Fisk Rubber Co. v. Hinson Auto Co.*, 168 Ark. 418, 270 S.W. 605 (1925); *Harris v. Kilgore*, 56 Ga. App. 516, 193 S.E. 179 (1937); *Rothenheber v. Pulitzer Pub. Co.*, 262 S.W. 48 (Mo. App. 1924); *Cross v. Inge*, 105 Okla. 145, 231 Pac. 1066 (1924); *Swanson v. De Vine*, 49 Utah 1, 160 Pac. 872 (1916).

115. 49 Utah 1, 160 Pac. 872 (1916). The case was decided under the former statute, Utah Laws 1905, c. 90, which was confined to sales of a stock of merchandise. The decision, therefore, is of doubtful validity in the light of the present broadly-worded statute discussed in note 71, *supra*.

116. *Wellston Radio Corp. v. Culberson*, 175 Ark. 921, 300 S.W. 443 (1927); *Cross v. Inge*, 105 Okla. 145, 231 Pac. 1066 (1924).

sarily sold in connection with an item in the stock-bin.<sup>117</sup> On the other hand if the stock maintained serves a dual purpose, *i.e.*, as a source of repair parts and as an inventory to be sold at retail and then replenished as in the case of ordinary retail merchants, the business should fall within the statute. The fact of occasional deviations from a usual practice of selling in connection with repairs should not, however, cause courts to regard what is essentially a service enterprise as a retail mercantile establishment.

*e. Restaurants and saloons.*

The bulk sales statutes of several jurisdictions expressly apply to the sale of a restaurant business,<sup>118</sup> and in Washington<sup>119</sup> the sale of a bar is also expressly covered by the statute. Moreover, the Oregon,<sup>120</sup> Idaho<sup>121</sup> and Utah<sup>122</sup> statutes, in addition to covering restaurants expressly, seem broad enough to cover bars as well. Finally, the Illinois,<sup>123</sup> Louisiana<sup>124</sup> and Nebraska<sup>125</sup> statutes, though expressly mentioning neither restaurants nor bars, are clearly of sufficient breadth to cover both.

In other states the courts are presented with interpretation problems typical of these statutes. Again two lines of approach are apparent, but they are less widely divergent here than elsewhere in this general area; the overlap is marked. One group of courts has concentrated on close analysis of the ordinary meaning of particular words, and has frequently attempted to distinguish contrary holdings elsewhere on the basis of slight language variations,<sup>126</sup> variations which,

117. See 35 VA. L. REV. 123 (1949).

118. CAL. CIV. CODE § 3440.1 (Supp. 1953); IDAHO CODE ANN. § 64-701 (1948); Ore. Laws 1949, c. 435; UTAH CODE ANN. § 25-2-1 (1953); WASH. REV. CODE § 63-08.010 (1951).

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

120. Ore. Laws 1949, c. 435.

121. IDAHO CODE ANN. § 64-701 (1948).

122. UTAH CODE ANN. § 25-2-1 (1953). Because of the extensive specification of related businesses covered in the California statute and the fact that bars are not among those businesses enumerated, it is doubtful that that statute covers bars. CAL. CIV. CODE § 3440.1 (Supp. 1953).

123. ILL. ANN. STAT. c. 121½, § 78 (Supp. 1952).

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

125. NEB. REV. STAT. § 36-501 (1952).

126. *E.g.*, Johnson v. Kelly, 32 N.D. 116, 155 N.W. 683 (1915); Plass v. Morgan, 36 Wash. 160, 78 Pac. 784 (1904). The same kind of distinction was drawn in *Misosos v. Spyros*, 182 Wis. 631, 197 N.W. 196 (1924), but there the Wisconsin Court was on sound ground in drawing a distinction between the Wisconsin and Illinois statutes, since the latter is perhaps the broadest of all bulk sales statutes. In *Lewis, Hubbard & Co. v. Loughran*, 85 W. Va. 235, 101 S.E. 465 (1919), the court refused to base its holding upon any distinction in statutory wording between the West Virginia and Washington statutes, and in so doing rejected the Washington Court's own distinction which it drew in the *Plass* case. In *Bolanovich v. Peter Hauptmann Tobacco Co.*, 261 S.W. 723 (Mo. App. 1924), the court conceded that while the language of the Missouri statute suggested a greater scope than that of some other statutes, they would not construe it to cover a restaurant business.

to this writer at least, seem not justified contextually in many instances.

The purported reason for decision in another group of cases is an application of the derogation rule which, of course, has meant a series of holdings that restaurants are not covered by the statutes.<sup>127</sup> Both because of the fact that the determination of the effect of so-called rules of construction is difficult, and because of the overlap of approach mentioned above, any attempt at evaluation of the impact of the derogation rule would be sheer guesswork.

For three reasons an examination of the cases decided under the Washington bulk sales statute<sup>128</sup> is indicated at this point: (1) many more cases raising the issue with which we are concerned have been decided by the Supreme Court of Washington than by any other court,<sup>129</sup> (2) the Washington statute has been several times amended,<sup>130</sup> and (3) as a combined result of the series of amendments as well as the large number of cases, many of the interpretation problems referred to above have been accented. The earliest Washington statute<sup>131</sup> applied to the purchase of ". . . any stock of goods, wares or merchandise. . . ." In *Plass v. Morgan*<sup>132</sup> the court, in holding that the sale of a restaurant and boarding-house was within the purview of the statute, emphasized the breadth and scope of such words as "any" and "stock" and so differentiated them from a common form of words found in other statutes, "stock of merchandise," which were thought to have a common law meaning narrower than the language of the Washington statute.

Two months later the court, without deciding whether the sale of the supplies of a saloon fell within the act, held that a cash register which was included in the sale but which was not itself kept for sale was not a part of the goods covered by the statute.<sup>133</sup> In 1913, how-

The court held the "settled construction" of the statute to be that it covers ". . . the same scope and purposes as the acts of other states relating to the same subject." *Id.* at 724.

127. *Swift & Co. v. Tempelos*, 178 N.C. 487, 101 S.E. 8 (1919); *O'Connor v. Smith*, 188 Va. 214, 49 S.E.2d 310 (1948); *Missos v. Spyros*, 182 Wis. 631, 197 N.W. 196 (1924). See also, *Johnson v. Kelly*, 32 N.D. 116, 155 N.W. 683 (1915), where the act is referred to as "drastic," and *Lewis, Hubbard & Co. v. Loughran*, 85 Va. 235, 101 S.E. 465 (1919), where the act is said to merit a strict construction because it restrains the right to alien property.

128. Presently, WASH. REV. CODE §§ 63.08.010-63.08.060 (1951).

129. Five cases involving restaurants and three cases involving saloons have been decided by the Supreme Court of Washington.

130. The original version is found in Wash. Laws 1901, c. CIX. Amendments are found in Wash. Laws 1913, c. 175; Wash. Laws Ex. Sess. 1925, p. 342; Wash. Laws 1939, c. 122; Wash. Laws 1943, c. 98.

131. Wash. Laws 1901, c. CIX.

132. 36 Wash. 160, 78 Pac. 784 (1904).

133. *Albrecht v. Cudihee*, 37 Wash. 206, 79 Pac. 628 (1905).

ever, in *Friedman v. Branner*,<sup>134</sup> the court stated that it was beyond doubt that the sale of a saloon business fell within the statute.

In 1925 the legislature amended the statute to read in part as follows:

Any sale . . . of all or substantially all of any stock of goods, wares or merchandise, and/or all or substantially all of the fixtures and equipment used in and about the business of a vendor engaged in the business of buying and selling and dealing in goods, wares or merchandise, of any kind or description. . . .<sup>135</sup> [Italics added.]

When *Garner v. Thompson*<sup>136</sup> was decided in 1931, the court, after a careful examination of decisions from other jurisdictions, concluded that a restaurant business was not one in which the owner engaged in "buying and selling and dealing in merchandise," the new statutory test, primarily on the ground that one who buys, sells and deals in merchandise is a merchant, and that a merchant sells the same thing he buys without substantially altering its form.

The statute was amended again in 1939<sup>137</sup> to cover expressly restaurants, as well as certain other establishments in which services play an important if not a dominant role. Three later Washington cases<sup>138</sup> have, of course, recognized that the interpretation problem with respect to the inclusion of restaurants has been solved at one simple stroke by the legislature.

In retrospect the following observations seem pertinent. While the initial Washington statute was, arguably, broader in its terms than certain other bulk sales statutes, yet it is dubious that the language distinction relied on so heavily by the court was warranted, for there was no weighty internal evidence, and certainly no external evidence was referred to, to indicate a legislative purpose to cover a wider range of businesses than that contemplated by other statutes. The 1925 amendment clearly placed the Washington statute on the same level of definiteness (or ambiguity, if you will) as that of most other bulk sales statutes, and so the same need for interpretation arose as existed elsewhere, although it might be contended that the narrower wording was itself an indication of a legislative intention to cut down the scope of the statute. Possibly the legislature chose this method of expressing dissatisfaction with the decision in the *Plass* case.<sup>139</sup> In any event,

134. 72 Wash. 338, 130 Pac. 360 (1913); see *Seattle Brewing & Malting Co. v. Donofrio*, 34 Wash. 18, 74 Pac. 823 (1904).

135. Wash. Laws Ex. Sess. 1925, p. 342.

136. 161 Wash. 317, 296 Pac. 1043 (1931).

137. Wash. Laws 1939, c. 122.

138. *Rustuen v. Apro*, 243 P.2d 479 (Wash. 1952); *Minder v. Gurley*, 222 P.2d 185 (Wash. 1950); *Electrical Products Consolidated v. Smyser*, 19 Wash. 2d 509, 143 P.2d 452 (1943).

139. Driscoll, *The "Sales in Bulk" Act*, 4 WASH. L. REV. 97, 100 (1929), takes the position that the 1925 amendment was clearly intended to confine the operation of the statute to mercantile businesses. The author of that article based his conclu-

the court, wisely it would seem, sought the aid of precedents elsewhere, and found them in basic agreement. Then came the final solution of the problem, a single legislative decision which ended the controversy.

Surely, however, we should not disguise the fact, by discussing legislative-intent-seeking in a situation in which there is no substantial evidence of any intent, that what we have observed is merely the ordinary process of relieving the court from the necessity of making, or adhering to already made, value judgments on the issue of whether restaurants ought to be covered by bulk sales statutes.

In addition to the Washington cases, only three states having the broadly-worded or expressly inclusive statutes discussed, *supra*,<sup>140</sup> have passed upon the question of whether a restaurant is covered by the statute, and, of course, in all of the cases the question has been answered in the affirmative.<sup>141</sup> All other cases in point were decided under statutes which have left the courts considerable leeway in reaching their conclusions.<sup>142</sup> Only in Maryland<sup>143</sup> and Michigan<sup>144</sup> have the courts held the more usual type of statute applicable to the sale of a restaurant business. In each other case the court has indicated that restaurants are not contemplated by the statutory language.<sup>145</sup>

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sions in this regard on the notes of the Revision Committee of the Washington Legislature which were made available to him as well as information given to him personally by the draftsman of the 1925 act. *Id.* at 97, note 6.

140. See notes 118 to 125, *supra*.

141. *In re Bowers*, 33 F. Supp. 965 (S.D. Cal. 1940); *Sampson v. Boysen*, 9 Cal. App. 2d 413, 50 P.2d 95 (1935); *Copeliars v. Copeliars*, 297 Ill. App. 647, 18 N.E.2d 120 (1938); *Goldberg v. Martin*, 203 La. 70, 13 So.2d 465 (1943). But see, *Denekamp v. Heisler*, 12 La. App. 471, 126 So. 447 (1930), holding that a boarding-house does not come within the scope of the statute.

142. *In re Henningsen*, 297 Fed. 821 (2d Cir. 1924); *D. G. Goff Co. v. First State Bank of DeQueen*, 175 Ark. 158, 298 S.W. 884 (1927); *Farmers' & Drovers' National Bank v. Hannaman*, 115 Kan. 370, 223 Pac. 478 (1924); *Calvert Building & Construction Co. v. Winakur*, 154 Md. 519, 141 Atl. 355 (1928); *Sakelos v. Hutchinson Brothers*, 129 Md. 300, 99 Atl. 357 (1916); *Michigan Packing Co. v. Messaris*, 257 Mich. 422, 241 N.W. 236 (1932); *Carnaggio Bros. v. City of Greenwood*, 142 Miss. 885, 108 So. 141 (1926); *Bolanovich v. Peter Hauptmann Tobacco Co.*, 261 S.W. 723 (Mo. App. 1924); *Gallup v. Rhodes*, 207 Mo. App. 692, 230 S.W. 664 (1921); *Swift & Co. v. Tempelos*, 178 N.C. 487, 101 S.E. 8 (1919); *Johnson v. Kelly*, 32 N.D. 116, 155 N.W. 683 (1915); *Straus Cigar Co. v. Bon Marche*, 142 Tenn. 129, 218 S.W. 219 (1919); *Daggett v. Wolff*, 44 S.W.2d 1063 (Tex. Civ. App. 1931); *O'Connor v. Smith*, 188 Va. 214, 49 S.E.2d 310 (1948); *Lewis, Hubbard & Co. v. Loughran*, 85 W. Va. 235, 101 S.E. 465 (1919); *Missos v. Spyros*, 182 Wis. 631, 197 N.W. 196 (1924).

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

144. *Michigan Packing Co. v. Messaris*, 257 Mich. 422, 241 N.W. 236 (1932).

145. Although neither the Supreme Court nor the Superior Court of Pennsylvania has passed upon the precise question, it has several times been decided in the lower Pennsylvania courts, but the decisions are in hopeless conflict. That a restaurant is not covered, see *Weiner v. Everglades*, 33 Del. Co. R. 280 (1945); *Cressman v. Haas*, 64 Pitts. L.J. 499 (1916). That a restaurant is covered, see *Lazofson v. Steiner*, 66 Pa. D. & C. 179 (1948); *Martindale v. Knight*, 25 Pa. Dist. 469 (1916).

Two distinct theories underlie the line of decisions which hold that restaurants fall outside the purview of the usual type of bulk sales statute. One is that the serving of food in a restaurant is an uttering and not a sale;<sup>146</sup> the other is that the statutes were not designed to apply to situations in which the seller has substantially changed the form of the product sold,<sup>147</sup> in this instance by the addition of a substantial amount of labor.

The case most clearly based on the former rationale is *O'Connor v. Smith*.<sup>148</sup> There the Supreme Court of Errors of Virginia applied the derogation rule in spite of dicta in an earlier case<sup>149</sup> that the statute, being remedial in nature, should be so construed as to advance the remedy. The court, relying exclusively on encyclopedic authority, found the overwhelming majority opinion to be that ". . . a restaurant business is not one involving the carrying of a stock of merchandise or the buying and selling of merchandise."<sup>150</sup> The opinion also contains a long quotation from one of the leading encyclopedias to the effect that both at common law and under the Uniform Sales Act, there is no sale when a restaurant keeper supplies his guests with food. Whatever may be the correct, or preferred, interpretation of the statute in this factual situation, the reasoning of the Virginia court is especially deplorable for two reasons: (1) the old distinction between selling and uttering has been properly subjected to much criticism and is on the wane,<sup>151</sup> and (2) the solution to the problem under discussion should not be based upon overly-technical common law distinctions designed for a different purpose.<sup>152</sup> If in fact a restaurant business, judged by proper criteria, contains the same risks and receives credit upon the same basis as do businesses clearly within the scope of bulk sales statutes, and if, as suggested, the statutes themselves provide relatively little guidance, it should be included. If differences, both significant and material, are found, of course the opposite conclusion should be reached.

The "substantial change of form" rationale, however, underlies a

146. See, MELICK, *THE SALE OF FOOD AND DRINK AT COMMON LAW AND UNDER THE UNIFORM SALES ACT*, pp. 165 *et seq.* (1936), for a discussion of the historical basis of the concept of uttering.

147. For the same argument as applied to manufacturers, see discussion at notes 40 to 43, *supra*.

148. 188 Va. 214, 49 S.E.2d 310 (1948).

149. *Trimble v. Covington Grocery Co.*, 112 Va. 826, 72 S.E. 724 (1911).

150. *O'Connor v. Smith*, 188 Va. 214, 219, 49 S.E.2d 310, 312 (1948).

151. MELICK, *op. cit. supra* note 146, at 166 n. 18: for a concise and well-reasoned opinion rejecting the "uttering concept," see *Temple v. Keeler*, 238 N.Y. 344, 144 N.E. 635 (1924).

152. The principal purpose for the distinction is to differentiate cases in which there is a warranty of fitness implied from those in which liability is based on negligence, or to state it differently, is one who serves food absolutely liable or only liable upon proof of fault? Furthermore, Melick points out that the restaurateur as we know him today would have been considered a trader or seller under the English common law, for the uttering concept referred only to innkeepers, and



much larger group of cases,<sup>153</sup> in which the opinions rest upon somewhat firmer ground. Representative is *Farmers' & Drovers' National Bank v. Hannaman*,<sup>154</sup> a case which relied to a considerable extent upon the leading case of *Swift & Co. v. Tempelos*.<sup>155</sup> The Kansas court held that while a restaurateur buys merchandise and resells it, nevertheless, the change in form is so substantial as to preclude a holding that he is a merchant. These opinions at least have the merit of coming closer to stating the real reasons which underlie their decisions.

On the other hand, the Supreme Court of Michigan<sup>156</sup> has taken the position that a restaurant business falls within the Michigan bulk mortgages statute.<sup>157</sup> Disregarding authorities elsewhere on the ground that they are in conflict, but finding some support from the Maryland decisions,<sup>158</sup> the Michigan court reasoned:

It is a matter of common knowledge that, in the conduct of the restaurant business, certain items of food, such as butter, milk, cream, and oftentimes bread and pastries, are retailed for consumption by customers upon the premises in exactly the same form as purchased by the restaurateur for use in his business. Obviously it is a fair interpretation of the statute to give to the one furnishing these items of merchandise to the restaurateur the same protection as though furnished to a retail grocer.<sup>159</sup>

It is not readily apparent that one who is engaged in selling goods for resale is necessarily entitled to such uniformity of protection, regardless of the varying kinds of business to which he chooses to sell. Presumably a wholesaler is aware that different kinds of businesses represent, oftentimes, different kinds of credit risks, and that different items may serve as the basis for security in different businesses. Thus, he should realize that he may have to impose different credit terms, or use varying kinds of security devices, in one situation from what he must use in another. To reiterate: while it may be true that testing by proper criteria would lead to the conclusion that restaurants should be held to fall within bulk sales statutes, yet the criterion used by the Michigan court seems an entirely irrelevant one.

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then only ". . . if he merely furnished as an entirety, for a reasonable sum, food, drink and lodging as a part of the general entertainment supplied all guests. . . ." MELICK, *op. cit. supra* note 146 at 173. For a short discussion, see, 1 WILLISTON, SALES, § 242b (Rev. ed. 1948).

153. *Farmers' & Drovers' National Bank v. Hannaman*, 115 Kan. 370, 223 Pac. 478 (1924); *Bolanovich v. Peter Hauptmann Tobacco Co.*, 261 S.W. 723 (Mo. App. 1924); *Swift & Co. v. Tempelos*, 178 N.C. 487, 101 S.E. 8 (1919). The same idea seems to be in the background in *Lewis, Hubbard & Co. v. Loughran*, 85 W. Va. 235, 101 S.E. 465 (1919).

154. 115 Kan. 370, 223 Pac. 478 (1924).

155. 178 N.C. 487, 101 S.E. 8 (1919).

156. *Michigan Packing Co. v. Messaris*, 257 Mich. 422, 241 N.W. 236 (1932).

157. MICH. STAT. ANN. §§ 19.371 to 19.373 (1937).

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

159. *Michigan Packing Co. v. Messaris*, 257 Mich. 422, 426, 241 N.W. 236, 237 (1932).

It was suggested earlier in this article that the problem of what businesses are covered is closely related to, often inseparable from, the problem of what goods are included.<sup>160</sup> That statement finds unusual application here. Although it is true that under both the broadly-worded statutes and the expressly inclusive statutes discussed, *supra*,<sup>161</sup> a sale of fixtures alone is interdicted, the answer is not so clear under the more usual type of statute. In jurisdictions having such a statute the question of whether the sale of fixtures alone is covered often becomes decisive, especially if the court, as it frequently does, takes the position that supplies sold form an insubstantial portion of the whole subject-matter of the transaction and so treats the case as one in which fixtures alone are sold.<sup>162</sup>

Several cases have been found in which one of two situations obtains: (1) the supplies were excluded from the sale,<sup>163</sup> or (2) the supplies constituted such an insubstantial part of the whole transaction as to be regarded as *de minimis* by the court.<sup>164</sup> The fact that the supplies of a restaurant often are of relatively little value when compared with the fixtures and other equipment is readily understandable since so much of the supplies of a restaurant takes the form of perishables and therefore a large inventory cannot be maintained. As will become apparent in the discussion in a later article,<sup>165</sup> the sale of fixtures alone is not ordinarily interdicted by bulk sales statutes, and so the whole transaction has been frequently held to fall outside the scope of the statute. All of this, *i.e.*, that non-merchandise items monopolize the list of assets of a restaurant business, points to the conclusion that such a business is so unlike the ordinary retail grocery store in terms of what credit and security methods should be employed that it should not be treated in the same way for bulk sales purposes.

As in the cases relating to repair shops,<sup>166</sup> it is abundantly clear that if the court otherwise takes the position that a restaurant should not be included within the scope of bulk sales statutes, the fact of inci-

160. Introduction, *supra*.

161. See notes 118 to 125, *supra*.

162. *Gallup v. Rhodes*, 207 Mo. App. 692, 230 S.W. 664 (1921); *Johnson v. Kelly*, 32 N.D. 116, 55 N.W. 683 (1915); *Straus Cigar Co. v. Bon Marche*, 142 Tenn. 129, 218 S.W. 219 (1919); *Lewis, Hubbard & Co. v. Loughran*, 85 W. Va. 235, 101 S.E. 465 (1919). In *Carnaggio Bros. v. City of Greenwood*, 142 Miss. 885, 108 So. 141 (1926), only fixtures were sold, but it is impossible to determine whether that fact was controlling. The language is:

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

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

163. *Carnaggio Bros. v. City of Greenwood*, 142 Miss. 885, 108 So. 141 (1926).

164. See cases cited note 162, *supra*.

165. See Miller, *Bulk Sales Laws: Property Included*, to appear in the April, 1954, issue of the Washington University Law Quarterly.

166. See section 2, *d.*, *supra*.

dental sales in relatively small quantities of items which are taken out of the restaurant for consumption will not be sufficient to convert an otherwise excluded business into an included one.<sup>167</sup>

Surprisingly enough, however, the courts which have passed on the question have almost unanimously held that saloons fall within the purview of bulk sales statutes.<sup>168</sup> In fact, one court which has excluded restaurants<sup>169</sup> has included saloons.<sup>170</sup> It is true, however, that the holding in the saloon case<sup>171</sup> was to some degree weakened by the language and holding of the later restaurant case.<sup>172</sup>

It is only in the latter case, *Bolanovich v. Peter Hauptmann Tobacco Co.*,<sup>171</sup> that any rationale has been offered to support the inclusion of saloons and the exclusion of restaurants. There it was suggested that a saloon-keeper sold articles in the same packages in which they were purchased; presumably the restaurateur did not. It is true that ordinarily there was a lesser change of form and that service formed less of the total product in the case of the typical pre-prohibition saloon than in the case of a restaurant. However, it is extremely doubtful that in a modern bar less of the cost of the product is attributable to overhead, entertainment and other service features than in the case of the modern restaurant. Of course, the court in the *Bolanovich* case may have had its attention focused on the relatively insubstantial change of form as well as the actual amount of service rendered rather than on the proportion of the total *cost* of the final product properly allocable as service and overhead expenses. Furthermore the drinking habits of patrons of modern bars are somewhat different today from those of the patrons of the pre-prohibition corner saloon in the sense that a higher proportion of the patrons now ask for drinks which are quite different from their original in-the-bottle form.

The problem of the sale of fixtures and other equipment in connec-

167. *D.C. Goff Co. v. First State Bank of DeQueen*, 175 Ark. 158, 298 S.W. 884 (1927); *Bolanovich v. Peter Hauptmann Tobacco Co.*, 261 S.W. 723 (Mo. App. 1924); *O'Connor v. Smith*, 188 Va. 214, 49 S.E.2d 310 (1948).

168. *Parham & Co. v. Potts-Thompson Liquor Co.*, 127 Ga. 303, 56 S.E. 460 (1907); *Hersch v. H. Albrecht & Co.*, 202 Ill. App. 573 (1916); *Porter v. Goudzwaard*, 162 Mich. 158, 127 N.W. 295 (1910); *Kolander v. Dunn*, 95 Minn. 422, 104 N.W. 371 (1905); *Semmes v. Rudolph Stecher Brewing Co.*, 195 Mo. App. 621, 187 S.W. 604 (1916); *Escalle v. Mark*, 43 Nev. 172, 183 Pac. 387 (1919); *Marshon v. Toohy*, 38 Nev. 248, 148 Pac. 357 (1915); *Friedman v. Branner*, 72 Wash. 338, 130 Pac. 360 (1913); *Albrecht v. Cudihee*, 37 Wash. 206, 79 Pac. 628 (1905). *Contra*, *Pritz v. Jones*, 117 App. Div. 643, 102 N.Y. Supp. 549 (1st Dep't 1907). But see, *Stumpp & Walter Co. v. Napanoeh Country Club, Inc.*, 198 Misc. 600, 102 N.Y.S.2d 489 (Sup. Ct. 1950).

169. *Bolanovich v. Peter Hauptmann Tobacco Co.*, 261 S.W. 723 (Mo. App. 1924); *Gallup v. Rhodes*, 207 Mo. App. 692, 230 S.W. 664 (1921).

170. *Semmes v. Rudolph Stecher Brewing Co.*, 195 Mo. App. 621, 187 S.W. 604 (1916).

171. *Ibid.*

172. *Bolanovich v. Peter Hauptmann Tobacco Co.*, 261 S.W. 723 (Mo. App. 1924).

173. *Ibid.*

tion with inventory recurs in these cases.<sup>174</sup> Some courts have included in goods covered the fixtures or other equipment so long as some inventory was sold,<sup>175</sup> while others have held that where inventory, fixtures and other equipment are sold, only the inventory is covered by the statute.<sup>176</sup> The solution of that problem depends upon factors to be discussed in a later article.<sup>177</sup> It should be mentioned, however, that courts have more help here from the statutory language itself than in many other areas.<sup>178</sup>

To summarize, certain statutes are so worded as to include clearly both restaurants and bars, but most of the statutes leave room for interpretation. Although most of those courts whose decisions were not controlled by the statutory language itself have held restaurants to fall outside the statute and bars to fall within, there is a dissenting view. Courts excluding restaurants adopt one of two rationales: (a) serving food in a restaurant is not a sale but a mere uttering of it, or (b) the statutes cover only businesses in which the product sold undergoes no substantial change of form. In several of the cases the derogation rule has been used as a prop to support the decisions.

On the other hand only two of the courts, unhampered by precise legislative language, have chosen to include restaurants, one without offering a rationale, the other on the basis of a seemingly irrelevant one. The rationale offered by the only court which has attempted to differentiate the treatment accorded bars from that accorded restaurants is tenuous at best, and perhaps represents only a retrenchment from a previously taken position. If we grant that bars do differ from restaurants in two respects, *i.e.*, (1) on the whole there is less change of form in the case of a saloon than a restaurant, and (2) something which has not been mentioned in the cases, that a saloon-keeper can and does carry larger inventories and needs less fixtures and other equipment with the result that inventory forms a much higher percentage of his total assets than in the case of a restaurateur, yet from

174. *Parham & Co. v. Potts-Thompson Liquor Co.*, 127 Ga. 303, 56 S.E. 460 (1907); *Kolander v. Dunn*, 95 Minn. 422, 104 N.W. 371 (1905); *Gallup v. Rhodes*, 207 Mo. App. 692, 230 S.W. 664 (1921); *Marshon v. Toohy*, 38 Nev. 248, 148 Pac. 357 (1915); *Albrecht v. Cudihee*, 37 Wash. 206, 79 Pac. 628 (1905).

175. *Parham & Co. v. Potts-Thompson Liquor Co.*, 127 Ga. 303, 56 S.E. 460 (1907); *Semmes v. Rudolph Stecher Brewing Co.*, 195 Mo. App. 621, 187 S.W. 604 (1916).

176. *Kolander v. Dunn*, 95 Minn. 422, 104 N.W. 371 (1905); *Marshon v. Toohy*, 38 Nev. 248, 148 Pac. 357 (1915).

177. See Miller, *Bulk Sales Laws: Property Included*, to appear in the April, 1954, issue of the Washington University Law Quarterly.

178. Thus the language of many statutes makes it quite clear whether a sale of fixtures alone, in the situation where the business is otherwise clearly covered, necessitates compliance with the act. Compare, *e.g.*, MICH. STAT. ANN. § 19.361 (1937), "The sale . . . of a stock of merchandise, or merchandise *and* the fixtures pertaining to . . ." (Italics added.), with MO. REV. STAT. § 427.010 (1949), "The sale . . . of a stock of merchandise, or merchandise, fixtures and equipment, or equipment pertaining to . . ." (Italics added.)

the broader view of the essentially service nature of the functions performed by both, it is difficult to conclude that they should be treated differently for bulk sales purposes.

#### f. *Farmers*

The argument that farmers come within the purview of bulk sales statutes seems to have been urged seriously before the courts of but two states, Illinois and New Jersey. The New Jersey and Illinois courts reached opposite conclusions, the former excluding<sup>179</sup> and the latter including<sup>180</sup> farmers. The factors affecting decision in these cases are broad considerations which may be described in terms of the over-all attitude of the court toward the particular statute involved, particularly in the light of its legislative and judicial history.

As was recounted, *supra*,<sup>181</sup> the decisions interpreting the Illinois statute<sup>182</sup> still reflect the impact of the original Illinois case<sup>183</sup> which held the first statute<sup>184</sup> in that state unconstitutional as class legislation. The Illinois court, from the first, took the position that the new Illinois statute<sup>185</sup> was aimed at meeting the objections to the earlier one;<sup>186</sup> more specifically, that it was a statute so broad in its coverage as to preclude the success of any contention that it was discriminatory against certain kinds of businesses. As a result, the court has consistently given the statute the broadest possible interpretation.<sup>187</sup>

Conversely, the New Jersey court has, from the beginning,<sup>188</sup> demonstrated antipathy toward its statute and, perhaps more than any other court, has emphasized the need for a strict construction of it because of its being in derogation of the common law.<sup>189</sup> Thus, in spite of the not generally recognized fact that the language of the

179. *Samuelson v. Goldberg*, 13 N.J. Misc. 204, 177 Atl. 260 (Sup. Ct. 1935).

180. *Coon v. Doss*, 361 Ill. 515, 198 N.E. 341 (1935); *Weskalines v. Hesterman*, 288 Ill. 199, 123 N.E. 314 (1919); *Tipsword v. Doss*, 273 Ill. App. 1 (1933); *Larson v. Judd*, 200 Ill. App. 420 (1916); see also, *Main v. Hall*, 41 F.2d 715 (7th Cir. 1930); *Swern v. Liggett*, 51 F.2d 821 (E.D. Ill. 1931).

181. See note 68, *supra*, and discussion in text at that point.

182. The present statute is ILL. ANN. STAT. c. 121½, §§ 78 to 81 (Supp. 1952).

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

184. Ill. Laws 1905, p.284.

185. Ill. Laws 1913, p.258.

186. *Weskalnies v. Hesterman*, 288 Ill. 199, 123 N.E. 314 (1919).

187. At least, a broad interpretation is given to it on the issue of what businesses are covered, although the court has stated that the derogation rule is applicable. *Coon v. Doss*, 361 Ill. 515, 198 N.E. 341 (1935). The following cases have interpreted the act broadly so as to include businesses not covered by some other acts: *Coon v. Doss*, *supra*; *Luthy & Co. v. Paradis*, 299 Ill. 380, 132 N.E. 556 (1921); *LaSalle Opera House Co. v. LaSalle Amusement Co.*, 289 Ill. 194, 124 N.E. 454 (1919); *Weskalnies v. Hesterman*, 288 Ill. 199, 123 N.E. 314 (1919).

188. See, e.g., *Muller v. Hubschman*, 84 N.J. Eq. 30, 96 Atl. 189 (Ch. 1914).

189. E.g., *Schwartz v. King Realty & Investment Co.*, 93 N.J.L. 111, 107 Atl. 154 (Sup. Ct. 1919).

New Jersey statute<sup>190</sup> is equally as broad as that of the Illinois statute,<sup>191</sup> a series of New Jersey cases<sup>192</sup> has so interpreted it, that for practical purposes it is one of the narrower statutes. Thus in *Samuelson v. Goldberg*,<sup>193</sup> the Supreme Court held that farmers were not covered, relying on the language in the earlier Court of Errors and Appeals decision of *Van Genderen v. Arrow Bus Lines, Inc.*,<sup>194</sup> which stated clearly the outer limits of the New Jersey statute as follows:

. . . [T]he class of vendors embraced in the statutory provisions are those whose business is the sale of stock or merchandise to intending customers who resort to the place where such stock or merchandise is kept for sale to such persons. The prohibition of the statute, as we see it, is directed solely at the bulk sale of this stock or merchandise by a person carrying on such business, and includes the sale of the fixtures used by such person in the carrying on of that business.<sup>195</sup>

Beyond these cases, the conclusion that farmers are not included within the scope of bulk sales legislation is strengthened by the exclusion of businesses less unlike retail merchants than are farmers.<sup>196</sup> In the light of both the purpose properly ascribable to legislatures in passing bulk sale legislation, and the fact that extension of credit to farmers is at least not so directly related to the existence of a specific inventory which can be looked to for payment, the non-inclusion of farmers seems proper.

*g. Businesses in which only services are sold.*

Several bulk sales statutes specifically include certain exclusively service businesses,<sup>197</sup> and some others are so broadly worded as to

190. N.J. STAT. ANN. §46:29-1 (1940) provides in part: "The sale in bulk of the whole or a large part of the stock of merchandise and fixtures or merchandise or fixtures, or goods and chattels, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business or occupation . . ." (Italics added).

191. ILL. ANN. STAT. c. 121½, § 78 (Supp. 1952) provides in part: "The sale . . . in bulk of the major part or the whole of a stock of merchandise, or merchandise and fixtures or other goods and chattels of the vendor's business . . ." (Italics added). If anything, it would appear that the additional words "or occupation" in the New Jersey statute makes that law the broader of the two.

192. See, particularly, *VanGenderen v. Arrow Bus Lines, Inc.*, 107 N.J. Eq. 217, 151 Atl. 605 (Ct. Err. & App. 1930); *Schwartz v. King Realty & Investment Co.*, 93 N.J.L. 111, 107 Atl. 154 (Sup. Ct. 1919); *Muller v. Hubschman*, 84 N.J. Eq. 30, 96 Atl. 189 (Ch. 1914).

193. 13 N.J. Misc. 204, 177 Atl. 260 (Sup. Ct. 1935).

194. 107 N.J. Eq. 217, 151 Atl. 605 (Ct. Err. & App. 1930).

195. *Id.* at 219, 151 Atl. at 606.

196. See the discussion *supra*, Sections 2, b, c, d, and e.

197. CAL. CIV. CODE § 3440.1 (Supp. 1953) ". . . of the fixtures, or store equipment, of a baker, cafe or restaurant owner, garage owner, machinist, cleaner and dyer . . ."; IDAHO CODE ANN. § 64-701 (1948) ". . . or supplies of a hotel, restaurant, barber shop or any place of business . . ."; WASH. REV. CODE § 63.08.010 (1951) ". . . or . . . a restaurant, cafe, beer parlor, tavern, hotel, club, or gasoline service station . . ."

cover service establishments.<sup>198</sup> However, no cases have been found which have been decided under any of the statutes specifically including certain service establishments, although several cases<sup>199</sup> have been decided under the broadly-worded Illinois statute.<sup>200</sup> Only two cases<sup>201</sup> have been found in which it has been held that an enterprise which sells only services falls within the scope of the putatively applicable bulk sales statute, and one of those is the Illinois case.<sup>202</sup> The latter is explicable in terms of the legislative and judicial history of the Illinois statute.<sup>203</sup> All other cases have held that the bulk sales legislation was not intended to be applied to establishments which sell no goods.<sup>204</sup>

Thus, even the Supreme Court of Michigan, which has displayed a fairly consistent friendly attitude toward the Michigan bulk sales and bulk mortgages statutes,<sup>205</sup> refused to accept the argument that when the bulk mortgages statute was amended in 1931 to read "any said business"<sup>206</sup> instead of the earlier "said business"<sup>207</sup> there was an intention to extend the scope of the statute to cover non-merchandise businesses.<sup>208</sup> Likewise, the Supreme Court of Washington, in *Everett*

198. ILL. ANN. STAT. c. 121½, § 78 (Supp. 1952); NEB. REV. STAT. § 36-501 (1952); Ore. Laws 1949, c. 435. See also N. J. STAT. ANN. § 46: 29-1 (1940) and the discussion of the interpretation of that statute at notes 188 to 195, *supra*.

199. LaSalle Opera House Co. v. LaSalle Amusement Co., 289 Ill. 194, 124 N.E. 454 (1919); St. Paul-Mercury Indemnity Company of Saint Paul v. Hoey, 325 Ill. App. 693, 60 N.E.2d 641 (1945); Page v. Wright, 194 Ill. App. 149 (1915). In *Athon v. McAllister*, 205 Ill. App. 41 (1917), the business sold was a combination drayage and farming business. In holding that the sale of the assets of both businesses fell within the statute, the court declined to follow the earlier cases of *H. S. Richardson Coal Co. v. Cermak*, 190 Ill. App. 106 (1914), and *Heslop v. Golden*, 189 Ill. App. 388 (1914), (which had held that the statute was confined to mercantile businesses) on the ground that they were in conflict with *G. S. Johnson Co. v. Belosky*, 263 Ill. 363, 105 N.E. 287 (1914).

200. ILL. ANN. STAT. c. 121½, § 78 (Supp. 1952).

201. LaSalle Opera House Co. v. LaSalle Amusement Co., 289 Ill. 194, 124 N.E. 454 (1919); *Flushing National Bank in New York v. Abrams*, 270 App. Div. 911, 61 N.Y.S.2d 609 (2d Dep't 1946), *aff'd mem.*, 296 N.Y. 1009, 73 N.E.2d 582 (1947).

202. LaSalle Opera House Co. v. LaSalle Amusement Co., 289 Ill. 194, 124 N.E. 454 (1919).

203. See the discussion at notes 66 to 68, *supra*.

204. *St. Matthews Motor Co. v. Schnepf*, 306 Ky. 823, 209 S.W.2d 481 (1948); *Item Co., Ltd. v. National Dyers & Cleaners, Ltd.*, 15 La. App. 108, 130 So. 879 (1930); *Deverges v. National Dyers & Cleaners, Ltd.* 15 La. App. 339, 130 So. 882 (1930); *Flint Citizens Loan & Investment Co. v. Moss*, 265 Mich. 40, 251 N.W. 347 (1933); *Balter & Miller v. Crum*, 199 Mo. App. 380, 203 S.W. 506 (1918); *Van Genderen v. Arrow Bus Lines, Inc.*, 107 N.J. Eq. 217, 151 Atl. 605 (Ct. Err. & App. 1930); *Begnell v. Safety Coach Line, Inc.*, 198 N.C. 688, 153 S.E. 264 (1930); *Miller v. Lincoln*, 43 Pa. C.C. 557 (1915); *Gaspee Cab, Inc. v. McGovern*, 51 R.I. 247, 153 Atl. 870 (1931); *Everett Produce Co. v. Smith Bros.*, 40 Wash. 566, 82 Pac. 905 (1905).

205. For a discussion of the Michigan Court's treatment of its statutes, see Introduction *supra*.

206. Mich. Acts 1931, No. 198.

207. Mich. Acts 1929, No. 200.

208. *Flint Citizens Loan & Investment Co. v. Moss*, 265 Mich. 40, 251 N.W. 347 (1933).

*Produce Co. v. Smith Bros.*,<sup>200</sup> declined to extend the coverage of the Washington statute<sup>210</sup> to the sale of a livery stable business. In so holding, the Court distinguished the earlier Washington case of *Plass v. Morgan*,<sup>211</sup> which held that the sale of a restaurant fell within the scope of the statute, on the ground that in the restaurant case, although there was a change of form, a product was sold, while in the case of a livery stable nothing but services were sold. Similarly courts have excluded sales of fleets of busses and taxicabs.<sup>212</sup>

The decision of the Supreme Court of Illinois holding that sale of a lease-hold interest in a theatre, with all the furniture, fixtures, equipment and other tangible property as well as the good will of the theatrical business and its trademarks and trade-names, was interdicted by the Illinois statute was an entirely expectable decision in the light of its earlier interpretation.<sup>213</sup>

The Illinois Court, relying on *Weskalnies v. Hesterman*,<sup>214</sup> said: . . . [T]he act applied to *any* sale in bulk of the major part or all of the goods and chattels of the vendor's business. . . . [Italics added.]<sup>215</sup>

*Flushing National Bank in New York v. Abrams*<sup>216</sup> cannot be so easily understood. There the New York Court of Appeals affirmed a decision of the Appellate Division that a dry-cleaning business was covered by the statute. When it is recalled that the New York courts first approached bulk sales legislation in a hostile manner, declaring the original statute unconstitutional<sup>217</sup> and applying the derogation rule to the later ones,<sup>218</sup> at least initially, it is difficult to understand the holding in this case. True it is that the more recent New York cases have obviously abandoned the derogation rule, and that many liberal-in-fact interpretations have been given the New York statute,<sup>219</sup> yet there has been no indication in any of them that the statute would

209. 40 Wash. 566, 82 Pac. 905 (1905).

210. Wash. Laws 1901, c. CIX.

211. 36 WASH. 160, 78 Pac. 784 (1904).

212. *St. Matthews Motor Co. v. Schnepf*, 306 Ky. 823, 209 S.W.2d 481 (1948); *Van Genderen v. Arrow Bus Lines, Inc.*, 107 N.J. Eq. 217, 151 Atl. 605 (Ct. Err. & App. 1930); *Begnell v. Safety Coach Line, Inc.*, 198 N.C. 688, 153 S.E. 264 (1930); *Gaspee Cab, Inc. v. McGovern*, 51 R.I. 247, 153 Atl. 870 (1931).

213. See the discussion at note 70 *supra*.

214. 288 Ill. 199, 123 N.E. 314 (1919). The case held that the Illinois statute applied to farmers.

215. *LaSalle Opera House Co. v. LaSalle Amusement Co.*, 289 Ill. 194, 196, 124 N.E. 454, 455 (1919).

216. 270 App. Div. 911, 61 N.Y.S.2d 609 (2d Dep't 1946), *aff'd mem.*, 296 N.Y. 1009, 73 N.E.2d 582 (1947).

217. N.Y. Laws 1902, c. 528, was declared unconstitutional in a four-three decision in *Wright v. Hart*, 182 N.Y. 330, 75 N.E. 404 (1905).

218. *E.g.*, *Apex Leasing Co. v. Litke*, 173 App. Div. 323, 159 N.Y. Supp. 707 (1st Dep't 1916).

219. See the discussion of the New York cases in note 30 *supra*. *E.g.*, *Mosson v. Kriser*, 212 App. Div. 282, 208 N.Y. Supp. 566 (1st Dep't 1925); and see the discussion in text *supra*, at notes 77 to 86.



be applied to businesses with no stocks of goods. To the contrary even the more liberal New York cases dealing with the applicability of the statute to manufacturers have insisted that some merchandise be sold before the sale could be considered as coming under the statute.<sup>220</sup> It is true that both the Appellate Division and Court of Appeals opinions were memorandum opinions, and that the applicability of the statute seems almost to be assumed rather than decided, yet it is difficult, in view of the vast number of New York cases on the subject, to conclude that the decision was not a conscious one. In any event, it is a clearly incorrect and unjustified holding, gauged by any criteria which the writer could conceive to be appropriate.

#### h. *Miscellaneous.*

The variety of possible businesses as well as slight distinctions between substantially identical businesses has made it impossible not to anticipate the subject-matter of this section. Nevertheless, there yet remain certain kinds of establishments which it has not proven convenient to discuss in connection with the major groupings, but which need attention. Here, even more than in the other cases, the idea is evident that the judiciary must play an important and perhaps dominant part in the lawmaking process whenever the legislatures choose to handle broadly a problem of a complex nature covering variant fact situations.

With but one exception<sup>221</sup> the cases to be discussed here involve businesses in which the preponderant "product" sold is services, but which have as a part of their business the sale of some items which cannot be classified exclusively as services. In a few of the cases, the non-service element has been regarded as so insubstantial as to be regarded as *de minimis* by the courts, with the result that the particular business has been excluded on the ground that it is, for all practical purposes, exclusively a service establishment.<sup>222</sup>

Typical of the problems seen in this area are the cases which involve the sale of a poolroom. The usual poolroom proprietor has a showcase containing cigars and other tobacco, perhaps candy bars, oftentimes a cooler for soft drinks. In a sense he is a retailer of the tobacco and soft drinks, but the courts have not taken the position that the whole poolroom is covered by bulk sales legislation merely because of the fact of some incidental sales of tobacco and candy.<sup>223</sup> It is true, however, that some cases have separated the tobacco and candy from the

220. *E.g.*, *Matter of Sunshine Stores, Inc.*, 264 App. Div. 930, 36 N.Y.S.2d 2 (3d Dep't 1942).

221. *Prins v. American Trust Co.*, 169 Ark. 455, 275 S.W. 914 (1925).

222. *Wright v. Aaron*, 214 Ark. 254, 215 S.W.2d 725 (1948); *Ferrat v. Adamson*, 53 Mont. 172, 163 Pac. 112 (1917).

223. See note 222 *supra*. *But see*, *Bac Corp. v. Welsh*, 33 Del. Co. R. 113, 115 (1944).

other goods owned by the seller and have held the act applicable to the former but not to the latter.<sup>224</sup> Obviously, if the poolroom is run merely as an adjunct to a more substantial enterprise which has characteristics of a retail store, such as a confectionary, at least the confectionary part of the business would be included.<sup>225</sup>

Another enterprise giving rise to a similar problem is the undertaking business. Almost invariably an undertaker maintains a stock of caskets, casket hardware, steel vaults, and robes which he sells to his customers, usually as part of a single transaction which also includes his services. In one case involving such a business, the court, without any discussion, treated a sale of the business as included within the statute without any effort to distinguish the various items sold.<sup>226</sup> In *People's Savings Bank v. Van Allsburg*,<sup>227</sup> however, the Supreme Court of Michigan found that caskets, steel vaults, robes and casket hardware maintained as a stock by an undertaker constituted merchandise within the meaning of that term in the statute, but refused to hold that a funeral car, casket wagon, harness, buggy and other impedimenta were either merchandise or fixtures, and so excluded them.<sup>228</sup>

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224. *McPartin v. Clarkson*, 240 Mich. 390, 215 N.W. 338 (1927); *Independent Breweries Co. v. Lawton*, 200 Mo. App. 238, 204 S.W. 730 (1918). In *Rothchild v. State of Indiana*, 200 Ind. 501, 165 N.E. 60 (1929), a perjury prosecution based on a statement by the seller of a poolroom with the usual cigar and soft-drink stand that there were no claims of any kind against the property, a conviction was reversed on the ground that there was no lien on the property prior to the consummation of the bulk sale. There is no discussion of the issue of whether there was any necessity for complying with the bulk sales statute under such circumstances, but had the court considered the problem and decided that there was no need for compliance, a simple statement that such a business was not included would have been an easier answer than the one given. *N.M. Uri & Co. v. McCroskey*, 135 Ark. 537, 205 S.W. 976 (1918).

225. This may have been the situation in *Bac Corporation v. Welsh*, 33 Del. Co. R. 113 (1944).

226. *Ledwidge v. Arkansas National Bank*, 135 Ark. 420, 205 S.W. 808 (1918).

227. 165 Mich. 524, 131 N.W. 101 (1911).

228. The history of the third piece of litigation involving undertakers is an interesting if confusing one. The first appeal, *Dallas Coffin Co. v. Yeager*, 19 S.W.2d 156 (Tex. Civ. App. 1929), raised only the issue of whether a purchaser was entitled to rely on the seller's oral statement that he had no creditors, and this was decided adversely to the purchaser. No question was raised as to the applicability of the bulk sales statute to an undertaking business. On the second appeal, *Yeager v. Dallas Coffin Co.*, 46 S.W.2d 1016 (Tex. Civ. App. 1932), the court apparently accepted the rationale underlying the Michigan case, but found that part of the articles in question did not constitute merchandise, and that the articles which might constitute merchandise were not adequately described to permit their allocation to that class. Finally, on the third appeal, *Yeager v. Dallas Coffin Co.*, 69 S.W.2d 493 (Tex. Civ. App. 1934), the court pointed out that there had now been five trials and three appeals in the case. The court then emphasized the necessity for a showing that some articles sold had been indiscriminately exhibited to the public as well as the applicability of the derogation rule to the statute. The court finally concluded that there was no evidence in the record before it that any of the articles had ever been indiscriminately exhibited for sale to the public, reversed a judgment for the creditor, and entered final judgment for the purchaser.

Although the framework of the case seems to rest on the idea that a proper

Another group of cases relates to the sale of hotel businesses. Although not universally true, most hotels have both barrooms and restaurants as an integral part of the establishment. Presumably, at least in-so-far as the sale of the restaurant and bar business is concerned, that ought to be covered by the statute if it is covered when operated independently of a hotel.<sup>229</sup> The courts, however, have regarded hotels along with their appurtenances as *sui generis* and have almost uniformly held them to fall outside the scope of the statutes.<sup>230</sup>

Another class of cases which have caused some difficulty is that involving contractors. In some cases the contractor may provide only services, as in the case of a typical building contractor. In that situation the rules applicable to businesses which sell only services should apply.<sup>231</sup> But frequently a specialty contractor provides material as well as services, and a problem not dissimilar from those found in the

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record was not made, yet there arises a gnawing suspicion that by 1934 the court may have changed its mind as to whether it is possible under any circumstances to show that something sold by an undertaker is merchandise.

229. The problem was squarely presented in *Pacific States Savings and Loan Company v. Wagner*, 14 Cal. App. 2d 126, 57 P.2d 997 (1936). The California statute (CAL. CIV. CODE § 3440.1 [Supp. 1953]) expressly covers restaurants but makes no mention of hotels. A chattel mortgage was placed on all the furniture, fixtures and equipment located in a hotel including some property used in connection with a dining room and kitchen operated in the hotel. At least 75% of the dining room business came from hotel patrons, the rest coming from the public generally. The hotel had advertised its dining room as open to the public. The court held the business outside the scope of the statute, saying:

It is a matter of common knowledge that hotels ordinarily maintain dining rooms as part of the hotel business and that ordinarily the public may obtain meals at hotel dining rooms without obtaining lodgings and without registering as guests. It must be presumed that the members of the legislature were aware of these conditions and that the section of the code under discussion was enacted in the light of such knowledge. The legislature enumerated certain businesses the owners of which were required to file the notice prescribed in order to make a valid mortgage but the legislature did not include in this list a number of other businesses, among them that of a hotel owner. Therefore a hotel owner was not required to file the notice referred to. It is not necessary to define the words *restaurant* and *hotel* to demonstrate that the business conducted by plaintiff in its dining room should be classified as that of hotel business rather than restaurant business. If the legislature had meant to require a hotel owner to file the notice referred to in section 3440 in order to execute a mortgage on that part of the hotel fixtures used in the dining room, it would have been a simple matter to so specify in the statute.

*Id.* at 128, 57 P.2d at 998.

It might be suggested that although the legislature did not choose to include hotels, it did choose to include restaurants, and it did not differentiate restaurants located in and part of hotels from other restaurants.

230. *Meier Electric and Machine Co. v. Dixon*, 81 Ind. App. 400, 143 N.E. 363 (1921); *Stewart v. Sulger*, 174 App. Div. 838, 161 N.Y. Supp. 489 (3d Dep't 1916); *Oberlin v. Harokopas*, 44 Ohio App. 111, 184 N.E. 257 (1932); *Mervine v. Indian Queen Hotel Corp.*, 11 Pa. D. & C. 353 (1928); *Kemp and Davis v. Corbin & Co.*, 22 Pa. Dist. 215 (1912). In *Wettlaufer v. Rogers*, 172 Misc. 554, 15 N.Y.S. 2d 644 (Sup. Ct. 1939), the court, relying on the *Stewart* case held the statute inapplicable to a boarding-house. *Contra*, *Stumpp & Walter Co. v. Napanoch Country Club, Inc.*, 198 Misc. 600, 102 N.Y.S.2d 489 (Sup. Ct. 1950). Hotels are expressly covered by the provisions of IDAHO CODE ANN. § 64-701 (1948); UTAH CODE ANN. § 25-2-1 (1953); WASH. REV. CODE § 63.08.010 (1951).

231. *Northrop v. Finn Construction Co.*, 260 Pa. 15, 103 Atl. 544 (1918).

repair shop cases arises. Although in *Axtell Co. v. Word*<sup>232</sup> the Court of Civil Appeals of Texas held that a plumbing contractor who furnished the materials which were used in doing the work did not fall within the statute on the ground that the sale of the materials was merely incidental to the chief business of selling labor and mechanical skill, the holdings are not unanimous.

Two cases are of special significance, one decided under the broadly-worded and broadly-interpreted Illinois statute,<sup>233</sup> the other under the New York statute.<sup>234</sup> In *Corrigan v. Miller*,<sup>235</sup> the Illinois court held that under the earlier interpretations given the Illinois statute by the Supreme Court of that state, it was not confined to mercantile businesses, but applied to any sale in bulk of the goods and chattels of any business and so included a Tile-Text and marble contractor. *Mott v. Reeves*,<sup>236</sup> however, is not so easily explained. The New York statute in force at the time covered transactions only when some merchandise was included in them. The seller was a retail merchant who engaged in wiring buildings and installing lighting fixtures as a sideline. The contract price agreed upon in each case consisted of the cost of the materials used, of which the seller kept a stock, plus the cost of the installation work. Ordinarily the cost of installation was about one-half of the total cost of any job. The stock maintained for this purpose was sold without compliance with the statute. The court held the statute applicable on the theory that these articles were merchandise and that the fact that they were sold only in connection with a sale of services did not destroy their character as merchandise. In answer to the contention that these articles were like the raw materials of a manufacturer, the court pointed out that they underwent almost no change of form in the installation process.

It is difficult to distinguish these cases from those involving repair shops. In the latter cases the courts have consistently held that the fact that services make up a large part of what is actually sold is the controlling factor in determining that the business is not an included one. The same reasoning is just as appropriate in the contracting cases.<sup>237</sup>

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232. 29 S.W.2d 421 (Tex. Civ. App. 1930).

233. ILL. ANN. STAT. c. 121½, § 78 (Supp. 1952).

234. N.Y. PERS. PROP. LAW § 44.

235. 338 Ill. App. 212, 86 N.E.2d 853 (1949).

236. 125 Misc. 511, 211 N.Y. Supp. 375 (Sup. Ct. 1925), *aff'd mem.*, 217 App. Div. 718, 215 N.Y. Supp. 889 (4th Dep't 1926), *aff'd without opinion*, 246 N.Y. 567, 159 N.E. 654 (1927).

237. In *Teich v. McAuley*, 212 S.W. 979 (Tex. Civ. App. 1919), a seller was engaged in the business of buying marble and making it into monuments. The court, without adverting to the change of form necessarily involved in such an operation, held that the stock of marble constituted a stock of merchandise within the statute. The result here is not consistent with those reached in later Texas cases involving manufactories. See, *e.g.*, *Tomforde v. Mitchell Const. Co.*, 91 S.W.2d 1137 (Tex. Civ. App. 1936).

In one unusual case, *Ben Bimberg & Co., Inc. v. Unity Coat and Apron Co.*,<sup>238</sup> the court held that the supplying of certain articles for temporary use was a business covered by the New York bulk sales statute on the ground that the supplied articles constituted a stock of merchandise. The business consisted of supplying laundered coats, aprons and other laundered articles to its customers for a certain price. When soiled, the articles were returned and replaced by others. The court took the position that the articles supplied were merchandise and that the fact that they were rented rather than sold was immaterial. Although these items could constitute a stock of merchandise of an establishment whose business it was to sell them, it is completely inconsistent with all the other decisions to say that they were merchandise even though rented. The establishment was a service establishment, and its character was not changed by that fact that the service it rendered consisted of renting tangible chattels which were constantly replaced by other like chattels.

The single case which falls under this section and which did not involve a business in which the sale of services predominated is *Prins v. American Trust Co.*<sup>239</sup> There the seller operated a number of large plantations and maintained a retail store which sold to the plantation tenants. The Supreme Court of Arkansas held that the sale of the retail store was interdicted by the statute, refusing to apply the rule of "incidental sales," which it had developed in a series of decisions involving manufactories and repair shops.<sup>240</sup> Since the retail store was a substantial business in itself, the Court felt that the fact that it was used to supply only tenants of the owner's plantation was immaterial, a decision which is irrefutably sound.

In summary, the courts have, in the case of businesses which involve elements of several of the principal categories, demonstrated some tendency to separate out the various elements of the business and to treat each element by itself for bulk sales purposes, unless the merchandise aspects of the business have been so insubstantial either absolutely or relatively, as to be regarded as merely incidental to a more significant but excluded business.

### III. UNIFORM COMMERCIAL CODE

The Uniform Commercial Code,<sup>241</sup> a joint product of the American Law Institute and the National Conference of Commissioners on Uniform State Laws, has defined the enterprises which fall within the

238. 150 Misc. 836, 270 N.Y. Supp. 580 (Sup. Ct. 1934).

239. 169 Ark. 455, 275 S.W. 914 (1925).

240. See text at notes 93 to 96, and 113 to 114, *supra*.

241. All references are to the Official Draft, Text and Comments Edition, 1952, as revised by the Recommendations of the Editorial Board for Changes in the Text and Comments of the Uniform Commercial Code Official Draft, Text and Comments Edition, June 1, 1953. Two general articles have appeared on the subject of the Bulk Transfers Article of the Code. See Billig, *Article 6—Order Out*

scope of its Bulk Transfers Article<sup>242</sup> as “. . . all those whose principal business is the sale of merchandise from stock, including those who manufacture what they sell. . . .”<sup>243</sup> Thus, the line is drawn at a somewhat different place from where it is drawn under the overwhelming majority of the cases decided under current statutes, since it includes manufacturing businesses. More precisely, the question which is determinative of whether a particular business falls within or without the statute is, whether its “principal business is the sale not of merchandise but of services.”<sup>244</sup> Comment 2 to the section we are considering enumerates specifically as excluded business “. . . farming, . . . contracting, . . . professional services, . . . such things as cleaning shops, barber shops, pool halls, hotels, restaurants, and the like. . . .”<sup>245</sup> Obviously, the list is not intended to be exhaustive.

The comment also states as the reason for excluding such businesses that while “. . . some bulk sales risk exists in the excluded businesses, they have in common the fact that unsecured credit is not commonly extended on the faith of a stock of merchandise.”<sup>246</sup> It is my belief that not only is this the criterion which underlies the case law under the existing statutes, although it does not seem to have been made explicit in those cases, but further that it is the only appropriate criterion. It represents a recognition of how in fact certain businesses are financed, and presumably finds that such financing methods are proper. Stated differently, it is based on the idea that the commercial law should be designed to facilitate commercial practices where such practices are both sound and up-to-date.

A further objective of commercial law is certainty. Not only the section under consideration, but the Bulk Sales Article as a whole, makes a substantial contribution to the attainment of that objective by more carefully delineating the situations in which it is necessary to comply with it.<sup>247</sup>

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*of Chaos; A Bulk Transfers Article Emerges*, 1952 WIS. L. REV. 312; Miller, *The Effect of the Bulk Sales Article on Existing Commercial Practices*, 16 LAW & CONTEMP. PROB. 267 (1951). The article has been discussed with reference primarily to local law in Larson, *Bulk Sales: Texas Law and the Uniform Commercial Code*, 6 SOUTHWESTERN L.J. 417 (1952), and in D. B. T., *Article 6—Bulk Transfers*, 17 ALB. L. REV. 192 (1953). The Article is also discussed in Weintraub and Levin, *Bulk Sales Law and Adequate Protection of Creditors*, 65 HARV. L. REV. 418 (1952).

242. UNIFORM COMMERCIAL CODE Art. 6 (Official Draft 1952 as revised by the Recommendations of the Editorial Board for Changes in the Text and Comments of the Uniform Commercial Code Official Draft, Text and Comments Edition, June 1, 1953).

243. *Id.*, § 6-102 (3).

244. *Id.*, § 6-102, Comment 2.

245. *Ibid.*

246. *Ibid.*

247. Miller, *supra* note 241, *passim*.

## IV. SUMMARY AND CRITIQUE

Although no business, professional services excepted, has been held to fall outside the scope of every bulk sales statute, yet there is substantial uniformity as to many kinds of businesses. Thus, retailers invariably, and wholesalers almost uniformly, are included. While most of the cases exclude manufacturers, still there is a substantial number of cases which suggest inclusion under some circumstances. Establishments which provided only services are almost uniformly excluded, and, in general, those businesses in which the sale of services predominate are excluded, although many courts have scrutinized such businesses more closely in order to determine whether the sale of goods formed a substantial part of the business, and have included them if the answer was yes. Farmers have been almost universally excluded.

Although much of the reasoning in the cases is unsatisfactory in the sense that the underlying reasons for decision are not formulated, or at least are not stated in the opinion, and although all too many of the decisions are beclouded by constant references to restricting rules of statutory construction in a situation where an examination of the whole mass of cases indicates that such rules play no really important part in the decision-making process, still an examination of that mass of decisions suggests a groping toward a criterion, a criterion which has not as yet been made explicit in any of the cases. That criterion, I believe, is the one utilized by the draftsman of the Bulk Sales Article of the Uniform Commercial Code, namely, *whether unsecured credit is ordinarily advanced on the faith of a stock of merchandise.*<sup>248</sup>

The bulk transfer problem is a complex one, and the temptation is strong for the legislature to lay down only broad outlines with the idea of having the courts fill in the details. In my opinion that temptation should be resisted to the utmost in the field of commercial law. In no other field of the law are decisions to act in a certain way so frequently made on the basis of the applicable rules of law. It is necessary, therefore, that those rules be stated with maximum precision. It follows that the initial rule, the legislative rule, should be as precise as possible in this area. This is not to say that a statute should attempt to list every possible kind of business, however. The difficulties attendant upon such a scheme become apparent when we suppose the situation of a business which the legislature has, understandingly enough, simply forgotten to include. It should be possible, however, by careful drafting, and the Uniform Commercial Code has proven this point, to delineate the bulk transfer situations in such a way as to make predictability of judicial result very high, in fact to render

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248. *Supra*, note 244.

unnecessary much potential litigation because of that high predictability. Indeed I would go so far as to suggest that the need for precision in this area is almost as important as the selection of the correct criterion for exclusion and inclusion. While the ultimate decision on the soundness of any legislation must await the cases decided under it, for the decisions under a statute are a substantial factor in the measurement of its success, yet I am willing to state that the Uniform Commercial Code has provided a solution in which both objectives have been met admirably.<sup>249</sup>

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249. See articles by Billig and Miller *supra* note 241.