

BULK SALES LAWS: A STUDY IN ECONOMIC ADJUSTMENT¹

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Joseph Johnson operates a men's clothing store in a rented storeroom along Market Street in the town of X. He has a stock of goods valued in his property statement at \$3000. Harry Jackson, credit manager for the T supply house, extends Johnson credit and fills his orders up to \$1000. Ten days after these goods have been delivered, Jackson learns that Johnson has sold out his business "lock, stock, and barrel" to Fred Brown for \$2000, has invested the money in an automobile, and has left in the car for an undisclosed destination. An investigation reveals that Johnson has no other assets than the automobile, and that, at the time of the transfer of the stock of goods, Johnson gave Brown positive assurance that the business was free from debt.

On the statute books of the forty-eight states there are enactments describing, sometimes in great detail, the conditions which both Johnson and his vendee must meet before the former legally can transfer his stock of goods in bulk. While these statutes vary as regards specific provisions, four general types have been evolved.²

1. The so-called "New York form" has been the model for the bulk sales statutes in thirty-three jurisdictions.³ This type of

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² MONTGOMERY, LAWS AND DECISIONS APPLYING TO SALES IN BULK (2d ed. 1926) 13.

³ ALA. CIV. CODE (1923) §§ 8041-8045; ARK. DIG. STAT. (Supp. 1927) §§ 4870-4872; COLO. COMP. LAWS (1921) §§ 3756-3758; DEL. REV. CODE (1915) § 2638; ILL. REV. STAT. (Cahill, 1923) 3025; IND. ANN. STAT. (Burns, 1926) §§ 8052-8054; IOWA CODE (1924) §§ 10008-10012; KAN. REV. STAT. ANN. (1923) c. 58, §§ 101-104; ME. REV. STAT. (1916) c. 114, § 6; MASS. GEN. LAWS (1921) c. 106, §§ 1, 2; 2 MICH. COMP. LAWS (1915) §§ 6346-6348; MINN. GEN. STAT. (1923) §§ 8473-8474; MISS. ANN. CODE (Hemingway, 1927) §§ 3335-3338; MO. REV. STAT. (1919) §§ 2286-2290; NEB. COMP. STAT. (1922) §§ 2561-2562; N. H. PUB. LAWS (1926) 840; N. J. COMP. STAT. (Cum. Supp. 1924) §§ 180-182; N. M. ANN. STAT. (1915) §§ 4804-4806, as amended, LAWS of 1915, c. 22; N. Y. CONS. LAWS (Cahill, 1923) c. 42, § 44; N. C. CODE ANN. (1927) § 1013; 1 N. D. COMP. LAWS (1913) §§ 7224-7227; OHIO GEN. CODE (Page, 1926) §§ 11,102-11,103-1; 2 OKLA. COMP. STAT. (1921) §§ 6027-6030; R. I.

enactment usually provides that the sale, transfer, or assignment in bulk of the whole or any part of a stock of merchandise, or (in the event of a sale made outside of the ordinary course of trade) of such merchandise and fixtures used in the business—shall be void as against the creditors of the seller or assignor unless certain conditions are complied with. These are that a detailed inventory of the stock and its cost price must be made at least five days before the transfer; that the purchaser or assignee must receive from the seller or assignor a sworn statement listing his creditors and the amount owing each; and that the purchaser or assignee must notify these creditors, either personally or by registered mail, at least five days before the transfer, as to the price, terms, and conditions of the proposed sale. Assignments for the benefit of creditors are exempt from provisions of these statutes, as are sales by judicial and fiduciary officers and by assignees for the benefit of creditors. Any purchaser or assignee who fails to conform to the requirements of the statute, upon the application of any creditor of the seller, becomes a receiver for the creditors and is held accountable to the latter for all merchandise and fixtures which have come into his hands.

2. A type of statute known as the "Pennsylvania form" is much more comprehensive in scope, and is the one most favored at the present time by the outstanding proponents of bulk sales legislation.⁴ Eleven states have modelled their bulk sales laws along its lines.⁵ The principal provisions of the New York form are included, although ten days' notice to creditors, instead of

GEN. LAWS (1923) §§ 4503-4504; 3 S. C. CODE OF LAWS (1922) §§ 3527-3529; S. D. REV. CODE (1919) §§ 914-921; TENN. ANN. CODE (Shannon, 1917) §§ 3118a-65-3118a-67; TEX. REV. CIV. STAT. (1925) arts. 4001-4003; VT. GEN. LAWS (1917) §§ 6013-6014; VA. CODE ANN. (1919) § 5187, as amended, Laws of 1926, 598; W. VA. CODE (Barnes, 1923) c. 74, § 3a, as amended, Acts of 1921, c. 108; WIS. STAT. (1925) §§ 241.18-141.21; WYO. COMP. STAT. ANN. (1920) c. 302.

⁴ See Montgomery, *The Bulk Sales Law as It Was Intended to Be and as It Is* (1923) 25 CREDIT MONTHLY 8. The new Louisiana Bulk Sales Law of 1926 follows generally the "Pennsylvania form." See note 36, *infra*.

⁵ D. C. ANN. CODE (Torbert, 1919) 457; 2 FLA. REV. GEN. STAT. (1920) §§ 3865-3868, 5200; GA. ANN. CODE (Michie, 1926) §§ 3226-3229; 2 IDAHO COMP. STAT. (1919) §§ 5752-5756; KY. STAT. (Carroll, 1922) §§ 2651a-1-2651a-7; Acts of La. 1926, 464; 3 MD. ANN. CODE (1914) §§ 100-103; 4 MD. ANN. CODE (1914) § 104; NEV. REV. LAW (1912) § 3908; 2 ORE. LAWS (Olson, 1920) §§ 8161-8164; PA. STAT. (West, 1920) §§ 784-791; UTAH COMP. LAWS (1917) §§ 5103-5107.

five, are required. In addition the Pennsylvania form sets forth the form of certificate of indebtedness to which the seller must make affidavit. If the act is not complied with, the transaction is "fraudulent and void," rather than void. The purchaser also is required to see that the proceeds of the sale are applied to the debts of the seller. A wilful false statement by the seller to the purchaser is made a misdemeanor. The creditors of the vendor may waive the protection of the act, and a ninety-day limitation is imposed upon those who would take advantage of the statute.

3. Montana ⁶ has passed a bulk sales law which resembles the Pennsylvania act, and includes many of its provisions. However, under this Montana statute, the purchaser is not required to give notice of the contemplated sale to the creditors of his vendor.

4. In Connecticut ⁷ a bulk sales law very limited in scope has been enacted. Only those vendors who are engaged in the business of buying commodities and selling the same "in small quantities for the purpose of making a profit" are included within its provisions. Barber shops, dental parlors, restaurants, and shoe-shining and hat-cleaning shops are mentioned specifically as within its scope. The proposed transfer must be recorded "in the town clerk's office of the town in which such business was being conducted" at least fourteen days before the sale, but no personal notice to the seller's creditors is required. Arizona ⁸ follows the "Connecticut form," as do California ⁹ and Washington,¹⁰ "although in the two latter jurisdictions the operation of the act is not limited to those buying and selling commodities in small quantities" only.¹¹ As amended in 1926, the Washington statute also includes provisions similar to those found in the Montana and the Pennsylvania acts.

Although a statute modelled after one of the foregoing forms is now in force in every American jurisdiction, thirty-five years ago no such bulk sales legislation existed. Why then have

⁶ 2 MONT. REV. CODES (Choate, 1921) §§ 8607-8611.

⁷ 2 CONN. GEN. STAT. (1918) §§ 4749-4751.

⁸ ARIZ. CIV. CODE (1913) §§ 5249-5250, as amended, Laws of 1915, c. 42.

⁹ CAL. CODES AND GEN. LAWS (Supp. 1927) § 3440.

¹⁰ WASH. COMP. STAT. (Supp. 1927) §§ 5832-5836.

¹¹ MONTGOMERY, *op. cit. supra* note 2, at 16.

our state legislatures, within a relatively short period, seen fit to give their unanimous approval to these enactments, and is Dean Pound's assertion correct that "credit men's associations have procured laws against the sale of stocks in bulk"?¹² Is this a case where the economic interpretation of law is the correct one, and where "organized pressure from groups having a common economic interest"¹³ is the "sole explanation"¹⁴ for the existence of specific legislation which otherwise might never have been passed?

This paper will discuss the foregoing questions under three main heads: (1) the need for bulk sales legislation; (2) the campaign for bulk sales legislation, with its results; and (3) the constitutionality of bulk sales legislation.

THE NEED FOR BULK SALES LEGISLATION

Conditions in the late nineties are thus described by J. Harry Tregoe,¹⁵ first president of the National Association of Credit Men, and at the present time one of this country's outstanding figures in the field of credit:¹⁶

"A favorite indoor sport of three decades ago with the fraudulently inclined debtor was to sell his stock in bulk, pocket the proceeds and laugh at his creditors. There was no way of reaching the debtor along criminal lines if he had broken no law, and the game could be played without fear of punishment whenever the debtor felt the urge of the deceitful method."

Is this quoted statement merely the reaction of one who saw through the eyes of the so-called creditor class?¹⁷ Or *was* this "indoor sport" a prevalent evil before the days of bulk sales statutes?

¹² POUND, INTERPRETATION OF LEGAL HISTORY (1923) 113.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ From 1912 to 1927 Mr. Tregoe served as executive manager of the National Association of Credit Men. At present he heads the Tregoe Economic Organization, with headquarters in Los Angeles, California.

¹⁶ (1927) 29 CREDIT MONTHLY 11, 12.

¹⁷ Some credit men of the period were most vigorous in their denunciation of dishonest retailers and their accomplices: "I do not believe that it is possible

The state reports from about 1890 to 1903—the period of greatest agitation for bulk sales laws—are filled with decisions which involve the transfer by a tradesman of his entire stock in gross, without making proper provision for his creditors.¹⁸ As only a small fraction of the actual cases ever reached the appellate courts, there is little question but that creditors of the period *did* face a widespread practice which placed them at the mercy of dishonestly inclined debtors.¹⁹

to legislate a thief into an honest man, but I do believe that it is possible to frame a law that will place almost insurmountable barriers in the way of that damnable class of pirates who swoop down upon a peaceful and confiding community and levant between two suns. And what is more they take with them a clear title to their ill-gotten gains, leaving behind a broken faith in the honesty of mankind, and sometimes also there is left behind one of those creatures who sleeps in the ecstatic security of always having his fingers crossed—that rare individual, the conceited credit man." From an address of retiring President Alexis C. Foster, of the Denver Association of Credit Men, delivered October 14, 1902, reported in (Nov. 5, 1902) BULLETIN NATIONAL ASSOCIATION OF CREDIT MEN.

¹⁸ *Nelms v. Steiner Bros.*, 113 Ala. 562, 22 So. 435 (1897); *Chipman v. Glennon*, 98 Ala. 263, 13 So. 822 (1892); *Carl & Tobey Co. v. Beal & Fletcher Co.*, 64 Ark. 373, 42 S. W. 664 (1897); *Milling v. Hillenbrand*, 56 Ill. App. 306 (1894); *Carter & Co. v. Richardson & Co.*, 22 Ky. L. Rep. 1204, 60 S. W. 397 (1901); *Edgewood Distilling Co. v. Nowland*, 19 Ky. L. Rep. 1740, 44 S. W. 364 (1898); *Hirsch v. Fudicker*, 43 La. Ann. 886, 9 So. 742 (1891); *Bliss v. Crosier*, 159 Mass. 498, 34 N. E. 1075 (1893); *Killam v. Pierce*, 153 Mass. 502, 27 N. E. 520 (1891); *Schloss v. Estey*, 114 Mich. 429, 72 N. W. 264 (1899); *Pollock v. Butler*, 23 So. 577 (Miss. 1898); *Wilkerson v. Moffett-West Drug Co.*, 74 Miss. 499, 21 So. 564 (1897); *John Deere Plow Co. v. Sullivan*, 158 Mo. 440, 59 S. W. 1005 (1900); *St. Louis Brewing Assn. v. Steimke*, 68 Mo. App. 52 (1896); *Beels v. Flynn*, 28 Neb. 575, 44 N. W. 732 (1890); *Fisher v. Stout*, 74 App. Div. 97, 77 N. Y. Supp. 945 (1902); *Moyer v. Bloomingdale*, 38 App. Div. 227, 56 N. Y. Supp. 991 (1899); *King v. Simmons*, 36 App. Div. 623, 55 N. Y. Supp. 173 (1898); *Blumenthal v. Michel*, 33 App. Div. 636, 54 N. Y. Supp. 81 (1898); *Ross v. Caywood*, 16 App. Div. 591, 44 N. Y. Supp. 985 (1897); *Rheinfelt v. Dahlman*, 19 Misc. 162, 43 N. Y. Supp. 281 (1897); *Wheeler v. Giddens*, 59 S. W. 181 (Tenn. Ch. 1900); *Gierse & Co. v. Whitehurst*, 66 Tex. 244, 18 S. W. 340 (1886); *Yerby v. Martin*, 38 S. W. 541 (Tex. Civ. App. 1897); *Amsden v. Fitch & Enricht*, 67 Vt. 522, 32 Atl. 478 (1895).

¹⁹ Jurists as well as credit men, considered the evil which the bulk sales statutes sought to remedy a widespread one.

"Prior to the passage of the law it was a common practice for retailers to sell their stock of goods in bulk, pay no one, and leave the man who sold them the goods without recourse. Such practices became so disastrous to the wholesalers that they were driven to the necessity of procuring legislation which would afford them protection against unscrupulous retail merchants. The bulk sales law is the result." *Coleman, C. J.*, in *Escalle v. Mark*, 43 Nev. 172, 177, 183 Pac. 387, 389 (1919).

"This criticism of the statute is sought to be answered by the plea that the law was designed to correct a great public evil, that it was aimed at a class of merchants who have engaged in the fraudulent practice of obtaining merchandise on credit for the purpose of making hasty and secret sales thereof in

The panic of 1893 proved disastrous to those retailers who had stocked up with goods at pre-panic prices, especially in the agricultural communities, and the temptation was great to unload for even a small percentage of the original cost of the merchandise. In the two years prior to April, 1899, at which time Minnesota passed a bulk sales law, at least seven cases, each involving the transfer of an entire stock in trade without provision for the vendor's creditors, reached the Supreme Court of that state.²⁰ Iowa was suffering from an epidemic of "curbstone" real-estate dealers. These operators, by advertising in the newspapers that they had improved farms to trade for stocks of goods, would get in touch with merchants whose financial condition was critical and who naturally would be attracted to an advertisement which offered a farm in exchange for merchandise. These real-estate men were of the "fly-by-night" class and nine times out of ten the farm offered would be heavily mortgaged. However, by persuasion and the inducement of a small cash payment in addition to the farm (with perhaps the aid of a local banker who "stood in" to get part of the cash either as his commission, or as payment on one of his own claims against the merchant), the merchant would be prevailed upon to make the trade. The real-estate operator then would move the goods to the next town and hold a "forced sale," while the merchant would have nothing left upon which his creditors could get execution, save the encumbered farm.²¹

In Oregon the problem was especially acute because of the unsettled nature of the country. Credit men report that it was

bulk and then decamping with, or otherwise disposing of, the proceeds at the expense of their creditors. It may be conceded that this was the ostensible purpose of the statute, and that the evil complained of was of substantial reality and magnitude, for which an efficacious remedy was much to be desired." Werner, J., in *Wright v. Hart*, 182 N. Y. 330, 336, 75 N. E. 404, 406 (1905).

²⁰ *Manwaring v. O'Brien*, 75 Minn. 542, 78 N. W. 1 (Feb. 2, 1899); *Benson v. Nash*, 75 Minn. 341, 77 N. W. 991 (Jan. 24, 1899); *Benton v. Minneapolis Tailoring & Mfg. Co.*, 73 Minn. 498, 76 N. W. 265 (Aug. 4, 1898); *Bruggemann v. Wagener*, 72 Minn. 329, 75 N. W. 230 (May 20, 1898); *Brown v. Scheffer*, 72 Minn. 27, 74 N. W. 902 (Apr. 22, 1898); *McCarvel v. Wood*, 68 Minn. 104, 70 N. W. 871 (Apr. 30, 1897); *Mix v. Edge*, 67 Minn. 116, 69 N. W. 703 (Jan. 4, 1897).

²¹ Address of R. O. Green, Fort Dodge, Iowa, before Des Moines Association of Credit Men, (Sept. 1908) BULLETIN NATIONAL ASSOCIATION OF CREDIT MEN 648, 650.

customary for an itinerant merchant to lease a storeroom and fixtures, stock up with goods bought on credit, and then sell out "in bulk." As quickly as the purchase price was paid, the "tramp merchant" would leave for another location, and soon would be operating again along similar lines.²²

Carter & Co. v. Richardson & Co.,²³ a Kentucky decision in 1901, furnishes a typical illustration of practices current at that time. This case, as do most in this group, grew out of a writ of attachment sought by a creditor of the vendor against a stock of goods transferred in bulk and in the hands of the vendee. Cohn, the seller, was a merchant in Bowling Green who owned goods worth upwards of \$6000. About \$2000 in stock had been purchased during the summer of 1895 on credits due to expire from October 15th to November 1st. In the early part of October an agent of the defendants appeared in Bowling Green and purchased the entire stock of goods for cash at about 50 per cent of its value, Cohn disappearing the same night. Next day the agent packed up the stock and moved it through the back door of the storeroom to a freight car. Here the creditor attached the goods. And it is at this point that the courts began to play a part in the solution of the problem.

Under such circumstances as those related, the court labored under the handicap of not having an adequate common law remedy for the protection of the creditor. The common law went on the theory that one having possession of certain chattels, unencumbered, was privileged to sell them regardless of the fact that the possessor might still owe all or a considerable part of the purchase price to *his* vendor. The *Statute of 13 Elizabeth*, adopted in most of the American states, afforded relief to an unpaid creditor of the seller, but only upon the theory that the buyer had participated in the fraudulent act of his vendor by purchasing the chattel with knowledge that the seller's creditors would suffer. Thus, where the buyer had paid valuable consideration for the stock of goods, it was necessary for the creditor to show a "mu-

²² Letter to the writer, June 4, 1928, from William B. Layton, Portland, Ore., counsel for the Portland Association of Credit Men.

²³ *Supra* note 18.

tual fraudulent intent”²⁴ on the part of the contracting parties in order to have the transaction declared void. The creditor, necessarily, was always under a heavy burden, because “fraud works in secret,”²⁵ and because the evidence necessary to uncover the “furtive scheme must, as a rule, be drawn from hostile witnesses, usually relatives or intimate friends of the seller, who took part in the fraud and shared in the plunder.”²⁶

In the *Carter* case, however, the Kentucky court held that as the fraud of Cohn, the vendor, was unquestionable, and as the circumstances were such as to put the agent of the vendee upon notice of such intent, those facts, coupled with the inadequacy of the consideration, were enough to remove the vendee from the category of a *bona fide* purchaser. Therefore, the attachment writ was allowed to lie.

Those courts which strove hardest to protect the creditor did so by finding the sale mutually fraudulent whenever possible. Rombauer, P. J., thus described the “badges of fraud” in the Missouri case of *St. Louis Brewing Assn. v. Steimke*,²⁷ decided in 1896:

“It will be seen that there was substantial evidence of the following facts which might be considered by the jury as badges of fraud. Undue and unusual haste in the transaction of purchase. The purchase of the contents of a store in lump without detailed inventory and appraisal and without any satisfactory explanation why the goods were neither inventoried nor appraised. Gross inadequacy of price.”

In *Beels v. Flynn*,²⁸ decided in 1890, Maxwell, J., speaking for the Nebraska court, remarked:

“A purchaser cannot close his eyes to the circumstances under which a debtor sells his goods—his entire stock. If he buys at a considerable discount and the effect of his pro-

²⁴ 12 R. C. L. 533-536.

²⁵ Vann, J., in dissenting opinion to *Wright v. Hart*, 182 N. Y. 330, 346, 75 N. E. 404, 410 (1905).

²⁶ *Ibid.*

²⁷ *Supra* note 18, at 56.

²⁸ *Supra* note 18, at 581, 44 N. W. at 732.

posed means of payment must be to hinder and delay, if not defraud, creditors of the seller, the purchaser will buy at his peril."

The Minnesota court in 1899, by Collins, J., likewise placed upon the vendee a heavy burden in *Manwaring v. O'Brien*:²⁹

"Fraud is rarely susceptible of direct proof and may be presumed from circumstances. Nor, in a case of this kind, is it necessary to prove that an alleged party to the fraud, such as a vendee, actually participated therein, or that he had actual notice of his vendor's fraudulent intent. Where the vendee has knowledge of such facts as would lead the ordinary prudent man, using ordinary caution, to make inquiries, whereby the fraudulent intent would have been discovered, he cannot be deemed a bona fide purchaser of property."

Such then was the state of the law governing the transfer of stocks of goods in bulk during the closing years of the Nineteenth Century. Only if a conspicuous "badge of fraud" could be affixed to the vendee by the creditor did the latter win. However, as the above cases show, some courts went far in finding this fraudulent intent on the part of the buyer. If the sale was made suddenly, without inventory, and especially if the price paid was inadequate, the court would scrutinize the transaction closely. And if the vendee failed to make the inquiries ordinarily incidental to a purchase of the kind, at least one court, Minnesota, made such omission virtually equivalent to a presumption of fraudulent intent on the part of the buyer. But, notwithstanding all this, in numerous cases,³⁰ although the seller might be intent on defrauding his creditors, the buyer proved himself a *bona fide* purchaser, free from all knowledge, actual or constructive, of the seller's debts. And so the creditor went without a remedy. The additional fact that there was no national bankruptcy act in effect until 1898, and that each state was administering its own insolvency laws, placed another stumbling block in the path of creditors.

²⁹ *Supra* note 20, at 545, 78 N. W. at 2.

³⁰ See cases *supra* note 18.

THE CAMPAIGN FOR BULK SALES LEGISLATION

While great need existed for legislation to supplement the common law remedies of the late nineties, it is extremely doubtful if the state legislatures, upon their own initiative, would have rushed pell-mell to the aid of the creditor class. However, in the decade from 1894 to 1904, at least a score of states passed "bulk bills" (as they were then called) which placed stringent requirements upon any retailer who would dispose of his stock of merchandise in gross, as well as upon his transferee. And behind these various state enactments lies the story of one of the most highly organized, and thoroughly efficient, nation-wide lobbying campaigns ever conducted in the interests of one economic group. That group consisted of the credit department representatives of business houses scattered all over the United States, who were bound together in an organization called the National Association of Credit Men.

The *Louisiana Bulk Sales Act of 1896* is regarded as the pioneer statute of its kind.³¹ However, two years earlier, during the session of 1894, the Louisiana legislature passed a bill "to define and punish certain misdemeanors in trade and commerce."³² Section 2 of that act provided that "whosoever shall purchase goods, wares or merchandise or other commodity on credit and shall sell, hypothecate, or dispose of the same out of the usual course of business and with the intent to cheat or defraud the seller or vendor, shall be guilty of a misdemeanor. . . ." Section 3 provided that "whosoever shall purchase any goods, wares or merchandise, or other commodity on credit and shall secrete himself, or abscond from the state for the purpose, and with the intent of cheating or defrauding the seller or vendor, shall be guilty of a misdemeanor. . . ."

This statute, which thus attempted to remedy the evil by making the defrauding vendor or absconding vendee criminally responsible, was drawn by a New Orleans attorney at the request of a group of local credit men.³³ The New Orleans Credit Men's

³¹ MONTGOMERY, *op. cit. supra* note 2, at 9.

³² Acts of La. 1894, 205.

³³ Letter to the writer, May 31, 1928, from Major T. J. Bartlette, manager of the New Orleans Credit Men's Association, who was one of the sponsors of the bill.

Association had not organized at that date, and, in fact, did not receive its first charter until 1896. As the Act of 1894 was found "to be defective,"³⁴ the newly-born credit association succeeded in having it amended in 1896.³⁵

This amended Statute of 1896, by eliminating the words "or other commodity" from the Act of 1894, confined the chattels included to "goods, wares and merchandise." It also added the two following important sections:

"Sec. 4. . . . That whosoever shall wilfully and knowingly purchase in blocks goods, wares or merchandise, unpaid for by the seller, without exacting from said seller a written statement sworn to, showing that said goods, wares or merchandise have been paid for, shall be guilty of a misdemeanor. . . ."

"Sec. 5. . . . That the failure of the vendor under sections 1, 2, and 3 to pay over to his vendor or vendors the price of such goods, wares or merchandise in proportion to their claims or to return the same; and the failure of the purchaser under section 4 to exact a signed sworn statement from the seller required in said section, shall be such prima facie evidence of fraudulent intent within the meaning of this act as to warrant both criminal and civil proceedings."³⁶

The National Association of Credit Men was organized at Toledo, Ohio, in 1896, the New Orleans Credit Men's Association being a vigorous promoter of the convention at which the national body was formed.³⁷ The first few years of the new association's history were occupied largely with the effort to have

³⁴ *Ibid.*

³⁵ Acts of La. 1896, 137.

³⁶ The Louisiana statute remained in this form until again amended in 1912. Acts of La. 1912, 135. Section 4 then was changed to make the transfer "prima facie fraudulent and void," unless the purchaser demanded an inventory of the stock of goods from his vendor, together with a list of the vendor's creditors, whom the vendee must notify five days before taking possession. Failure of the purchaser to comply with section 4 made him accountable to these creditors for all goods coming into his possession.

A new bulk sales law for Louisiana was signed by the governor, July 15, 1926. Acts of La. 1926, 464. This act was drafted along the lines of the "model bill" prepared by the National Association of Credit Men. See MONTGOMERY, *op. cit. supra* note 2, at 66. See also Montgomery, *Louisiana Bulk Sales* (1926) 28 CREDIT MONTHLY 28. Apparently the constitutionality of these various Louisiana statutes was never questioned.

³⁷ Letter to the writer, May 16, 1928, from J. Harry Tregoe.

Congress enact a federal bankruptcy law.³⁸ However, as early as 1897, a general interest in bulk sales legislation was aroused,³⁹ and by 1902-03, when the first issues of the Bulletin of the National Association of Credit Men were published, the following paragraph appeared:⁴⁰

“With the bankruptcy question disposed of for the present, the matter of the adoption of laws regulating sales of stocks of goods in bulk is now the principal feature of the legislative work before the national association. We are pleased to report, even at this early period of the year, the introduction of measures on this subject in the legislatures of Massachusetts, Colorado, Indiana, Missouri, Alabama, and Kansas.”

Long before 1903, however, an intensive campaign had been waged by the credit men through their local organizations, to arouse public sentiment in favor of “bulk bills.”⁴¹ The national association at that time was not large, and even by 1903 it had only about thirty-five local branches and a total membership of about four thousand.⁴² Wholesalers everywhere rallied in sup-

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ (Feb. 5, 1903) BULLETIN NATIONAL ASSOCIATION OF CREDIT MEN 3.

⁴¹ The following circular letter, sent out during the fight for a bulk sales law for Georgia by the Atlanta Chamber of Commerce, is typical. (Sept. 5, 1903) BULLETIN NATIONAL ASSOCIATION OF CREDIT MEN 4.

“Senate Bill No. 192. A Law for General Welfare.

Dear Sir:

Can we ask your favorable consideration of the above bill, whose purpose is to prevent the fraudulent sales of merchandise stocks in bulk? We believe it to be needful legislation for the following reasons: (1) The progressive citizens of every community are found among its wholesale and retail merchants—these need all the protection they can get; (2) The law has the endorsement of all the commercial bodies in every town of the state; (3) It will protect the honest trader who pays 100 cents from the competition of the dishonest insolvent traders who sell out ‘to a friend,’ settle for a small amount, and open again with a stock whose cost looks like 30 cents; (4) It will give an additional safeguard to all commercial transactions and add no little to the credit of small dealers, which today is an equivalent of added capital; (5) It will inure to the commercial interests of the state to have it become a law at this session.

Thanking you in advance for what you can do to give it this direction, we are,

Yours for Georgia,
Atlanta Chamber of Commerce.
J. K. Orr, President.”

⁴² (July 1, 1903) BULLETIN NATIONAL ASSOCIATION OF CREDIT MEN 29.

port of the bills. Some retailers, however, were more skeptical, maintaining that the proposed laws were inimical to their interests, in that they placed unnecessary restrictions upon the honest merchant who wished to sell his business. The credit men answered this argument by appealing to the financial self-interest of the retailers. Suppose, contended the credit men, that "a dishonest debtor, with the intention of defrauding creditors, transfers his stock to an accomplice. The latter offers it to the consumer at ruinous prices 'to close,' and the honest debtor must meet the competition or lose numerous sales which he otherwise would have effected at a profit. After an experience of this kind, the dealer invariably becomes an earnest advocate of bulk sales laws."⁴³ Then, too, as one newspaper pointed out in its editorial column,⁴⁴ the wholesaler was bound to lose money when a retailer, to whom he had sold goods, disposed of his stock in bulk and left the state without paying his creditors. This loss had to be distributed. And so future wholesale prices to honest merchants would be raised in proportion.

The legislative committee of the National Association of Credit Men meanwhile drafted model "bulk bills" and had these introduced into the several state legislatures. As the states, one by one, passed these measures, the question soon arose as to the constitutionality of such enactments. Invariably, the credit men would appear through their attorneys and would ask leave of the court to file a brief setting out the arguments in support of this type of legislation. As will be indicated at a later point, where the constitutional history of several state bulk sales statutes will be considered, it was often necessary to raise funds of considerable size to finance these appeals.

Publicity was the outstanding feature of the credit men's campaign. Whenever a state enacted a bulk sales law the legislative committee of the National Association of Credit Men would print the text of the statute and distribute it widely. As the court decisions sustaining the constitutionality of these laws were

⁴³ (Oct. 15, 1906) *ibid.* 29.

⁴⁴ Sioux City, Iowa, Journal, as quoted in (May 15, 1909) BULLETIN NATIONAL ASSOCIATION OF CREDIT MEN 259.

pronounced, a copy of the judge's opinion would be added to the text of the enactment. Gradually this information was collected in pamphlet form, and at the New York convention of the National Association of Credit Men, held in 1904, the legislative committee reported the distribution of five thousand copies of this pamphlet.⁴⁵ Leaflets for use in the various jurisdictions also were prepared, and as the courts interpreted specific sections of the act, this information would be included, as well as comment by local counsel suggesting the proper method of proceeding.⁴⁶ At the present time the only compilation of the various bulk sales statutes, as enacted and as interpreted by the courts, is that of W. Randolph Montgomery, counsel for the National Association of Credit Men, entitled *Laws and Decisions Applying to Sales in Bulk*, now in the second edition.

The "bulk bill" campaign of the National Association of Credit Men first brought tangible results when Oregon⁴⁷ passed a statute in 1899 "to regulate the purchase, sale and transfer of goods, wares and merchandise in bulk." Minnesota⁴⁸ followed during the same year, Maryland⁴⁹ the next year, and by the end of 1901 Wisconsin,⁵⁰ Tennessee,⁵¹ Washington,⁵² Utah,⁵³ and Indiana⁵⁴ all had bulk sales laws. The first Ohio⁵⁵ and the first New York⁵⁶ bulk sales statutes were passed in 1902. Then came the "banner year," 1903, with favorable legislative action in California,⁵⁷ Colorado,⁵⁸ Connecticut,⁵⁹ Delaware,⁶⁰ Georgia,⁶¹

⁴⁵ (July 1, 1904) *ibid.* 79.

⁴⁶ (1916) *ibid.* 126.

⁴⁷ Laws of Ore. 1899, 248.

⁴⁸ Laws of Minn. 1899, 357.

⁴⁹ Laws of Md. 1900, 907.

⁵⁰ Laws of Wis. 1901, 684.

⁵¹ Laws of Tenn. 1901, 234.

⁵² Laws of Wash. 1901, 224.

⁵³ Laws of Utah 1901, 67.

⁵⁴ Laws of Ind. 1901, 505.

⁵⁵ Laws of Ohio 1902, 96.

⁵⁶ Laws of N. Y. 1902, 1249.

⁵⁷ CAL. CIV. CODE (1901) § 3440, as amended by Stat. 1903, 111.

⁵⁸ Session Laws of Colo. 1903, 225.

⁵⁹ Pub. Acts of Conn. 1903, 49.

⁶⁰ Laws of Del. 1903, 748.

⁶¹ Laws of Ga. 1903, 92.

Idaho,⁶² Massachusetts,⁶³ and Oklahoma,⁶⁴ and with an amendment to the Indiana act.⁶⁵ The next half-dozen years saw a bulk sales law on the statute books of every American state and of the District of Columbia.⁶⁶

With the exception of the Connecticut act, which merely prohibited the sale of a stock in bulk without prior recording of the property transferred in the town clerk's office, and the California act, which required similar registration with the county recorder, these early statutes were not dissimilar as to general provisions. All set out specific conditions to be fulfilled by both purchaser and seller before the consummation of the sale. The original Oregon act placed upon the vendee the duty of demanding from his vendor a list of the latter's creditors with the amount owing each. A vendor who knowingly made a materially false statement concerning the transaction, or who failed to include the names of all his creditors, was to be deemed guilty of perjury. The Minnesota act followed generally the wording later to become known as the "New York form," and provided that if a sale in bulk was made without complying with its terms, the transaction "shall be presumed fraudulent and void." This was the clause—describing the effect of non-compliance—in which the legislatures differed most. In fact, so varied was the wording of the several enactments, that the Minnesota court, in *Thorpe v. Pennock Mercantile Co.*,⁶⁷ found it necessary to set out these "legal effect" provisions in all acts passed prior to 1906, before it could decide finally that the Minnesota provision merely prescribed a rule of evidence.

The campaign of the credit men in these various states which had enacted bulk sales laws furnishes many interesting sidelights on the methods used in procuring desired legislation. In California the San Francisco and the Los Angeles associations of

⁶² Session Laws of Idaho 1903, 11.

⁶³ Acts and Resolves of Mass. 1903, 389.

⁶⁴ Session Laws of Okla. 1903, 249.

⁶⁵ Laws of Ind. 1903, 276.

⁶⁶ For a complete list of the statutes passed prior to 1906 see *Thorpe v. Pennock Mercantile Co.*, 99 Minn. 22, 27, 108 N. W. 940, 941, 942 (1906).

⁶⁷ *Ibid.*

credit men, both powerful groups, stirred their respective memberships into active participation in the "drive" on the legislature. The bill was introduced into the upper house by Senator E. I. Wolfe, at the request of the San Francisco association, and upon passage, was signed by Governor George C. Pardee on March 10, 1903.⁶⁸ The Portland Association of Credit Men, another commercial body possessing wide influence in the Northwest, after bringing about the enactment of the Oregon statute in 1899, turned its attention to surrounding states and sponsored the bill passed by the Idaho legislature in 1903.⁶⁹

In the Rocky Mountain territory the Denver Credit Men's Association devoted numerous meetings to devising ways and means for obtaining a bulk sales law for Colorado.⁷⁰ One bill passed both houses of the legislature, but was vetoed by the governor because of "constitutional defects." A second bill failed of passage by one vote. Eventually, however, Senate Bill No. 25, introduced by Senator Charles D. Griffith, former president of the Denver Association and delegate to several national credit conventions, passed both houses.⁷¹ It was approved by the governor February 26, 1903.

In the East,⁷² one of the most active local groups sponsoring bulk sales legislation was the Boston Credit Men's Association. After an unsuccessful attempt to have the "bulk bill" passed at the 1902 session of the Massachusetts General Court,⁷³ the Boston credit men concentrated their efforts on the session of 1903. While the "bulk bill" was pending in the senate, a Boston dealer in "second-hand" stocks, named Raymond, made a vigorous attempt to defeat it. Failing in this, Raymond charged that certain senators had been improperly influenced by the credit men

⁶⁸ (March 5, 1903) BULLETIN NATIONAL ASSOCIATION OF CREDIT MEN 29; (April 5, 1903) *ibid.*

⁶⁹ (March 5, 1903) *ibid.* 29.

⁷⁰ *Ibid.*

⁷¹ (Nov. 5, 1902) *ibid.*; (Feb. 5, 1903) *ibid.* 12.

⁷² The Delaware act, signed by the governor, March 24, 1903, was introduced into the legislature at the instance of W. J. McMannis, a member of the National Association of Credit Men, who represented Delaware on the association's legislative committee. (Apr. 5, 1903) BULLETIN NATIONAL ASSOCIATION OF CREDIT MEN 2.

⁷³ (Nov. 5, 1903) BULLETIN NATIONAL ASSOCIATION OF CREDIT MEN 18.

into supporting the bulk sales statute. These charges were made the basis of an investigation, in the course of which President John R. Ainsley, and other members of the Boston Credit Men's Association, were called to testify before a committee. "The result of the investigation was a complete refutation (of the charges) made by the person Raymond."⁷⁴ The "bulk bill" passed both houses and was approved by the governor.⁷⁵ Two years later the Boston Credit Men's Association gave valuable assistance in the campaign leading up to the passing of the Maine act, which became operative July 1, 1905.

CONSTITUTIONALITY OF BULK SALES LEGISLATION

Questions concerning the constitutionality of bulk sales laws were raised early. The Tennessee and the Washington acts each reached their respective state supreme courts in 1902. The Tennessee act was tested in *Ness v. Borches*,⁷⁶ which grew out of a writ of replevin for sixty-seven pairs of shoes, valued at sixty-seven dollars. Driscoll & Co., the vendors, were retail merchants at Given, Tenn., who owed debts both to Borches & Co. of Knoxville and Donaldson Bros. of Morristown. Borches & Co. demanded payment, and not receiving it, "proceeded to buy from Heritage, the clerk of Driscoll & Co., the entire stock of Driscoll & Co., except a few odds and ends of no material value." This was done without any notice by either the seller or purchaser to the creditors of Driscoll & Co., as required by the Tennessee act. It did not appear that there was any fraud in the transaction, nor that it was contrary to the wishes of the firm. Donaldson Bros. heard of the transfer and attached the shoes. Borches & Co. replevied them. The trial court held the *Tennessee Bulk Sales Law* unconstitutional and ruled that Driscoll & Co. had made a valid sale.

⁷⁴ (June 5, 1903) BULLETIN NATIONAL ASSOCIATION OF CREDIT MEN 3.

⁷⁵ The Supreme Judicial Court sustained the Bulk Sales Law in *Squire v. Tellier*, 185 Mass. 18, 69 N. E. 312 (1904). The Boston Credit Men's Association was permitted by the court to enter a brief prepared by Messrs. Pillsbury and Morgan, counsel for the association. (Feb. 5, 1904) BULLETIN NATIONAL ASSOCIATION OF CREDIT MEN 1.

⁷⁶ 109 Tenn. 398, 71 S. W. 50 (1902).

The Tennessee act followed closely the plan of the Minnesota statute. It provided that a sale made in violation of its terms should be "presumed to be fraudulent and void." The majority of the Supreme Court, in a brief opinion, held the act constitutional, declaring,⁷⁷

"that it was intended to prevent the practice of fraudulently selling out goods to the injury of creditors by merchants; that it is merely a regulation of the business of merchandising; that it is not class legislation, and that the limitation of the act to merchants is not arbitrary classification; that it does not take away the property of the citizen, but only regulates the sale of merchandise in such manner as to prevent fraud."

Mr. Justice Wilkes, in a dissenting opinion, branded the *Bulk Sales Law* as "vicious class legislation," which, by restricting the free sale and disposition of stocks of goods, deprived the merchant of his property without due process of law.

The Washington act came before the state Supreme Court in *McDaniels v. J. J. Connelly Shoe Co.*⁷⁸ The issue arose out of a writ of garnishment by an assignee of the creditor of the vendor, sued out against the vendee who had purchased the stock in bulk without complying with the provisions of the new *Bulk Sales Law*. The Superior Court of Pierce County dismissed the writ. Realizing that this was one of their first test cases, the Merchants' Association of Seattle, supported by the National Association of Credit Men, financed the plaintiff's appeal to the Supreme Court. In order to carry up this case, a fund was collected from various local branches of the National Association of Credit Men.⁷⁹

The Washington statute differed from that of Tennessee in several particulars. The first section required that the purchaser, before paying for the stock of goods, demand a list of the vendor's creditors, with their addresses and the amount owing each, this information to be verified according to the form set

⁷⁷ *Ibid.* 402, 71 S. W. at 51.

⁷⁸ 30 Wash. 549, 71 Pac. 37, 60 L. R. A. 947 (1902).

⁷⁹ (Feb. 5, 1903) BULLETIN NATIONAL ASSOCIATION OF CREDIT MEN 3.

out in the statute. The second section stipulated that the sale should be deemed "fraudulent and void" unless the vendee received this list, and unless he either paid these creditors himself, or saw to it that the vendor paid them out of the purchase money. A third section resembled the Oregon statute by making a false statement, in the information furnished by the vendor, an act of perjury.

Judge Fullerton, speaking for the court, held the act constitutional, declaring that the limitations placed upon the transfer of property by merchants were within the police power, and were not without precedent. The placing of merchants in a separate category, in regard to the operation of the act, was held to be a reasonable classification. And the act did not operate in restraint of trade, as it prevented no one from transferring his stock in the ordinary course of business. Whether the specific statute in question was too harsh was not for the court to decide, Judge Fullerton concluded.⁸⁰

The proponents of bulk sales legislation met their first reversal on constitutional grounds in 1904, when the Utah Supreme Court construed the Statute of 1901, modelled after the "New York form."⁸¹ This statute declared that any transfer of a stock in bulk, made without complying with its terms, should be considered "fraudulent and void," and that those participating in the same should be deemed guilty of a misdemeanor, for which a penalty was provided. In holding the Act of 1901 unconstitutional, the court relied on the stock arguments of the day. Liberty, as that term is used in both the United States and the Utah Constitutions, includes the "right in each subject to purchase, hold, and sell or dispose of property in the same way that his neighbor may; and of such liberties no one can be deprived without due process of law."⁸² This act deprived a merchant owing debts of his power to contract in respect to the sale of his stock in trade. It

⁸⁰ The Tennessee and Washington decisions were regarded by the credit men as great victories. Early in 1903 some effort was made to repeal the Bulk Sales Law of the former state. "The attack was sharply met by the Nashville and Memphis associations and the effort at repeal was quickly abandoned." (May 5, 1903) BULLETIN NATIONAL ASSOCIATION OF CREDIT MEN 18.

⁸¹ Block v. Schwartz, 27 Utah 387, 76 Pac. 22, 65 L. R. A. 308 (1904).

⁸² *Ibid.* 396, 76 Pac. at 25.

did not aim to touch like contracts made by merchants not owing debts. Therefore, not only was the former group deprived of their property without due process of law, but the act created an arbitrary and prohibited classification even within the business of retailing. The court also considered the bulk sales statutes of other jurisdictions which had been declared constitutional and declared that none of these made failure to comply with their provisions a misdemeanor. Furthermore, the Utah act likewise failed to exempt from its operations officers acting in a fiduciary capacity, or under judicial process.⁸³

The Utah Statute of 1901 was amended in 1905⁸⁴ and modelled after the "Pennsylvania form,"⁸⁵ which includes in the text the form of statement concerning his creditors to which the vendor must make affidavit. A section similar to that in the Oregon statute was drafted, which makes a wilful false statement by the vendor an act of perjury. The "misdemeanor clause" was dropped and a new section added exempting fiduciary and judicial officers from the operation of the act, thus eliminating some of the most objectionable features pointed out by the court in *Block v. Schwartz*. Up to the present time the Supreme Court of Utah has not passed on the constitutionality of the amended act.

Constitutional difficulties were encountered also in Indiana when suits were brought under the *Bulk Sales Law of 1901*. This statute was modelled after the "New York form" and declared that transfers made in violation of its provisions should be deemed "fraudulent and void" as against the creditors of the seller. In *Sellers v. Hayes*⁸⁶ the Indiana Supreme Court intimated that it considered the act unconstitutional. Meanwhile, the Indianapolis credit men introduced into the legislature a measure "for the purpose of strengthening the present Indiana

⁸³ The "misdemeanor clause" and the omission from the act of provisions exempting fiduciary and judicial officers from its operations caused the Idaho court to conclude in *Boise Assn. of Credit Men v. Ellis*, 26 Idaho 438, 144 Pac. 6 (1914), that: "it is not probable that a law with such drastic and unreasonable provisions as the Utah statute had would ever be sustained by any court."

⁸⁴ Laws of Utah 1905, 103.

⁸⁵ MONTGOMERY, *op. cit. supra* note 2, at 15.

⁸⁶ 163 Ind. 422, 72 N. E. 119 (1904).

statute on the regulation of sales of stocks of goods in bulk.”⁸⁷ This bill became the Act of March 9, 1903,⁸⁸ containing much more elaborate provisions than did its predecessor. In *McKinster v. Sager*⁸⁹ the Indiana Supreme Court declared the Act of 1903 unconstitutional under the Fourteenth Amendment, in that, as all creditors of the merchant were excluded except merchandise ones—and these given a superior lien on the goods—this classification was too narrow. Six years later, in 1909, the Indiana legislature passed a third *Bulk Sales Law*,⁹⁰ a “substantial copy” of the Michigan Act of 1905,⁹¹ which had been held constitutional by the United States Supreme Court in *Kidd, Dater & Price Co. v. Musselman Grocer Co.*⁹² This Act of 1909 came before the Indiana Supreme Court in *Hirth-Krause Co. v. Cohen*,⁹³ and was held constitutional. The new act included *all* creditors of the merchant—a provision which eliminated one of the prior objections to the Act of 1903. Besides, the Indiana court admitted frankly that the judicial trend of the times clearly favored bulk sales legislation.

The constitutional history of bulk sales legislation in Illinois is similar to that of Indiana. The original *Bulk Sales Statute* was passed in 1905.⁹⁴ It followed the “New York form,” and limited the transfers within its scope to “an entire stock of merchandise in gross.” The Illinois Supreme Court, through Mr. Justice Vickers, in *Off & Co. v. Morehead*,⁹⁵ construed “stock of merchandise” as meaning “stock in trade” and objected to this narrow classification of the act, maintaining that there was no special reason why the creditors of merchants should be singled out and protected while the creditors of manufacturers, hotel keepers,

⁸⁷ (Feb. 5, 1903) BULLETIN NATIONAL ASSOCIATION OF CREDIT MEN 3.

⁸⁸ Laws of Ind. 1903, 276.

⁸⁹ 163 Ind. 671, 72 N. E. 854 (1904).

⁹⁰ Laws of Ind. 1909, 122.

⁹¹ Mich. Pub. Acts 1905, 322.

⁹² 217 U. S. 461, 30 Sup. Ct. 606 (1910). In this case the United States Supreme Court followed its previous ruling in *Lemieux v. Young*, 211 U. S. 489, 29 Sup. Ct. 174 (1909), which held the Connecticut Bulk Sales Law constitutional.

⁹³ 177 Ind. 1, 97 N. E. 1 (1912).

⁹⁴ Laws of Ill. 1905, 285.

⁹⁵ 235 Ill. 40, 85 N. E. 264 (1908).

livery stable proprietors, publishers, and those in other businesses should be deprived of the advantages of the statute. Accordingly, the court held the act unconstitutional, as violating sections 1 and 2 of the Illinois Bill of Rights.

In 1913 the Illinois statute was amended,⁹⁶ and made much broader in scope. To the phrase "stock of merchandise" were added the words "or merchandise and fixtures or other goods and chattels of the vendor's business." A wilful false statement by the vendor to the vendee concerning the number of his creditors, or the condition of their accounts, was made a misdemeanor. Another added section exempted from the operation of the act sales by fiduciaries and by judicial officers, as well as public auctions advertised at least ten days in advance.

Mr. Justice Vickers again wrote the opinion of the court when this amended Statute of 1913 came up for interpretation in *Johnson Co. v. Belosky*.⁹⁷ He reviewed his previous opinion, and then stated that the legislature obviously had attempted to mould a statute to meet the objections pointed out by the court in the *Off & Co.* case. In this task it had succeeded, and the new act, since it applied to other transfers than those involving stocks of merchandise, was a valid exercise of the police power. "The reasonableness of the act and the necessity for its enactment are legislative questions, with which the courts have no concern," he concluded.

The two jurisdictions in which bulk sales legislation had its hardest battles were New York and Ohio. Both states passed their first acts in 1902. The New York statute reached the Court of Appeals three years later in the leading case of *Wright v. Hart*.⁹⁸ The act was in the "New York form,"⁹⁹ then most

⁹⁶ Laws of Ill. 1913, 258.

⁹⁷ 263 Ill. 363, 105 N. E. 287 (1914).

⁹⁸ 182 N. Y. 330, 35 N. E. 404 (1905).

⁹⁹ The New York act provided: Every sale "of any portion of a stock of merchandise, other than in the ordinary course of trade in the regular and usual prosecution of the seller's business, or the sale of an entire stock of merchandise in bulk, shall be fraudulent and void as against the creditors of the seller, unless the seller and purchaser shall at least five days before the sale, make a full and detailed inventory, showing the quantity, and so far as possible with the exercise of reasonable diligence, the cost price to the seller of each article to be included in the sale, and unless such purchaser shall at least five days before the sale in good faith make full, explicit inquiry of the seller as to the name

prevalent, and was held unconstitutional by a four to three decision, Werner, J., writing the opinion for the majority. The attack on the statute was based on sections 1¹⁰⁰ and 6¹⁰¹ of article 1 of the state constitution and Article 1 of the Fourteenth Amendment to the Federal Constitution. The defense of the statute, which placed certain restraints upon liberty and property, was founded, said the court, on "that shibboleth of legislatures and courts known as the police power."¹⁰²

Judge Werner analyzed the *Bulk Sales Law* in its most minute detail, rendering by far the most comprehensive opinion ever attempted by any opponent of this type of legislation. The law impaired freedom of contract, he said, because it would result in "practically placing an embargo upon all sales of merchandise in bulk."¹⁰³ It was class legislation. If the term "merchandise" were given its ordinary business significance, then the act singled out merchants only, and imposed burdens upon them. If "merchandise" were given a broader interpretation, then like burdens were imposed on a class including manufacturers, jobbers, and wholesale merchants. The statute failed to distinguish between honest and fraudulent sales. The five-day waiting period provided might kill a sale on a fluctuating market. The seller might not care to disclose to the buyer the "cost price" of each article, and, besides, "every paper of pins or fine tooth comb would have to be inventoried."¹⁰⁴ In regard to the required notification to creditors, in some cases "the inventory" might have to be dupli-

and place of residence or place of business of each and every creditor of the seller, and the amount owing each creditor, and unless the purchaser shall at least five days before the sale in good faith notify or cause to be notified personally or by registered mail each of the seller's creditors of whom the purchaser has knowledge, or can with the exercise of reasonable diligence acquire knowledge of such proposed sale, and of the stated cost price of merchandise to be sold, and of the price to be paid therefore by the purchaser. The seller shall at least five days before such sale file a truthful answer in writing to each and all of said inquiries."

¹⁰⁰ Providing that "no member of this state shall be . . . deprived of any rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers."

¹⁰¹ Providing that no person shall "be deprived of life, liberty or property without due process of law."

¹⁰² *Supra* note 98, at 335, 75 N. E. at 406.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.* 340, 75 N. E. at 407.

cated by the hundreds or thousands and sent to creditors scattered over all portions of the globe.”¹⁰⁵

Near the close of his opinion, Judge Werner paid his respects to the bulk sales law campaign conducted by the credit men, in the following language:¹⁰⁶

“It is said that similar statutes, some of them much more drastic, have been adopted in twenty different states or jurisdictions. Twenty wrongs can never make one right. There is, moreover, a singular, not to say suspicious, coincidence in the time and substance of all this legislation. We are indebted to our brother Bartlett for the suggestion that more than half of these statutes were enacted in 1903 and 1904, and nearly all of them since 1900. Statutes that are passed *pro bono publico* rarely sweep the country with such irresistible momentum, while much fantastic legislation has resulted from organized crusades upon legislatures by the advocates and supporters of special classes.”

Vann, J., wrote the principal dissenting opinion, in which he stressed the need for bulk sales legislation “to suppress a widespread evil, well known to current history and condemned by repeated adjudications of this court and all the leading courts of the state from time out of mind.”¹⁰⁷

The first New York statute was amended in 1904.¹⁰⁸ The words “fraudulent and void” were changed to “will be presumed to be fraudulent and void,” and in *Sprintz v. Saxton*¹⁰⁹ the Appellate Division, Second Department, declared the act constitutional. In 1907¹¹⁰ a third statute was passed, similar in substance to the Act of 1904. Again in 1914¹¹¹ the law was changed still further and the present New York statute enacted.

As the Act of 1914 was substantially the same as the Act of 1902, declared unconstitutional in *Wright v. Hart*, it is of interest to follow its history somewhat in detail. The Supreme Court

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.* 345, 75 N. E. at 408.

¹⁰⁷ *Ibid.* 346, 75 N. E. at 410.

¹⁰⁸ Laws of 1904, c. 569. See (1916) 2 CORN. L. Q. 28.

¹⁰⁹ 126 App. Div. 421, 110 N. Y. Supp. 585 (1908).

¹¹⁰ Laws of 1907, c. 722.

¹¹¹ PERSONAL PROP. LAW, c. 722.

of New York County in *Apex Leasing Co. v. Litke*¹¹² held the act constitutional. The Supreme Court of King's County in *Klein v. Maravelas*¹¹³ held the act unconstitutional, and this decision was affirmed by the Appellate Division, Second Department, sitting in Brooklyn.¹¹⁴ At this stage of the proceedings the New York Credit Men's Association joined with the National Association of Credit Men, and with the local associations in Albany, Utica, Rochester, Syracuse, and Buffalo, and retained Julian A. Gregory of New York City as counsel. When an appeal was taken in *Klein v. Maravelas*, Mr. Gregory procured an order from the Court of Appeals, allowing the credit men to intervene and file a brief in their own behalf. This case came before the Court of Appeals in 1916,¹¹⁵ Judge Cardozo writing the opinion. The court frankly overruled *Wright v. Hart*, and pointed out that its doctrine, enunciated in 1905, no longer met the commercial needs of eleven years thereafter:¹¹⁶

"The unanimous or all but unanimous voice of the judges of the land in federal and state courts alike has upheld the constitutionality of these laws. At the time of our decision in *Wright v. Hart* such laws were thought new and strange. They were thought in the prevailing opinion to represent the fitful prejudices of the hour. The fact is that they have come to stay and like laws may be found on the statute books of every state. . . . Back of this legislation, which to a majority of the judges who decided *Wright v. Hart* seemed arbitrary and purposeless, there must have been a real need. We can see this now, even though it may have been obscure before. Our past decision ought not to stand in opposition to the uniform convictions of the entire judiciary of the land."¹¹⁷

¹¹² 93 Misc. 353, 158 N. Y. Supp. 21 (1916), *rev'd* on other grounds, 173 App. Div. 323, 159, N. Y. Supp. 707 (1916), *aff'd*, 225 N. Y. 625, 121 N. E. 853 (1918).

¹¹³ 94 Misc. 458, 159 N. Y. Supp. 554 (1916).

¹¹⁴ 173 App. Div. 933 (1916).

¹¹⁵ 219 N. Y. 383, 114 N. E. 809 (1916).

¹¹⁶ *Ibid.* 385, 114 N. E. at 810.

¹¹⁷ In order to bring the mortgage of a stock of merchandise in bulk under provisions similar to those governing sales in bulk, § 230 (a) of the NEW YORK LIEN LAW was enacted.

The first *Ohio Bulk Sales Statute*,¹¹⁸ which made transfers of stocks in violation of its provisions "fraudulent and void," was declared unconstitutional in *Miller v. Crawford*.¹¹⁹ Mr. Justice Shauk, who wrote the opinion, reasoned that as section 19 of the Ohio Bill of Rights provided that "private property shall ever be held inviolate but subservient to the public welfare," only a "substantial reason of a public character"¹²⁰ would justify a restriction upon the enjoyment and use of property. No such reason existed here, he contended, for "under the guise of preventing frauds,"¹²¹ in sales of stocks in bulk, this act prohibited them altogether, as it was virtually impossible for the buyer to comply with the requirements of the statute.

The second *Ohio Bulk Sales Statute* was passed April 30, 1908.¹²² This act said that a transfer made in violation of its requirements should be "presumed to be made with the intent to hinder, delay, or defraud creditors." Provision also was made for a recording of the proposed sale in the office of the county recorder not less than seven days prior to the transfer. In spite of these changes, the Act of 1908 was likewise held unconstitutional in *Williams & Thomas v. Preslo*,¹²³ the Ohio Supreme Court (again through Mr. Justice Shauk) maintaining that there was no fundamental difference between the Statute of 1902 and that of 1908.

Ohio held a constitutional convention in April, 1912. Long before the opening date of the convention the credit men of the state were busy. Early in the year the five Ohio associations of credit men sent delegates to a joint meeting called at Columbus. An account of the proceedings of this session reads:¹²⁴

"On this occasion Max Silberberg, representing the Cincinnati association, presented a report drafted by him and Henry Bentley, former secretary of the Cincinnati associa-

¹¹⁸ Laws of Ohio 1902, 96.

¹¹⁹ 70 Ohio St. 207, 71 N. E. 631 (1904).

¹²⁰ *Ibid.* 215, 71 N. E. at 632.

¹²¹ *Ibid.* 217, 71 N. E. at 633.

¹²² OHIO REV. STAT. §§ 6343, 6344.

¹²³ 84 Ohio St. 328, 95 N. E. 900 (1911).

¹²⁴ (Feb. 1912) BULLETIN NATIONAL ASSOCIATION OF CREDIT MEN 114.

tion, which received the approval of the state Board of Legislation. The report outlines the part which it seemed should be taken by the credit men's associations of Ohio at the constitutional convention. It brings out the part taken by the Cincinnati association in selecting the representatives to the convention to be placed on a non-partisan ticket, and how that organization had been instrumental in the election of eight out of nine candidates. . . ."

This report was devoted principally to considering the problem of framing an amendment to the Ohio constitution which would empower the legislature to pass a valid bulk sales law. The committee concluded, after analyzing the previous Ohio bulk sales decisions, that "any attempt to change the Constitution through the new convention by striking out Section 19 of Article 1 would be futile."¹²⁵ Instead, the committee advised a program of education for the Ohio courts in "the vital needs of modern business" and suggested that "associations of credit men throughout the state should invite during the coming year the judges of the Supreme Court to be present at their meetings and to get in touch with the association's work, get a knowledge of their high standing, the ideals and aims of the organizations, and get into close sympathy with the fight on the part of the business men against fraud."¹²⁶

That the constitutional convention felt there was a real need for bulk sales legislation in Ohio, is evidenced by the fact that when the new constitution was adopted, September 3, 1912, an amendment legalizing such a statute was included. This result was obtained in section 2 of article XIII. Clause 1 of this section treated of certain powers over corporations granted to the legislature. Clause 2 of the same section provided:

"Laws may be passed regulating the sale and conveyance of other personal property, whether owned by a corporation, joint stock company, or individual."

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

Acting under the authority of clause 2, the Ohio legislature, in 1913, passed a third *Bulk Sales Law*, identical in form with the present New York statute.¹²⁷

Cases soon arose under the new act. In the Common Pleas Court of Montgomery County, the statute was held constitutional. In the Common Pleas Court of Clarke County, it was held unconstitutional. The Clarke County case was affirmed by the Circuit Court of Appeals and this decision was carried to the Supreme Court of Ohio for final adjudication,¹²⁸ the Ohio Wholesale Grocers Association joining forces with the credit men and employing George B. Okey of Columbus as chief counsel.¹²⁹ Their united efforts met with success, for in *Steele, Hopkins & Meredith Co. v. Miller*,¹³⁰ the Ohio Supreme Court held the Act of 1913 constitutional.

Johnson, J., in writing the opinion, pointed out the rapid growth of credit transactions in the retail merchandising business. This condition, he said, gave an opportunity for fraud on creditor wholesalers, "not usual in other forms of business." The court also called attention to the debates of the members who drew the constitutional amendment. It was the general understanding of the framers of the amendment that—in the words of a leading member of the convention—it "has met the condition which the Supreme Court of Ohio has declared to exist, and unfetters the legislature so that it can pass this needed legislation." Therefore, the amendment and the Bill of Rights must be construed together. Neither does the new *Bulk Sales Law* violate the Federal Constitution. The classification is reasonable and the statute is justifiable legislation under the police power.

CONCLUSION

This discussion has sought to describe: (1) the extent to which, prior to the passage of bulk sales laws, the common law courts aided the creditors of a merchant who disposed of his stock

¹²⁷ OHIO GEN. CODE (Page, 1926) § 11,102.

¹²⁸ (Oct. 1914) BULLETIN NATIONAL ASSOCIATION OF CREDIT MEN 844.

¹²⁹ *Ibid.*

¹³⁰ 92 Ohio St. 115, 110 N. E. 648 (1915).

in bulk without paying his debts; (2) the effectiveness of the nation-wide campaign waged by the National Association of Credit Men to procure the enactment of bulk sales legislation; (3) the task which faced the proponents of bulk sales laws when these statutes were declared unconstitutional by the highest courts of five jurisdictions, and the methods used by the credit men in obtaining changes in those laws to meet the objections raised by the courts.

No attempt has been made to include within the scope of this article a discussion of the construction of specific bulk sales statutes. One of the major problems that has arisen in this connection is whether the words "stock of merchandise," or "goods, wares, and merchandise" includes trade fixtures or other property not kept for sale when the two latter are not mentioned specifically in the statute. The courts are not in agreement as to the answer.¹³¹ Another stumbling block is the phrase "presumed to be fraudulent and void" used in numerous bulk sales laws to describe the legal effect of a transfer of a stock in gross, made without complying with the terms of the act. One court would make these words merely prescribe a rule of evidence.¹³² Another would construe them as "enacting a rule of substantive law, making sales not in conformity to the statute, fraudulent as to creditors as a matter of law."¹³³ A third would hold that if no attempt is made by the parties to comply with the statute, then the sale is "unlawful and voidable," but "if the parties attempt to comply with the statute, but fail in some particulars," such conduct is only presumptively fraudulent and may be overcome by evidence proving good faith.¹³⁴

"Such diversity of construction" has led a commentator in

¹³¹ For cases discussing this question see *Sakelos v. Hutchinson Bros.*, 129 Md. 300, 99 Atl. 357 (1916); *Kolander v. Dunn*, 95 Minn. 422, 104 N. W. 371 (1905); *Swift v. Tempelos*, 178 N. C. 487, 101 S. E. 8 (1919); *Johnson v. Kelly*, 32 N. D. 116, 155 N. W. 683 (1915); *Cressman v. Haas*, 26 Pa. Dist. 812 (1917); *Lewis, Hubbard & Co. v. Loughran*, 85 W. Va. 235, 101 S. E. 465 (1919); *Plass v. Morgan*, 36 Wash. 160, 78 Pac. 784 (1904).

¹³² *Thorpe v. Pennock Mercantile Co.*, *supra* note 66; *Young v. Gordon*, 257 Fed. 846 (E. D. N. Y. 1919) (construing previous New York statute).

¹³³ *MONTGOMERY, op. cit. supra* note 2, citing *William R. Moore Dry Goods Co. v. Rowe*, 99 Miss. 30, 54 So. 659 (1911).

¹³⁴ *National City Bank v. Huey, et al., Drug Co.*, 113 S. C. 333, 102 S. E. 516 (1920).

the Harvard Law Review to "the suspicion that there is little real need for remedial statutes of this nature."¹³⁵ The *National Bankruptcy Act* is cited as furnishing an adequate remedy in providing "for a speedy discovery of assets and making a preference by an insolvent debtor an act of bankruptcy and voidable." Theoretically, these provisions may seem to furnish the merchandise creditor ample protection. As a practical matter, the average credit man places these legal remedies in the same category with those afforded to the owner of the proverbial stolen horse who had forgotten to lock the barn door. What the credit man desires most is not a legal remedy to be administered subsequent to the sale of the debtor's assets, but notice *in advance*, of the proposed transfer, such as a bulk sales statute provides. If this notice is afforded him, the credit man is, from a business standpoint at least, in a vastly better position than if the sale already has taken place, although his debtor at the time of the transfer may even have been technically insolvent under the *Bankruptcy Act*. It is also true that many of the sales in bulk which do the greatest damage to merchandise creditors are those made, not by a debtor who is technically insolvent under the *Bankruptcy Act*, but by one who merely is unable to meet his bills as they fall due. With the latter class of debtors the *Bankruptcy Act* is not concerned. And if the vendee purchased the stock in good faith, the creditor, in the absence of statute, is without a remedy.

The facts set forth in this study confirm Dean Pound's assertion that the existence of bulk sales legislation is due to the "organized pressure" brought upon the legislatures by one economic group—in this case a creditor group.¹³⁶ This pressure obtained almost immediate results in a score of widely scattered jurisdictions, for the forces opposing bulk sales laws were unorganized and soon put to flight. Nevertheless, as has been pointed out, difficulties were encountered later, because some of the judges, sitting during the opening years of the Twentieth Century, felt that these "new and strange" statutes violated fundamental constitutional privileges. But these obstacles also were

¹³⁵ (1920) 33 HARV. L. REV. 717, 718.

¹³⁶ POUND, *loc. cit. supra* note 12.

overcome, as the trend of the times aided and abetted the organized efforts of the proponents of bulk sales laws.

However, that certain economic groups, because of self-interest, foster particular types of legislation, is no reason, in itself, for condemning that legislation. Many of our statutory enactments, which are socially most desirable, have been adopted, not because the legislature hearkened to the voice of the sovereign multitude raised spontaneously in behalf of its own welfare, but because some organized group, for its own particular benefit, had carried its carefully planned campaign into the legislative halls.

Such has been the history of bulk sales legislation. It was socially desirable. It was fostered by a highly organized unit—the National Association of Credit Men. The wholesalers, because of practices prevalent among dishonest merchants, especially during the late nineties, placed a premium upon any extension of credit to a retailer, whether he were honest or dishonest. The ultimate consumer eventually underwrote the wholesaler's risk when the former settled his fortnightly account with "the butcher, the baker and the candle-stick maker." Society at large, as well as the credit man, needed some new legal remedy to curb the then all-too-current practice of unannounced sales of entire stocks of merchandise. The solution of the problem came with the passage of those statutes which regulate the transfer of goods in bulk.