

## SUPREME COURT OF NOTRE DAME

## WAGNER VS. PARKER

## No. 10

Equity—Recission—Executory Contract—Breach—Failure of Consideration—Bulk Sale—Validity Between Parties—Bulk Sales Act—Construction—Fraud on Creditors—Actual or Constructive—Pleading as Defense—Ex turpie causa nulla actio oritur—In pari delicto.

1. Where, pursuant to contract, W executes and delivers to P his promissory note and the assignment of his land contract, in consideration of the sale and transfer to him by P of the latter's stock of merchandise and his promise to pay the claims of his creditors, and P, after transferring the stock to W, fails and refuses to pay the claims of his creditors, but permits such stock to be taken under the Bulk Sales Law to satisfy such claims, W is entitled in equity to the cancellation of his note and the recission of the assignment of his land contract as against P.

2. For the failure or refusal of one of the parties to perform an essential part of his contract, the other party may have a recission thereof.

3. The Bulk Sales Law, declaring fraudulent and void as against creditors of the seller, a sale of merchandise in bulk, merely makes such sale voidable, and voidable only at the instance of the creditors. Such sale is perfectly legal and binding as between the parties themselves as to all rights and remedies under their contract of sale. The Bulk Sales Law has no application whatever to the contracting parties, if the claims of the seller's creditors are paid or otherwise provided for.

4. Contracts and conveyances made in fraud of creditors, whether in constructive fraud as in violation of the Bulk Sales Law, or in actual fraud in violation of the Statutes 13 and 27 Elizabeth as enacted in the States, are voidable only as to creditors. Such contracts and conveyances, both at common law and under these statutes, are perfectly legal and enforceable between the parties. When executed, they cannot be avoided by either party on the ground that they were made to defraud creditors; and when executory, they are enforceable in all their terms as any other contract. Neither party will be permitted to plead his fraud upon creditors as a defense in his own behalf in any case where such fraud is not necessary to sustain plaintiff's right of action.

5. The text statement of 12 Ruling Case Law, pg. 610, par. 120, made in connection with the subject of executed contracts, that is, that "If a contract is made for the transfer of property to defraud the creditors of the transferor, the contract, while executory, cannot be enforced either in equity or at law. The fraud may be set up as an absolute defense," is inaccurate and misleading,

and is in conflict with the true rule for determining the enforcement of such contracts, as stated in 12 R. C. L., pg. 613, par. 123, as follows: "That party must fail whose case is incomplete without proof of the fraud." Such "fraud not being an ingredient in the plaintiff's case, and being unavailable as a defense," recovery may be had thereon. Such executory contracts in fraud of creditors as well as those executed, being perfectly legal and binding as between the parties both at common law and under the Elizabeth statutes of frauds, are enforceable as other contracts, except where plaintiff must plead or prove such fraud to establish his case.

6. Whether a plaintiff comes into court "with the metaphorical unclean hands," whether his action is founded on an illegal contract or transaction, or in his own wrong, must be determined by his pleading and proof, and not by what the defendant may plead or prove.

7. If the plaintiff pleads a good cause of action on an executory contract, and the fact of fraud upon creditors is not necessary to the pleading or proof of his case, he is entitled to recover. In such case the doctrine in *in pari delicto* has no application whatever. And it is a violation of the maxim *ex turpi causa nulla actio oritur* to permit defendant to plead his own fraud upon creditors as a defense, for neither may plead his iniquity as a defense any more than as a cause of action.

## WAGNER VS. PARKER

## No. 10

Suit by John Wagner, the appellant, against Nathan Parker, the appellee, for the cancellation of a promissory note and the reassignment of a certain land contract. From a judgment for the defendant, Parker, the plaintiff, Wagner, appeals. *Reversed*.

Charles P. J. Mooney, Jr. and Gerald J. Craugh, for appellant.

Walter A. Rice and Charles M. Dunn, for appellee.

VURPILLAT, J. Wagner and Parker, the parties to this suit, were, on August 1, 1920, residents of St. Joseph County, Indiana; and then and there entered into a written contract by which Parker agreed to sell and deliver to Wagner his certain

grocery store located in Niles, Michigan, to guarantee the title thereto, and to pay all claims of creditors held against said store, which claims were expressly estimated to be about \$1,000; in consideration of which Wagner agreed to assign, transfer and deliver to Parker a certain contract conveying all his right and title to a specific tract of land situate in St. Joseph County, Indiana, and to execute and deliver to Parker his promissory note for \$400, payable in one year. Pursuant to the terms of this contract, Wagner executed and delivered said promissory note to Parker, and also assigned and delivered to him the land contract described. Parker then transferred and delivered to Wagner the grocery store in Niles, Michigan.

Soon after Wagner took possession of the store certain creditors of Parker brought action on their claims for \$1100, making both Parker and Wagner defendants, and proceeding against said store and stock of goods according to the Bulk Sales Law of Michigan. Appellee, Parker, in violation of his contract, refused to pay said claims, but defaulted in the action and permitted the creditors to seize the store and stock. Appellant, Wagner, made no resistance to the action of the appellee's creditors. That action resulted in a judgment for \$1100 and an order for the sale of the stock of goods in virtue of the Bulk Sales Act, and the sale had pursuant thereto took the entire stock of goods and store to satisfy the judgment.

Appellant, Wagner, then instituted this suit in the Notre Dame Circuit Court of Indiana to cancel the \$400-note held by Parker of him, and also to secure a reassignment to him of the land contract now held by Park-

er. The complaint is in one paragraph, is predicated on the foregoing statement of facts, and asks for the relief stated, upon the theory of a total failure of consideration.

Defendant, Parker, answered in general denial, and for a second paragraph plead the Michigan Bulk Sales Act, and alleged that plaintiff and defendant failed to make any compliance whatever in the sale and transfer of defendant's stock of goods in the Michigan store, as required by said Bulk Sales Act for the benefit of defendant's creditors; that the contract between plaintiff and defendant was therefore illegal and void, and that both parties were equally at fault therein. Plaintiff's demurrer to this second paragraph of answer was overruled and exception was taken to the ruling. Plaintiff then filed reply in two paragraphs, the first general denial, and the second stating facts to show that plaintiff was not *in pari delicto* with defendant in the formation of their contract for the transfer of the Michigan store. Demurrer to this second paragraph of reply was overruled. Trial resulted in a finding and judgment for the defendant. Motions for new trial and in arrest of judgment were overruled, and judgment for defendant was entered from which the plaintiff prosecutes this appeal.

Appellant assigns as error for the reversal of the judgment, the overruling of the demurrer to the second paragraph of answer, the overruling of the motion for a new trial, and that the judgment is contrary to the evidence and to the law.

It is obvious that there is a total failure of the consideration which appellee contracted to give to appellant for the note and land contract in suit. The Michigan store, transferred to

appellant, was almost immediately thereafter taken to satisfy the claims of creditors of appellee, and these claims, which appellee agreed to pay as the other part of the consideration, he has failed and refused to pay. So that, while the appellee has received and now holds appellant's note for \$400 and his interest in the St. Joseph County land as the entire consideration he was to receive from the contract, the appellant has nothing whatever to show as his part of the consideration for the contract.

It is an established principle of equity that for the failure or refusal of one of the parties to perform an essential part of his contract, the other party may have a rescission thereof. 6 R. C. L. 925; *Ft. Wayne Electric Co. vs. Miller*, 131 Ind. 499-30 N. E. 23; *Tenant Land Co. vs. Nordeman*, 148 Ky. 361-146 S. W. 756; *Lucy vs. Bundy*, 9 N. H. 298-32 Am. Dec. 359; *McGrath vs. Gegner*, 77 Md. 331-39 Am. St. Rep. 415; *Norrington vs. Wright*, 115 U. S. 211. For such failure of consideration a party may have cancellation of a note. *Kessler vs. Parlius*, 107 Minn. 224-119 N. W. 1069; and the rescission of a contract of conveyance. *Parkham vs. Randolph*, 4 How. (Miss.) 435-35 Am. Dec. 403; *Lide vs. Thomas* (S. C.) 4 Am. Dec. 581. This relief, which the plaintiff is ordinarily entitled to, was denied him by the trial court, presumably upon the theory advanced by defendant's second paragraph of answer that the contract of the parties which provides for the transfer of the stock of goods is governed by the Bulk Sales Law of Michigan, is illegal and void for the failure of the parties to comply with that law with respect to creditors of the seller, and that the principle of equity which denies its

aid to contracting parties who are *in pari delicto* in the formation of illegal contracts applies in this case and bars the granting of the relief sought.

But does the Bulk Sales Law have that effect? Is a contract for the sale of a stock of merchandise in bulk illegal and void for mere failure to give notice of such sale to the seller's creditors? We think not. Such contract is neither illegal nor void by any known test for determining the illegality of contracts. A contract is illegal if it is opposed to the common law, if it contravenes some established public policy, or if it is prohibited by statute. *Anson on Contracts*, 223. This contract is not opposed to any rule of the common-law. A sale in bulk is as valid at common-law as any other sale. Even creditors may attack such sale at common-law only upon the ground of actual fraud of the parties, and such fraud much be pleaded and proven in the case. Nor is a sale in bulk void as against public policy. No one has ever contended that such a sale contravenes any recognized public policy. These sales have been conducted from time immemorial and have never been questioned as a matter of public policy. And finally, the contract is neither illegal nor void by virtue of the Bulk Sales Law. "A Statute may render an agreement illegal in one of two ways—by express prohibition, or by penalty. It may say in so many words, that contracts of certain sort are illegal, or void, or both; and where it expressly avoids a contract, or makes it illegal, no doubt can arise as to the intentions of the Legislature." *Anson on Contracts*, 225. The Bulk Sales Law neither prohibits nor penalizes sales of merchandise in bulk as such, nor does the Act declare

such sale in itself illegal, or void, or both. It merely provides, in general, that a sale of a stock of merchandise in bulk shall be *void as against creditors of the vendor*, unless they have a certain number of days notice thereof. 12 R. C. L. 525; Black's *Constitutional Law*, 476, note 178. In *Ruling Case Law*, *supra*, it is said "In general these statutes provide that the sale of all or any portion of a stock of merchandise otherwise than in the ordinary course of trade shall be fraudulent and void against creditors of the seller, unless the seller delivers to the purchaser a list of his creditors, and the purchaser in turn notifies such creditors of the proposed sale at a stipulated time, usually five days, in advance."

The term void is frequently used in the statutes in the sense of voidable. *Allis vs. Billings*, 6 Met. (Mass.) 415 -39 Am. Dec. 744; *Crouse vs. Holman*, 19 Ind. 35; *VanSchaak vs. Robbins*, 36 Iowa 201; *Terrill vs. Anchauer*, 14 Ohio St. 80; *Fuller vs. Hasbrouch*, 46 Mich. 82; *Kearney vs. Vaughn*, 50 Mo., 284; *Bromley vs. Goodrich*, 40 Wis. 131; *Inskeep vs. Lecony*, 1 N. J. L. III. It is said in *Beecher vs. Marquette & Pac. Ry. Co.*, 45 Mich. 103, *Cooley, J.*, "If it is apparent that an act is prohibited and declared void on grounds of general policy, we must suppose the legislative intent to be that it shall be void to all intents; while if the manifest intent is to give protection to determinate individuals who are *sui juris*, the purpose is sufficiently accomplished if they are given the liberty of avoiding it." There is an entire absence of any language in the Bulk Sales Act prohibiting or declaring void on grounds of general policy sales of merchandise in bulk as such, but express provision is

made in the statute that such sale shall, unless conditions are complied with, be considered fraudulent and void *as to creditors of the vendor*, thereby clearly manifesting the intent merely to give protection to determinate individuals, namely: creditors of the vendor. And, as in the case of persons *sui juris*, for whose protection contracts are declared void, the purpose of the Bulk Sales Act is sufficiently accomplished, if these creditors are given the liberty of avoiding the sale. As an infant's contract is valid and enforceable unless the infant himself, at whose option alone it is voidable, attacks it and asks the special protection afforded him by the law, so is the contract of the parties to a bulk sale valid and enforceable between them, as to all rights and remedies, and such contract and sale are subject to attack only by the vendor's creditors, at whose option alone the sale is voidable. This construction of the Bulk Sales Act is not only supported in principle but is uniformly sustained by the decisions of the courts of last resort. *Mac Greenery et al vs. Murphy*, 76 N. H. 338-82 Atl. 720-39 L. R. A. (NS) 374; *George Kraft Co. vs. Heller*, 188 Ind. 612-125 N. E. 209; *Newman vs. Garfield*, (Vt.) 104 Atl. 881; *Escalle vs. Mark*, (Nev.) 183 Pac. 387; *John P. Squire & Co., vs. Tellier*, 185 Mass. 18- 69 N. E. 312-102 Am. St. Rep. 322; *Oregon Mill Co., vs. Hyde*, (Oregon) 162 Pac. 791; *Benson vs. Johnson*, (Ore.) 165 Pac. 1001; *Spurr vs. Travis*, 145 Mich. 721-108 N. W. 1090-116 Am. St. Rep. 330; *Young vs. Lemineaux*, 79 Conn. 434- 65 Atl. 436-129 Am. St. Rep. 193-20 L. R. A. (NS) 160-29 Sup. Ct. 174-53 L. Ed. 295. A leading case in the construction of the Bulk Sales Law, frequently cited

with approval, is *MacGreenery vs. Murphy, supra*. In that case the court says: "The statute purports to make such a sale void as against creditors of the seller, although the parties acted with the utmost good faith and entertained no purpose to defraud or to embarrass the seller's creditors in the collection of their claims. The sale, which was otherwise valid as against everybody, is made invalid as against creditors as a matter of law. It is declared fraudulent when no fraud was intended by the parties." It is said in 12 R. C. L. 525 that "the invalidity in any (sale) applies only to cases where the rights of creditors are involved, and sales in violation of the statutes are perfectly valid between the immediate parties or those claiming under them." Knowlton, C. J., speaking for the court in *John P. Squires vs. Tellier, supra*, in determining the constitutionality of the Massachusetts sales act, says: "A sale made in violation of the statute is void only as against creditors, and, if the vendor's debts are paid, the sale cannot be interfered with. A purchaser, to be safe, has only to see that the vendor's creditors are provided for. The vendor may sell freely, without regard to the statute, if he pays his debts. The Legislature when contemplating this legislation, had occasion to consider and balance against each other the general right of property owners to make contracts and dispose of their property, and the general right of creditors to be paid, and to have reasonable opportunities secured to them for the collection of their debts."

This construction of the Bulk Sales Law is in perfect harmony with the construction put upon the Statutes 13 and 27 Elizabeth, and

similar statutes in this country, which declare "utterly void" every conveyance of goods and chattels as well as land, made with intent to delay, hinder and defraud creditors, etc. Such statutes are uniformly construed as using the word "void" to mean voidable, and voidable *only* at the instance of the creditor. Save for the protection given to creditors to avoid them, these conveyances and contracts are perfectly valid as between the parties themselves. 12 R. C. L. 473 and 597. And in consonance with this uniform rule, that contracts and conveyances made in actual fraud of creditors are voidable only at the instance of defrauded creditors, and otherwise are perfectly legal and valid between the parties, such contracts will be enforced between the parties. Neither party will be permitted to plead his fraud upon creditors to avoid such contracts when executed, or to plead such fraud as a defense to the enforcement of such contract when executory. The following cases are cited in support of the proposition that executory contracts will be enforced between the parties, and that fraud upon creditors may not be plead as a defense: 1 Blackf. (Ind.) 262; *Springer vs. Drosch*, 32 Ind. 486-2 Am. Rep. 356; *Nichols vs. Patten*, 18 Me. 231-36 Am. Dec. 713; *Butler vs. Moore*, 73 Me. 151-40 Am. Rep. 348; *Carpenter vs. McClure*, 39 Vt. 9-91 Am. Dec. 370; *Harvey vs. Varney*, 98 Mass. 118; *Stillings vs. Turner*, 153 Mass. 534-27 N. E. 671; *Bradtfelt vs. Cooke*, 27 Oreg. 194-40 Pac. 1-50 Am. St. Rep. 701; *Bush vs. Rogers*, 65 Ga. 320-38 Am. Rep. 785; *Sewell vs. Norris*, 128 Ga. 824-58 S. E. 637-13 L. R. A. (NE) 1118; *Clemmens vs. Clemmens*, 28 Wis. 637 -9 Am. Rep. 520; *Sickman vs. Lapsley*, 13

Serg. & R. (Pa.) 224-15 Am. Dec. 596; Williams vs. Williams, 34 Pa. St. 312; Evans vs. Dravo, 24 Pa. St. 62--62 Am. Dec. 359; Newson vs. Douglas, 7 Harris & J. (Md.) 417-16 Am. Dec. 317; Elmore vs. Elmore, 22 Ky. 856-58 S. W. 980; Gary vs. Jacobson, 55 Miss. 204-30 Am. Rep. 514; Barwick vs. Royse, 74 Miss. 415-21 So. 238-60 Am. St. Rep. 512; Landwirth vs. Shaphran, 47 La. Ann. 336-16 So. 836; Sauter vs. Leveredge, 103 Mo. 615-15 S. W. 981; Davis vs. Mitchell, 34 Cal. 81; Lawton vs. Gordon, 34 Cal. 36; Note: 30 Am. Rep. 517; 12 R. C. L. 613, par. 123.

This formidable array of decisions is presented here not only to sustain the rule stated, but to controvert the adverse holding which we shall have occasion to consider. The rule as above stated is in perfect accord with all legal and equitable maxims and principles. Under this rule no distinction is made between executory and executed contracts entered into in fraud of creditors, for neither the common-law nor the statute of Elizabeth makes such distinction. The Supreme Court of Indiana, in Springer vs. Drosch, *supra*, in an opinion strongly fortified in reason, principle and precedent, holds "that the defense attempted in this case cannot avail the defendant (namely: that plaintiff may not recover the purchase price of merchandise sold to defendant because the sale was intended to defraud creditors)—that a contract for the sale or conveyance of property, to hinder or delay creditors, is only illegal as to creditors; and that as between the parties, and as to all others, it is a legal and valid sale or conveyance, and can be enforced in all its terms as any other contract." In Sickman vs. Lapsley (Pa.), *supra*, the court says: "In

Reichert vs. Castator, 5 Binn. 6 Am. Dec. 402, it was decided that an instrument, however fraudulent as to creditors, as to the party is binding and valid, and neither in courts of law nor equity would he be permitted to aver against his own voluntary iniquity. A man shall not be permitted to set up his iniquity as a defense any more than as a cause of action. Montifori vs. Montifori, 1. W. Bl. 363. Fraud is irrevocable as to him who commits it. 1 Fomb. 164." What is said by the Supreme Court of Main in Butler vs. Moore, *supra*, is quite pertinent here: "It is generally true that the law will not aid parties violating its express or implied rules, in executing their unlawful contracts, or afford them relief from their effects when executed. In such cases the old maxims, *ex turpi causa* and *in pari delicto*, stand like stone walls against the parties. The implication of the statute of 13 Eliz. declares that as between the parties to a conveyance made to prevent creditors of the grantor from attaching or seizing his property and thereby securing their debts, the transaction is not to be regarded void or voidable, but valid. And if valid we fail to see why the note given in payment is not also valid. The transaction is not a *turpis causa*, and neither do the parties stand *in pari delicto*. In the case at bar each of the parties deliberately entered into the contract. Each received a full consideration, the one for his land and the other for his note. Neither of them was defrauded. So far as their intention backed up by their acts affected any creditor of the grantor, the creditor thereby defrauded has full remedy etc." The distinction between illegal contracts, to which the doctrine *in pari delicto* applies, and contracts,

which creditors may avoid for fraud, and to which that doctrine does not apply, is clearly stated in Gary vs. Johnson, *supra*, as follows: "What sound principle demands that the fraudulent vendee shall be allowed to remain in possession of the property conveyed, and refuse to pay the price agreed on? The transaction is harmful only to the creditors of the vendor. If they do not complain—if they acquiesce—why should he be permitted to escape payment of his ill-gotten gains? There is a manifest distinction between conveyances in fraud of creditors, and offences against the penal law. By one the body politic, the sovereign Commonwealth, is wronged; by the other, those only who have an interest in undoing the fraud."

All the foregoing cases are authority for sustaining appellant's assignment that the trial court erred in overruling the demurrer to defendant's second paragraph of answer. There is however, some conflict in the decisions of the courts on the subject of the enforcement of executory contracts made in fraud of creditors. And since some of these cases give a semblance of support to appellee's position, we are constrained to give them careful, critical consideration.

The case which is chiefly responsible for the conflict is Nellis vs Clark 4 Hill (N. Y.) 427-20 Wend. 30. (1847.) By a vote of ten against nine judges and senators, this case, as subsequently declared by the New York court itself, Moseley vs. Moseley, 15 N.Y. 335, departed from the rule firmly established by the uniform decisions of this country and England "that contracts and conveyances made with a view to hinder, delay and defraud creditors were neverthe-

less valid and binding between the parties to such contracts and conveyances," the English statute of frauds, Eliz. 13 and 27, as well as that of New York itself, pronouncing such contracts and conveyances "void and of no effect *only* as against the person or persons who might in any wise be disturbed, hindered or defrauded."

And to sustain this departure, this case of Nellis vs. Clark gives countenance to four distinct judicial errors, namely: first, failing to make distinction between contracts legal in every respect but voidable only as to creditors injuriously affected, and contracts which are really illegal between the parties because the subject matter or consideration is unlawful—in short, making no distinction between illegal and voidable contracts; second, applying to voidable contracts the doctrine *in pari delicto* which applies only to illegal contracts and to wrongful transactions of both parties which plaintiff pleads as his cause of action; third, declaring that executory contracts in fraud of creditors are illegal at common-law, although the Statute of Elizabeth which the court expressly admits is declaratory of the common-law, pronounces such contracts void *only* as to creditors; and fourth, judicially legislating an amendment to the ancient Statute of Elizabeth as well as to the similar statute for New York by declaring (to use the court's own language) that "the word *only*, as used in the Statutes of Elizabeth, and in our Revised Statutes of 1787, on this subject, was not intended to render contracts of that character legal and valid between the parties thereto. But it was inserted to prevent the general provisions of the Statute from changing the common-law rule as between

the parties themselves in relation to *executed* contracts." See Moseley vs. *supra*.

Not only does Nellis vs. Clark sustain itself in these violated principles of law and equity, but for authority it relies solely upon the case of Smith vs. Hubbs, 10 Me. 71, a case which, as declared in Harvey vs. Varney, (Mass.) *supra*, was at that very time in effect overruled by the Supreme Court of Maine itself in the case of Nichols vs. Patten, 18 Me. 231-36 Am. Dec. 713; and later was expressly discredited in Butler vs. Moore, 73 Me. 151-40 Am. Rep. 348. Finally, so much of Nellis vs. Clark as survives its own inherent weakness, falls under the strong dissenting opinion of Chief Justice Nelson, who afterwards served as a justice of the United States Supreme Court. And the case is also thoroughly discredited and rejected in well considered opinions of the supreme courts of the following states in their respective cases, all cited above, to-wit: Indiana, Springer vs. Drosch; Vermont, Carpenter vs. McClure; Massachusetts, Harvey vs. Varney; Wisconsin, Clements vs. Clements; Maine, Butler vs. Moore; Oregon, Bradtfelt vs. Cook; Mississippi, Gary vs. Johnson. These are the cases which expressly disapprove. Nellis vs. Clark and Smith vs. Hubbs. There are decisions of other states which condemn the doctrine announced by these cases. See the numerous citations *supra*.

Unfortunately, however, there are a few courts which have perfunctorily cited these discredited and overruled cases in support of similar decisions, apparently without consideration of their character, and without a knowledge

of the adverse authorities. Such are the decisions in Goudy vs. Gebhart, 1 Ohio St. 262; Miller vs. Marckle, 21 Ill. 152; Church vs. Muir, 33 N. J. L. 318 (by 4 of 7 judges); Harvin vs. Weeks, II Rich. L. (S. C.) 601, (3 judges affirming, 2 dissenting and 1 absent.) Three other cases give expression to the same erroneous doctrine, also failing to distinguish between illegal and voidable contracts and mistaking the common-law. They are the old cases of Norris vs. Norris, 9 Dana (Ky.) 317-35 Am. Dec. 138; Hamilton vs. Scull, 25 Mo. 165-69 Am. Dec. 460; and Powell vs. Inman, 53 N. C. 436-82 Am. Dec. 426. Each of these cases is fully reported on one page or two pages of the official reports, and has little or no authority or discussion of principle in its support. In the indiscriminate citation of cases on this subject there are certain overruled decisions which are made to cast apparent support to the Nellis vs. Clark doctrine. They are Welby vs. Armstrong, 21 Ind. 481 and Heath vs. Van Cott, 9 Wis. 516, which are overruled respectively by Springer vs. Drosch (Ind.) and Clemmens vs. Clemmens (Wis.), both cited above.

These overruled cases, and others without citation of authority or principle in their support, as well as the cases of Nellis vs. Clark and Smith vs. Hubbs and those which follow them, are considered by us, not only because they controvert the rule announced herein, but also to show the uncertainty, confusion, conflict and judicial error occasioned through their misuse and improper recognition by careless courts, note writers and text authors. Thus in the note to 82 Am. Dec. 428, many strong cases from the best jurisdictions are



cited in support of the rule that the defendant may not plead fraud against creditors as a defense to an executory contract because such contract is valid and binding between the parties themselves; yet there are cited (not considered) all the foregoing dead, anaemic and constitutionally weak cases, together with a few others of their progeny in the same states, and with still others that bear no relation by blood or affinity to these cases, having to do solely with executed contracts, then the note-writer, obviously believing that in numbers there is sometimes strength, states his deduction that the weight of authority sustains the contrary rule. Of the real and sustained authorities cited in the note the great majority as well as weight support the rule herein announced.

Such has been the confusion, conflict and misleading effect of the adjudicated cases on this subject matter of the enforceable character of executory contracts in fraud of creditors, that even *Ruling Case Law*, otherwise so excellent and reliable a general authority presents three stated deductions on the subject which are in irreconcilable conflict. The statutes, 13 and 27 Eliz., apply to conveyances of personal property as well as land, (12 R.C.L. 468,) and include all forms of executory contracts, such as judgments, mortgages deeds of trust, bonds, notes, etc., as well as executed conveyances (12 R.C.L. 470). Now, these contracts without exception, executory as well as executed, are perfectly legal and binding between the parties and enforceable as such; par. 7, pg. 473, and par. III, pg. 597 of 12 R.C.L.; or they are illegal for fraud upon creditors, and as such, unenforceable between

the parties; par. 120, pg. 610 of 12 R.C.L. They cannot be both legal and illegal at the same time. They cannot be valid and binding under the substantive law, and at the same time unenforceable in the procedural law. Or, again, such contracts and conveyances may not be enforced, and "the fraud may be set up as an absolute defense," par. 120, Pg. 610, *supra*, or, they may be enforced, the fraud "being unavailable by way of defense." par. 123, pg. 613 of 12 R.C.L.. They cannot be unenforceable and enforceable at the same time. The fraud cannot be set up as a defense in one case and be unavailing as a defense in a similar case. There can be no compromise with error. The text statement in par. 120, pg. 12 R.C.L. is utterly inconsistent with the other two statements mentioned. The statement declares that "if a contract is made for the transfer of property to defraud the creditors of the transferor, the contract while executory, cannot be enforced either in equity or at law. The fraud may be set up as an absolute defense." This is not the law, is contrary to the great weight of authority, and is not sustained by the cases cited, presumably in its support. This is simply a statement of the erroneous doctrine announced in *Nellis vs. Clark*, and has little more than this case to warrant it. That it is not and never was the law, but is a mere departure in New York, is clearly established by the case of *Moseley vs. Moseley*, 15 N.Y. 335, which says: "It was formerly understood to be the law that contracts and conveyances made with a view to hinder, delay or defraud creditors were nevertheless valid and binding between the parties to such contracts and conveyances. The Eng-

lish statute of frauds, which was early re-enacted in this State, in declaring the effect of such transactions pronounced them void and of no effect only as against the person or persons who might in any wise be disturbed, hindered or defrauded. In *Nellis vs. Clark* the rule was departed from by a decision which restricted the doctrine to executed conveyances, the court holding that an executory agreement entered into in fraud of creditors could not be enforced between the parties; conceding, however, that the principle which I have stated applied universally to grants and conveyances, and all executed contracts. The court applies to transactions fraudulent against creditors the rule which prevails as to other illegal contracts, namely, that whatever the parties have illegally contracted to execute, neither can by law compel the other to execute, or to pay damages for not executing; and that as to conveyances and other executed contracts, it refuses to aid either party, but leaves them where it finds them. *This modification of the law* as it was finally held, having received the sanction of the Court of Errors, should now be considered as established." It is quite apparent that the New York Court itself, reluctantly and by force of *stare decisis*, follows the case of *Nellis vs. Clark* in its radical departure from the long established English and American common-law rule.

That it is not and never was the law is also established by the great preponderance of decisions, from the States as well as England. To the array of cases cited in the foregoing opinion might be added many more from the same jurisdictions and others. In the very best note to be found

in the American Selected Case System of Reports, that to *Gary vs. Johnson*, 30 Am. Rep. 520, at the conclusion of three and a half pages of critical review of the many early decisions on the subject, the author says: "It will be seen, that the principal case (*Gary vs. Johnson*, enforcing executory contract which defendant alleged was in fraud of plaintiff's creditors) is well supported by authority. Indeed, there is considerable numerical preponderance of States in its favor, and considering the English doctrine and the great authority of Massachusetts, and the almost equal division of the judges in *Nellis vs. Clark* in this State (N. Y.), it must be confessed that upon authority the case is well decided. In principle, also, the reasons for its doctrine are very cogent." The author does say, however, that "the question can hardly be said to be well settled." And we may say that this unsettled condition is to be found in those few states which have erroneously, and sometimes unwittingly, committed themselves to this *Nellis vs. Clark* departure, and have refused to overrule the error. In Illinois, instead of the case of *Miller vs. Marckle*, *supra*, see *Fitzgerald vs. Forrestal*, 48 Ill. 228 and *Davis vs. Ransom*, 26 Ill. 105; instead of the case of *Church vs. Muir* (N. J.) *supra*, see *Owens vs. Owens*, 23 N. J. Eq. 60, and *Stillwell vs. Stillwell*, 47 N. J. Eq. 275-20 Atl. 960-24 Am. St. Rep. 408; instead of *Norris vs. Norris* (Ky.), *supra*, see *Elmore vs. Elmore*, 22 Ky. 856-58 S. W. 980, and *Ives vs. Jenkins*, 7 Ky. L. R. 408; instead of *Hamilton vs. Scull*, (Mo.), *supra*, see *Moore vs. Thompson*, 6 Mo., 353, and *Sauter vs. Leveredge*, 103 Mo. 615-15 S. W. 981; instead of *Harvin vs. Weeks*, (S. C.), *supra*,

see *Sunnie vs. Murphy*, 2 Hill (S. C.) 488; instead of the case of *Walker vs. McConnico*, 40 Yerg. (Tenn.) 228, see *Ins. Co. of Tenn. vs. Waller*, 116 Tenn. I- 95 S. W. 11-115 Am. St. Rep. 763-7 Ann. Cas. 1078.

Not only is the text statement under consideration contrary to the great weight of authority, American as well as English, but it is not supported by the cases cited. Of the fourteen cases cited by the text, presumably to sustain it, only five of them lend it any support at all; five of them are against the text, and four are utterly without application. Of the five cases supporting the text, *Norris vs. Norris* (Ky.) and *Powell vs. Inmann* (N. C.) are the one and two page early decisions without support of case, principle, or reasoning, to which we have already adverted. The others are the ancient Nevada case of *McCausland vs. Ralston*, 28 Am. Rep. 781, and two Illinois cases, *Tyler vs. Tyler*, 126 Ill. 525-21 N. E. 616-9 Am. St. Rep. 642, and *Kirkpatrick vs. Clark*, 132 Ill. 342-24 N. E. 71-22 Am. St. Rep. 531-8 L.R.A. 511. All three of the latter decisions are founded expressly upon the cases of *Nellis vs. Clark* and *Smith vs. Hubbs*, and rise no higher in authority. These two Illinois decisions are not only founded on *Smith vs. Hubbs* (Me.) which was expressly overruled in Maine itself, and *Nellis vs. Clark* (N. Y.) which was based on *Smith vs. Hubbs* after that case had been overruled, but the second of the Illinois cases adds another overruled case to its support. In *Kirkpatrick vs. Clark*, the court says: "In *Harrison vs. Hatcher*, 44 Ga. 638, the precise question before us was presented, and we are disposed to concur with the conclusion reached by the court in

that case." And yet three Georgia cases overrule that decision. *Sewall vs. Norris* (Ga.) *supra*, concludes its opinion thus: "See *Parrott vs. Baker*, 82 Ga. 364-9 S. E. 1068, where the case of *Harrison vs. Hatcher*, 44 Ga. 638, decided by two judges, was overruled," calling attention also to *Beard vs. White*, 120 Ga. 1048-48 S.E. 400, which approves *Parrott vs. Baker* and expressly confirms the overruling of *Harrison vs. Hatcher*. *Tyler vs. Tyler*, follows the early case of *Miller vs. Marckle* (Ill.) *supra*, which cites *Smith vs. Hubbs* and *Nellis vs. Clark* as authority; and *Kirkpatrick vs. Clark* follows *Tyler vs. Tyler*, and adds to its citation of *Smith vs. Hubbs* and *Nellis vs. Clark*, the thrice overruled case of *Harrison vs. Hatcher*. Such, unfortunately, is the character of the Illinois cases, and the support they give the text.

There are four cases cited for the text which are positively against it: *Sewall vs. Norris* (Ga.) *Butler vs. Moore* (Me.) *Bradtfelt vs. Cooke* (Ore.) and *Carpenter vs. McClure*, (Vt.) all cited to sustain our opinion. The first case overrules the Georgia decision which the Illinois case, also cited for the text, approves. The other three cases, as we have already shown, expressly disapprove and reject *Smith vs. Hubbs* and *Nellis vs. Clark*, and all four of these cases sustain the right to recover on executory contracts and deny the right of the defendant to plead his own fraud upon creditors as a bar to recovery.

The fifth case cited which is against the text is *Williams vs. Clink*, 90 Mich. 297—51 N.W. 453—30 Am. St. Rep. 443. This is also relied on by appellee, but is against his position. To an action of replevin founded on a chattel mortgage held by

plaintiff, the defendant plead that the mortgage was without consideration, (not that it was given to defraud creditors.) The court instructed the jury that defendant was not estopped from recovering on his plea of want of consideration, even if the jury found that the mortgage had been executed in fraud of creditors.

This instruction, which plaintiff took exception to, was approved on appeal. This case decides that defendant's plea of want of consideration is good, but it does not decide that the fraud against creditors is a defense to the executory contract. No such defense was plead or proven in the case, and judgment for defendant was reversed and plaintiff was granted a new trial for the second prosecution of his case on his executory contract. The question of fraud was decided on the sole authority of Judge vs. Vogle, 38 Mich. 569, and this decision by Judge Cooley very emphatically states the rule that it is the sole right of creditors to plead that contracts and conveyances were made to defraud them; that it is a fraud which concerns only their own interest and in no manner affects the parties as between themselves. Judge Cooley says: "A mortgage fraudulent as against creditors may be avoided at their option; but how the intended fraud upon them can give it validity as to others is not explained in the briefs. The right of the creditors is to defeat it: but there seems to be no necessary relation between the right of one man to defeat it as a fraud upon him, and the right of another man to affirm it because of the same fraud. The fraud which should give one rights must be a fraud which in some way concerns his own interest." This decision of Judge Cooley is in perfect ac-

cord with another rendered by him, Beecher vs. Marquette & Pac. Ry. Co. (Mich.) cited in the early part of this opinion, holding that statutes declaring certain contracts void for the benefit of third persons are fully satisfied when such persons are given the right to avoid them. The statement in the main case that "if the contract is executory, it will not be enforced," is pure *obiter*, is erroneous, has no relation to the decided case and is made with reference to the case of Bassett vs Shepards on which the court was commenting and which has to do with an executed conveyance sought to be set aside on the ground that it was in fraud of creditors.

Four cases cited in support of the text have to do with executed conveyances, actual transfers of property made between the parties to defraud creditors. These cases are Gravier vs. Carraby, 17 La. 118-36 Am. Dec. 608; Brady vs. Huber, 197 Ill. 291-64 N. E. 264-90 Am. St. Rep. 161; Leger vs. Doyle, 11 Rich. L. (S. C.) 109-70 Am. Dec. 240; and McClintock vs. Loisseau, 31 W. Va. 865-8 S. E. 612-2 L. R. A. 816. These were actions to recover property actually conveyed. Such conveyances are perfectly legal between the parties, and may be set aside only by the defrauded creditors. Neither party will be permitted by law or equity to plead his own fraud upon creditors as a ground for avoiding such conveyance. This is the universal rule, and such cases have no application whatever to the text statement that *executory* contracts in fraud of creditors cannot be enforced, and that defendant may plead such fraud as a defence. The cases of Rich vs. Hays, 99 Me. 51-58 tl. 62, In re Simmons Estate, 20 Pa. 450, and Surlott vs.

Beddon, 19 Ky. 109, cited by appellee are of this character and do not support appellee's case.

The true rule which should apply to the rights of parties arising out of executory contracts made in fraud of creditors is as stated in 12 R. C. L. 613, par. 123. After stating that the cases are not harmonious, this authority says: "The general principle undoubtedly is that that party must fail whose case is incomplete without proof of the fraud. 13. Accordingly many cases have permitted recovery under such circumstances, the fraud not being a necessary ingredient of the plaintiff's case, and being unavailable by way of defense, 14, though in some cases the courts have refused to enforce such obligations 15." In connection with the last clause, which indicates the exception to the general rule, *Ruling Case Law* might well cite *Smith vs. Hubbs and Nellis vs. Clark*, and their kind; and then eliminate from par. 120, pg. 610, Vol. 12, the inconsistent and misleading statement.

The courts which refuse to enforce executory contracts between the parties because creditors are given the right to avoid them, lose themselves in the sound of the familiar saying, that "equity will leave such parties where it finds them? But do such courts leave the parties where they find them? Indeed they do not. They neither leave them where they find them nor find them where they leave them. There is only one way to find a party in law or equity, and that is by his pleading. His pleading alone determines whether he comes into court "with the metaphorical unclean hands," whether his action is founded on an illegal contract or transaction, or in his own wrong, or whether he vio-

lates the maxim *ex turpi causa nulla actio oritur*. And to these cases, and to these alone, applies the doctrine *in pari delicto potior est conditio defendentis*. Upon the filing of a demurrer to the plaintiff's declaration, complaint or bill which discloses any of the foregoing elements, the court immediately will sustain the demurrer and refuse all affirmative relief to either party, even though the defendant be in the equal fault with the plaintiff. Therefore, it is said that in such case the position of the defendant is the better. But in the appellant's case, as in every case founded on an executory contract made in fraud of creditors, "the fraud not being a necessary ingredient in the plaintiff's case," the plaintiff pleads a good declaration, complaint or bill upon an executory contract, as a bill of sale, note, bond, mortgage, deed of trust or judgment. From this pleading as its guide the court finds that plaintiff appears with clean hands, that his action is not founded upon any illegality or wrong, and that, instead of violating the maxim *ex turpi causa nulla actio oritur*, he pleads a perfect cause of action which, upon prima facie proof, entitles him to a judgment at law for damages or a decree in equity for rescission against the defendant for breach of the contract.

Where does the court find the defendant in such case? It finds him, first of all, liable to the plaintiff in the well plead cause of action, based on a perfectly legal contract between them, and in a situation to which the doctrine *in pari delicto* does not apply for the obvious reason that the parties cannot be in the equal fault in a case where no fault of the plaintiff appears either in the pleading or proof of the case. It finds that plain-

tiff's position in the case is better than that of the defendant, for defendant's demurrer to plaintiff's cause of action must be overruled and defendant must assume the burden of pleading and proving a good defense *in his own behalf* to avoid his liability to the plaintiff.

There is but one way in which the court can leave these parties where it finds them, and that is by the application of the general principle or rule stated is 12 R. C. L. pg. 613, par. 123, "that that party must fail whose case is incomplete without proof of the fraud," and, therefore, by a decision for the plaintiff, whose cause of action has in its pleading and proof no ingredient of fraud, and against the defendant who has nothing to offer in defense of himself, but who seeks instead to plead a cause of action in behalf of creditors (not parties to the action) on the ground of his own fraud upon them. The best courts and the majority of jurisdictions, in this manner, actually leave the parties where they find them.

Where do those courts which apply the erroneous doctrine leave the parties? First, they violate the maxim *ex turpi causa nulla actio oritur* by permitting the defendant to plead his own wrong as a defense, which he may not do any more than the plaintiff may plead his own wrong as a cause of action. Montefori vs. Montefori, 1 W Black. 464, Lord Mansfield; Evans vs. Dravo, 24 Pa. St. 62-62Am. Dec. 359. Second, they violate the jurisdictional maxim of equity by courting the defendant with his unclean hands. Third, they erroneously apply the doctrine, *in pari delicto*, to a contract voidable only by creditors and containing no illegality at all as between the par-

ties themselves. Fourth, they violate all rules of pleading by sustaining a plea or answer which states no facts whatever in defendant's own behalf to bar the plaintiff's recovery on the good cause of action stated, but which, instead, states facts to constitute a cause of action in behalf of creditors against the defendant himself on the ground of his own fraud upon them. Fifth, they wrongfully permit the defendant to make of the Statute of Elizabeth (and the Bulk Sales Law) a shield to protect himself in the possession of the plaintiff's property while at the same time resisting the just payment of the purchase price which he has legally contracted to pay, thereby lending their active aid to defendant to perpetrate a greater injury and fraud upon plaintiff than any fraud upon creditors that might be involved in the transaction. Sixth, these courts violate the maxims that "Equity follows the law" and that there is no wrong without a remedy, by denying to plaintiff his judgment or decree on a perfectly plead right of action, and by destroying the contract which, by the very decisions of these very courts themselves, is perfectly legal and binding between the parties, and subject to attack only by creditors under these statutes. 12 R. C. L. pg. 473, par. 7, and pf. 597, par. 111, and pf. 525, par. 54.

And, in this manner, do these courts actually leave the parties where they find them not.

What defense to the executory contract on which he is sued does the defendant plead? Not illegality, for by all the authorities and decisions of all the jurisdictions such contracts, though made in fraud of creditors, are perfectly legal and binding be-

tween the parties. 12 R. C. L., last cited. Not want of consideration, for defendant holds in his hands the stock of goods, the lands, or the chattels for which the note, mortgage, or bill of sale in suit was given. It is otherwise, of course, if there is in fact no consideration, unless essoppel applies. *Williams vs. Clink* (Mich.) *supra*; *Owens vs. Owens* (N. J.) *supra*. Not fraud, for fraud without injury is not available as a defense even in equity. *Myer vs. Yesser*, 42 Ind. 294; See *Chapin on Torts*, 416. And a defendant cannot be injured by a fraud which he himself is guilty of. In this case the defendant does not even allege that he himself has been defrauded, but that certain creditors have been defrauded. If this be a good defense, then is it a good defense for the adult to plead the infancy of the other party to the contract, or for the principal of a note to plead as his defense the release of the surety.

*Evans vs. Dravo* (Pa.) *supra*, was an action on a bond for \$2500, purporting to be the purchase price for land sold by plaintiff to defendant. Defendant was permitted to prove that the bond was executed to defraud plaintiff's wife and to secure her signature to the deed. The court in reversing the case said: "At law nothing but payment would discharge the bond; and if the defendant is relieved by the facts alleged it must be by the interposition of equity. The plaintiff needs no aid from equity—he stands on his legal rights \* \* \* \* The defendant is in the posture of a party in a court of equity asking that plaintiff shall be restrained from asserting his legal remedies \* \* \* \* Would a chancellor listen to a party seeking relief from the consequences of his

own fraud? Never. He would tell him that he who hath committed iniquity shall never have equity; \* \* \* and that no man shall be received to allege his own turpitude. The maxim of the common law is to the same effect, *ex dolo malo non oritur actio*. And no man \* \* \* shall set up his own iniquity as a defense any more than as a cause of action. But it is insisted that the plaintiff was *in pari delicto*, and that the maxims apply to him and his action as well as to the defendant. That he was a party to the fraud practiced on his wife is not to be doubted, since the verdict has established it; but if he needs no assistance from the fraud to make out his case, if he have a perfect cause of action without it, it is apprehended these maxims do not apply to him. 'The test,' says Judge Duncan, \* \* \* 'whether a demand connected with an illegal transaction is capable of being enforced at law is whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff cannot open his case without showing that he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant.' \* \* \* But what need has her husband's action of support from that part of the transaction? Obviously none whatever. And yet the root of the defense is in it. Without it the plaintiff has a perfect case; without it the defendant has not a shadow of defense. Then, according to the test of Judge Duncan, the plaintiff is unaffected by the fraud, though a party to it, while upon the maxims, both of law and equity, the defense should have been excluded. There is nothing novel in this principle. We apply it continually to voluntary conveyances, and to contracts made to

defraud creditors, which, though void as to them, are good and binding as between the immediate parties: *Hartley vs. McAnulty*, 4 Yeates 95 (2 Am. Dec. 396); *Reichart vs. Castator*, 5 Binn. 112 (6 Am. Dec. 402); and the cases collected by Hare and Wallece, in *I Smith's Lead. Cas.* 59, note".

If actual fraud upon creditors may not be set up as a defense between the parties themselves to a good cause of action plead by the plaintiff, certainly mere constructive fraud upon creditors, such as created by the Bulk Sales Law, also may not be available as a defense. The numerous cases cited in the early part of the opinion are authority upon this proposition as well the stated construction that the Bulk Sales Act merely makes voidable at the instance of the creditors themselves contracts and sales in bulk, and does not in any manner affect their validity as between the parties.

This was squarely decided in the case of *Escalle vs. Mark*, (Nev.) 183 Pac. 387. A judgment was rendered for the plaintiff in an action to recover the purchase price of a bulk sale of property. The case was between the buyer and seller themselves on their contract. The defendant, purchaser, appealed from the judgment. The court on appeal stated that "The only point urged upon our consideration as a reason why the judgment and order appealed from should be reversed is that prior to the making of the sale section 2 of the 'Bulk Sales Act' \* \* \* was not complied with." That section required notice of the sale to be given to the creditors five days in advance of the sale, and in default thereof, that such sale or transfer shall be fraudulent and void." The court held that as be-

tween the parties themselves this law had no application; that the statute merely made such sales voidable as to creditors themselves, and then only at their own instance or action. The court denied the plea of the defendant and affirmed the judgment.

Two cases are relied upon by appellee as sustaining the contention that the sale in violation of the Bulk Sales Law is void; *Kett vs. Masker*, (N. J.) 90 Atl. 243, and *Farrer vs. Lonsby Lbr. & Coal Co.*, 149 Mich. 118-112 N. W. 726. In the former case a purchaser brought replein to recover a stock of goods taken in attachment by creditors of the seller. It was therefore an action against the creditors, and not an action between the parties. Of course, the sale is void in every action by or against creditors, and that is all this case decides. In *Farrer vs. Lonsby Lbr. & Coal Co.*, last cited, the plaintiff, stock holders, filed suit against the defendant concern and its officers for accounting, receiver and injunction. The defendant had made a bulk sale of wood and coal to *Dalby & Sarns*, and they filed an intervening petition against the receiver, asking that the notes given by them forthbulksale purchased be returned, or that they be declared to have a lien against the property still held by the receiver. Creditors of defendant also intervened. The *Dalby & Sarnes* petition was denied, because it was directed against the creditors, the court holding that the sale to *Dalby & Sarnes* was, as to creditors, void, not only to convey title but also to create a lien against the goods. The court said: Counsel for the petitioning appellants appears to concede that under that act the sale was void, but claims that the receiver should either return the petitioners'



notes or pay them with the money derived from the sale of the goods. He also contends that the bill of sale should be treated as a mortgage. Neither of these contentions can be sustained. Otherwise a quick and easy way to completely avoid the statute would be furnished. A sale void as to creditors cannot, as between the parties, be made to operate to give the vendee a lien for the money he has paid (obviously for the reason that a lien in favor of the fraudulent purchaser as against the property would as effectually defeat the creditors as if such purchaser took good title by the sale as against them.) 4 Am. & Eng. Enc. of Law (2nd Ed.) 189. These petitioners acted in violation of the law. They are not before a court of equity with clean hands. They are not in a position to ask for any remedy in a court of equity." Of course, Dalby & Sarnes as petitioners are in court with unclean hands and entitled to no relief against the creditors—entitled to no lien against the very property which the creditors may apply to the payment of their claims against the seller, despite the bulk sale of such property to the petitioners. Their petition pleads their own wrong, their own violation of the statute as the ground for the relief sought. That the petitioners are in court with clean hands and that they may be entitled to the cancellation of their notes as against the defendants and the present holders of the notes is clearly indicated by the concluding language of the court in this case: "The holders of the notes in question are not now before the court, and their rights cannot be determined in this proceeding. If they present their notes to the court for allowance against the estate of the company as

indorser, the question will then arise for determination whether they are holders in due course and for value." In other words, if the present holders of the notes are not bonafide purchasers, the petitioners, as against them and the payee, to whom the notes were given in purchase of the goods in bulk, may have cancellation of such notes on the ground of the failure of consideration. This is so for the reason that as between the parties the Bulk Sales Law has no application.

The foregoing construction and application of the case of Farrer vs Lonsby Lbr. & Coal Co., et al. is confirmed by two recent decisions of the Supreme Court of Michigan: Albright vs. Stockhill et al., 175 N. W. 252, and Krolik vs. Kacxmerek et al., 175 N. W. 239. Both these cases are strongly analagous to the case appealed to this court. Both were suits to rescind sales in bulk made in violation of the Bulk Sales Act of Michigan. In both cases relief was granted the plaintiffs, and in both cases the decrees entered by the chancellor were affirmed on appeal. In both cases the defendants plead the violation of the Bulk Sales Act as a bar to the relief sought, and in both cases Farrer vs. Lonsby Lbr. & Coal Co., was relied on to sustain this contention. Both cases were decided at the same term of court on opinions by Stone, J, and these issues were disposed of in almost identical language, as follows: "The only question possessing any merit, that is presented by the appellant as a reason for reversal, is that the case is controlled by the case of Farrer vs. Lonsby, *supra*, and that, the parties having acted in violation of law, the appellee does not come into court with clean hands and hence cannot prevail. It

should be borne in mind that the instant case presents a situation of the entire failure of consideration for the sale. The whole trend of our decisions, as well as the decisions of other courts construing statutes similar to our Bulk Sales Law, is to the effect that the purpose of this, and similar acts, is to protect creditors. (Here citing cases). Such sale as between the seller and buyer is valid; and if the seller has been guilty of fraud to the injury of the buyer, or if there has been an entire failure of consideration (or grossly inadequate consideration), the seller cannot hide behind the statute and thus avoid liability to the purchaser. What was held in *Farrer vs. Lonsby Lumber & Coal Co.*, *supra*, is that a sale void as to creditors cannot, as between the parties, be made to operate to give the vendee a lien for the money he has paid. The remedy sought in that case was against the property (or the proceeds of it) sold in violation of the Bulk Sales Law. In the case at bar, the remedy sought by the vendee in no way affects the rights of creditors of the seller of the goods, but is aimed at a recovery from the seller of the property given in exchange for the goods. \* \* \*

The question lies wholly between the vendor and the vendee, affects creditors not at all, and the doctrine that one must come into a court of equity with clean hands in order to obtain relief has, in our opinion, no application. As we have said, it would be most inequitable to permit the vendor to retain the purchase price of the stock of goods while subjecting the stock to the payment of his debts."

The Bulk Sales Acts are in derogation of the common law and of the right to contract and to alienate prop-

erty, and must therefore be strictly construed. *Cooney vs. Sweet*, 133 Ga., 511-66 S. E. 257-25 L. R. A. (NS) 758; *Note to Ann. Cas.* 1914B, 1105. A construction, such as contended for by appellee in this case, which would prohibit or penalize or render void as between the parties themselves, a sale of merchandise in bulk, for mere failure to give notice thereof to the vendor's creditors, would render the statute itself unconstitutional as in conflict with the prohibition of the fourteenth amendment to the Federal Constitution, that no State shall deprive any person of life, liberty or property without due process of law, the freedom to contract, constituting both liberty and property. *Off vs. Morehead*, 235 Ill. 40-85 N. E. 264-126 Am. St. Rep. 184-20 L. R. A. (NS) 167; *Miller vs. Crawford*, 70 Ohio St. 207-71 N. E. 631; *Block vs. Schwartz*, 27 Utah 387-76 Pac. 22-101 Am. St. Rep. 971; *McKinster vs. Sager*, 163 Ind. 671-72 N. E. 8 4-68 L. R. A. 273-106 Am. St. Rep. 268; *Wright vs. Hart*, 182 N. Y. 330-75 N. E. 404-2 L. R. A. (NS) 338. Subsequent enactments of the Bulk Sales Law in Indiana and New York, making possible their construction as a reasonable exercise of the police power, have been sustained. *Hirth-Krouse Co., vs. Cowen*, 177 Ind. 1-97 N. E. 1; *Sprintz vs. Saxton*, 126 App. Div. 421-110 N. Y. Supp. 585. For cases in other States holding Bulk Sales Laws constitutional, see 12 R. C. L. 528; *note to 20 L. R. A. (NS) 160*. Not every process prescribed by act of the legislature constitutes "due process of law" *Black's Constitutional Law*, 572. Not every interference with the personal right of contract can be sustained as due process of law in the exercise of the police power. All-

geyer vs. Louisiana, 165 U. S. 578-17 Sup. Ct. 427-4 L. Ed. 837; Lochner vs. NewYork, 198 U. S. 45-25 Sup. Ct. 539-49 L. Ed. 937; Adair vs. United States, 208 U. S. 161-28 Sup. Ct. Rep. 277-52 L. Ed. 436,

The appellant was entitled to the relief sought in this case, and for

the error of the trial court in overruling the demurrer to appellee's second paragraph of answer, he judgment is reversed. The cause is remanded to the trial court with instructions to proceed in accordance with this opinion.

**BRIEF OF CHARLES P. J. NOONEY IN CASE OF  
WAGNER vs. PARKER.**

State of Indiana

In the Notre Dame Supreme Court  
John Wagner, appellant

vs.

Nathan Parker, appellee.

Brief for the appellant, John Wagner.

**NATURE OF THE SUIT**

This is an appeal brought by John Wagner, plaintiff below, against Nathan Parker, defendant below, from a judgment rendered against the appellant in the Notre Dame Circuit Court. The appellant brought suit to rescind an assignment of a land contract and to cancel a promissory note by him delivered to the appellee. The court found for the appellee that the appellant take nothing by the suit and that the appellee recover his costs and accordingly entered a decree in favor of the defendant and against the plaintiff, from which decree the latter prosecutes his appeal to this honorable court.

**WHAT THE ISSUES WERE**

Plaintiff filed a complaint in one paragraph praying a reassignment of his equity in the land contract and a cancellation of his note on the ground of a total failure of consideration. Defendant answered in two paragraphs: 1st, a general denial. and, 2nd, the illegality of the contract between the parties. To the last paragraph the plaintiff interposed a demurrer, questioning its sufficiency. The demurrer being overruled, plaintiff, saving his exception, then filed a reply in denial and confession and avoidance.

Plaintiff filed a motion for a new trial on the following grounds:

1. The decree was contrary to law.
2. It was contrary to the evidence introduced.
3. It was clearly against the weight of the evidence.
4. The court erred in overruling the plaintiff's motion at the close of the defendant's evidence to enter a decree in the former's favor.
5. The court erred in admitting in evidence the Bulk Sales Act of Michigan.

**CONDENSED STATEMENT OF  
THE EVIDENCE**

On the first day of August, 1920, Nathan Parker owned a grocery store, consisting of stock and fixtures, located on the corner of Main and Elm streets, Niles, Mich. John Wagner was the owner of an equity in a certain tract of land, to-wit: a contract for the purchase of the northeast quarter of the northeast quarter of Section 22, Sorins Addition to South Bend. Parker and Wagner, both residents of South Bend, on the first day of August, 1920, entered into the following contract for the sale and exchange of their properties, to-wit:

*Contract of Sale and Exchange*

This agreement, made and executed this first day of August, 1920, at South Bend, Indiana, between Nathan Parker, party of the first part and John Wagner, party of the second part, WITNESSETH: That the party of the first part does hereby sell, transfer, assign, exchange, set over, and deliver unto the party of the second part his grocery store, consisting of stock and fixtures, lo-

cated on the ground floor of the building, on the corner of Main and Elm Streets, Niles, Mich., said grocery store and its contents being more particularly described in the inventory thereof just completed, which is hereto attached, referred to, and made a part of this instrument. And the said party of the first part, for himself, his heirs, executors and administrators, does covenant and agree to warrant the sale of the said property and the title thereof to the said party of the second part, his heirs, executors, administrators, and assigns, and agrees to pay all the debts against the said property and said party on account thereof, which debts now amount to \$1,000. In consideration of which the party of the second part does hereby sell, transfer, assign and deliver over to the party of the first part all his right, title and interest in a certain tract of land situated in St. Joseph County, as evidenced by the contract of purchase held by the said party of the second part and this day assigned and delivered by the second party unto the party of the first part, which said contract together with the said assignment endorsed thereon is attached hereto, referred to, and made a part of this instrument. And, as a further consideration, the party of the second hereby executes and delivers to the party of the first part his promissory note of date for \$400, payable in one year, with interest at 6 per cent per annum, and attorney's fees, which note is referred to, attached to, and made a part of this instrument.

Executed in duplicate by the parties this first day of August, 1920, at South Bend, Indiana, each party retaining a copy as the original contract.

(Signed) Nathan Parker,

(Signed) John Wagner.

Pursuant to the foregoing instrument John Wagner, after delivering the assigned contract and note, went into possession of the store at Niles, Mich.

In Michigan the Bulk Sales Act was in force, but was entirely ignored by the parties in their contract, who made no attempt to comply with its provisions. After Wagner had gone into possession of the store, The National Grocery Company, the Great Atlantic and Pacific Tea Company, and the South Bend Wholesale Grocery Company, all of South Bend, Indiana, as creditors having claims against the vendee, brought action in the Michigan Court, under the Bulk Sales Law, took possession of the stock and fixtures, placed it in the hands of a receiver, and sold all the goods to satisfy the claims of the creditors, which claims aggregated \$1,100. Parker and Wagner were made defendants to this proceeding in Michigan. No part of these claims was paid by Parker.

On the trial plaintiff introduced the contract in evidence and testified that he had fulfilled its terms to the letter, and that the defendant had failed to discharge the debts amounting to \$1,000. The defendant's evidence consisted of the failure to obey the mandates of the Bulk Sales Law. No attempt was made by him which tended to show that the parties had conspired to defeat the creditors, or were, for other reasons, *in pari delicto*. As to the facts alleged by the plaintiff, they were not denied.

## POINTS AND AUTHORITIES

## I.

Every statute must be construed with reference to the object intended to be accomplished by it.

36 Cyc. 1102.

## II

The word "void" in the Bulk Sales Statutes is to be construed as meaning voidable at the option of creditors.

12 R. C. L. 474, 475.

McGreenery vs. Murphy, 76 N. H. 338, 82 At. 720.

Newman vs. Garfield, 104 At. 881 (Vt.).

Benson vs. Jonson, 165 Pac. 100.

Esca; le vs. Marks, 183 Pac. 387 (Nev.).

Oregon Mill Co. vs. Hyde, 169 Pac. 791.

Schmucker vs. Lawler, 38 Penn. Super, 578.

The validity of transactions fraudulent as to third persons is subject to attack by them alone. They are in every respect binding upon the immediate parties.

Gary vs. Jacobson, 30 Am. Rep. 514, 55 Miss. 204.

Gillian vs. Brown, 43 Miss. 641.

Walker vs. Jeffries, 45 Miss. 160.

Elmore vs. Elmore, 58 S. W. 980.

Ives vs. Jenkins, 7 Ky., Law Rep. 408.

Ferguson vs. Dent. 24 Federal 412.

## III

## IV

Sales in violation of the Bulk Sales Laws, while voidable at the option of creditors, are, as between the vendor and vendee, absolutely valid. This irregularity cannot be set up by either party as a ground for rescission or an excuse for non-performance. The title to the goods vests absolutely in the purchaser to be defeated only by the creditors intercession.

Schumacher vs. Lawler, 38 Penn. Sup. 578.

Escalle vs. Marks, 183 Pac. 387.

McGreenery vs. Murphy, 82 At. 720.

12 R. C. L. 474, 525.

Gary vs. Jacobson, 30 Am. Rep. 514, 55 Miss. 204.

Ore, Mill Co., vs. Hyde, 169 Pac. 791.

Newman vs. Garfield, 104 At. 881.

Fergusson vs. Dent, 24 Federal 412

## VI

As between the parties, the law of the actual *situs* of the owner of the property at the time of the transfer, that is, the law of the place where the transfer is made (*lex loci Contractus*), governs the validity and the effect of absolute conveyances of personality, including executed sales. If valid where made, the sale will be upheld, as between the parties, in every jurisdiction in which it may be called in question; if invalid where made it will not be sustained elsewhere. So executed sales of personality, as between the parties, are governed by the *lex loci contractus* as their validity and effect.

Kerr vs. Urie, 37 At. 789.

Marvin Safe Co., vs. Norton, 7 At. 418.

Weinstein vs. Freyer, 9 outh, 285.

In re Dalpay, 43 N. W. 564.

Fred Miller Brew. Co., vs. De France, 57 N. W. 959.

Minor, Conflict of Laws, 293-294.

## ARGUMENT

The facts in this case are most unique. The defense offered by the defendant is the failure of the parties to make their dealings comport with the requirements of the Michigan Bulk Sales Law. In his answer he set out in full the foreign statute. That the parties owing to a conspiracy to defraud creditors, or on account of some other fact, were in

*pari delicto* in their transgression was not suggested by the erudite counsel for the defense. He was content to rely upon the statute. To this answer the demurrer interposed by the plaintiff was overruled. His motion for a decree in his favor at the close of the other side's testimony met the same fate. It is now my intention to show that the facts contained in the defendant's pleadings and evidence cannot preclude a recovery by the plaintiff.

A short discussion relating to the interpretation of statutes would not be beside the issue. An elemental rule of statutory construction is to first ascertain the purpose the law-making body had in mind at the time of the enactment. Once that is found a definite point is had. The difficulty encountered in fathoming the purpose of the legislature is greatly decreased by giving ample consideration to the former law, its weaknesses and its evils. What effect is the new law to have upon the old? What exigencies prompted the legislators to prescribe this change? Is it to completely abolish or to supplement the old law that this statute was passed? The foregoing are a few of the questions, which when answered properly, remove the seemingly insurmountable obstacles barring the way towards a definite solution. In the matter which follows a terse and accurate statement of the fundamentals of interpretation is contained:

Every statute must be construed with reference to the object intended to be accomplished by it. In order to ascertain the object, it is proper to consider the occasion and necessity of its enactment, the defect and evils of the former law, and the remedy provided by the new one: and the statute should be given that construc-

tion which is best calculated to advance its object.

Now let us consider the Bulk Sales Statute. The first legislation of this nature was enacted about thirty years ago. Since then many states have passed such an act. Although such acts have not been accepted without cavil, their worth has been proved. By the common law, no remedy was afforded the creditors of those disposing of a stock of goods in bulk other than those allowed to creditors generally. Under the statute in question these creditors, while still in possession of all their common law rights, have a new and additional protection against their unscrupulous debtors. It must be that the legislature deemed these individuals to need a special safeguard. But did the legislature intend the protection of these statutes on anyone other than the pre-existing creditors of the seller? Only in the negative can this be answered. At the time of the passage of these statutes these creditors were the only individuals in need of any special relief. When the debtor disposed of his stock of goods, with it went the sole fund to which they could resort to satisfy their claims, since the debtor managed to place the purchase price, if there should be any, beyond the reach of creditors. The new statute sought to eliminate this evil by making it incumbent upon the seller and purchaser to give the creditor, by ample notice of sale, an opportunity to protect his interests. All the benefits resulting from these statutory obligations go to the creditor. No other person receives anything for complying with the statute.

The Bulk Sales Law has but one aim, namely: to prevent the sale of goods in bulk until the creditors of

the seller have been paid in full 12 R. C. L. 525.

In the language of the Bulk Sales Law, all sales violating its provisions are to be void, or void and fraudulent, as against creditors of the seller. A few statutes say they shall be void, without specifying at whose instance. These have been interpreted to mean the same as the former. Now, what is the legal meaning of these words "void" and "void and fraudulent?" Does the statute use the term "void" in its accepted sense, i. e., that the sale is absolutely invalid at the instance of any person regardless of his status in the transaction? If the question is answered affirmatively, we have no standing in this case whatever, since the law leaves both parties in such a sale where it finds them. This, however, could not be the legal intendment of the legislators. Since the law was passed solely for the benefit of creditors, it is only voidable as to them. They alone can question the validity of the conveyance. Whether the transfer is to stand or fall depends upon their election to pursue their new remedy. Below are collected some of the meanings placed upon the words "void" and "void and fraudulent:"

The words "fraudulent" and "void" mean constructively fraudulent and voidable upon action by creditors.

Newman vs. Garfield, 104 At. 881.

Though the word "void" is used in the statute, in legal effect it means voidable at the instance of McGreenery vs. Murphy, 76 N. H. 338, 39 L. R. A. (N.S.) 374.

?attaching creditors.

The Bulk Sales Law of Nevada employs the terms "void" and "fraudulent." Construing that statute in the case of Escalle vs.

Marks, 183Pac. 387, the court held that it was not the intention of the legislature to make the sales void as against all persons. attaching creditors.

When construed in the light of the purpose of the statute, it was clearly the intention of the legislature that the sale should be voidable only.

We shall now see what effect the violation of the Bulk Sales Law has upon the dealings of the purchaser and seller. It is our contention that this law since it is for the protection of creditors, leaves the sale valid as far as the immediate parties are concerned. They are bound by their promises just as effectually as if they had complied with the statute. The right to set the sale aside for their negligence is in the creditors exclusively. No one else has such a power. Nor can the creditor be called to exercise his right. At common law transactions of this nature were always, as against the original parties, held to be valid. After one of the individuals has fully performed his obligations, the other cannot as an excuse for his non-performance set up the fact that the agreement was prejudicial to the interests of creditors. This principle is best exemplified in *Elmore vs. Elmore*, 58 S. W. 980, where the defendant to defeat B, in an action for breach of promise then pending transferred his real estate to a relative, retaining the possession of it. Later the grantee brought ejectment and the defendant pleaded the fraudulent character of the transfer. The court, however, deemed this fact no defense. In granting the writ, the following remarks were made: While this deed is fraudulent as to the party in the breach of promise action, it is binding upon both the grantor and gran-



tee. A grantor in a fraudulent deed cannot plead the fraud and avoid the deed so as to defeat a recovery of the land. He cannot thus avoid the legal consequences of his own act.

To the same effect are *Jones vs. Jenkins*, 7 Ky. L. Rep. 408, and *Gary vs. Jacobson*, 30 Am. Rep. 514, 55 Miss. 204. The last case was a suit on a promissory note executed by the defendant as part payment of a stock of goods sold by one Carter to defraud his creditors. Plaintiff also had reason to know the fraudulent purpose of Carter. Below is the opinion of Justice Chalmers, who held the note valid:

The transaction is harmful only to the creditors of the vendor. If they do not complain—if they acquiesce, why should the grantee be permitted to escape payment of his ill-gotten gains. There is a manifest distinction between conveyances in defraud of creditors and offenses against the penal law. \* \* \* By one the body politic, the sovereign commonwealth, is wronged, by the other those only who have an interest in undoing the fraud, and this number is limited in our state to pre-existing creditors. As to them the transaction is void, or rather, voidable at their election. As to all others it is *valid and obligatory*.

The foregoing is a clear and concise statement of the rule as it was prior to the Bulk Sales Laws. Now since the new law changes the old one only by the addition of a special remedy, contracts in violation of this statute are by necessary implication valid. As between the parties to them these conveyances are final and binding in every detail, with title passing to the purchaser where it remains until divested by creditors in the appropriate proceedings. To

rescind or excuse his failure to perform the covenant, the plaintiff or the defendant, as the case may be, will have to advance a better reason than the fact that the sale was prejudicial to the interests of the grantor's creditors. To preclude the party who has abided by his part of the obligation from recovering, the aid of the statute cannot be successfully invoked. For a bar he must offer some other ground, as failure of consideration, infancy, payment, or the like. Now it might be contended that the validity of these transfers is only apparent; that they pass title for the reason that once the grantee has possession, he grantor is powerless to divest the other of that right. In other words, the transaction is valid because the court deems it unworthy of its interference. Such a contention is not logical. When the statutory violation is not an operative fact in the plaintiff's cause of action, he is entitled to the aid of the law. Nor can the defendant set up the failure to comply with the statute when rescission on other grounds is sought. See *Ferguson vs. Dent*, 24 Federal 412. *Escalle vs. Marks*, 183 PPac. 387, was an action by the seller to recover the unpaid part of the purchase price of a stock of goods sold in violation of the regulations governing sales in bulk. The defendant claimed that the sale was absolutely null and void, and for that reason the plaintiff could not recover. The court, however, entertained a different view. Below is an excerpt from the sound opinion of that tribunal:

It was not the intention of the legislature to make such transactions void as against all persons. When construed in the light of the purpose of the statute, it shows clearly the

intention of the legislature was that the sale should be voidable only.

The facts in *McGreenery vs. Murphy*, 76 N. H. 338, 39 L. R. A. (N. S.) 374, are different from those in the case under consideration. However, the principle enunciated therein may afford us some light. The creditors on trustee process attempted to reach the goods of their debtor in the hands of the grantee on the theory that the latter who had no title whatever held the property in trust for the debtor. The learned New Hampshire court, in holding that such a proceedings would not lie, spoke as follows:

The terms fraudulent and void relate to attaching creditors, who seek to set aside the vendee's title, which, until set aside, is a valid title. As between the parties to the sale, the title passed to the vendee, and it remains in him until it is vacated by a creditor of the vendor, upon proceedings instituted for that purpose, or until the vendee disposes of the property. Though the word void is used in the statute, in legal effect, it means voidable at the instance of the creditors.

To the same effect is *Schmucker vs. Lawler*, 38 Penn. Super. 578. There it was held the creditor had no remedy of garnishment, as the purchaser cannot be considered a debtor of the seller, and as between them the property is the former's absolutely, so that he does not hold it for, or as the property of, the latter. This is supported by *Benson vs. Johnson*, 165 Pac. 1001: "The legislation vests in creditors a right which, when acting for themselves they are at liberty to assert or ignore." *Oregon Mill Co. vs. Hyde*, 169 Pac. 791, also laid down the proposition that the sale is valid as between the original parties.

Now let the reasoning in the cases above be applied to the facts in this case. It has been plainly demonstrated that the sale is valid between the parties; that save for its one irregularity, namely, the failure to comply with the Bulk Sales Statute, it is to be treated with the same amount of respect that is accorded every other binding contract. From such transactions may proceed rights to compel the enforcement on one party's obligation if the other has discharged all his duties under the compact. In any proceedings to recover the goods or the purchase price thereof it will avail the defendant nothing to rely upon the statute. Now it cannot with reason be alleged that the defendant will be allowed to plead in a suit for rescission that which he cannot plead in an action to compel performance. He, therefore, should be denied the right to plead the Bulk Sales Act in this suit for cancellation. Upon the foregoing reasons our appeal is based on the contention that it was a substantial error for the court to overrule the plaintiff's demurrers to the answer and the evidence of the defendant. To escape liability he should have shown that the parties were *in pari delicto*; that a mutual intent to defraud creditors existed between the parties; that there was an absence of bad faith on the part of the plaintiff, or that there were some other facts, which tended to vitiate the plaintiff's cause of action.

This contract for sale and exchange was executed by Parker and Wagner in the county of St. Joseph, Indiana. Now it is an elemental rule of contract that the validity of the agreement is to be determined by the laws of the state where the contract is made. The reason is that the parties

are conclusively presumed to have had the local law in contemplation at the time they became obligated. If the contract is valid and binding in the state where it had its inception it is to be so regarded in all other jurisdictions. Therefore, since the *lex loci contractus* of this transaction is Indiana, no statute but the one of this state is to be looked to in determining the force of the sale. Therefore the court should have sustained the plaintiff's objection to the defendant's introduction of the Michigan statute. Authority on this point is cited below:

. . . . as between the parties, the law of the actual situs of the owner at the time of the transfer, that is, the law of the place where the transfer is made (*lex loci contractus*), governs the validity and effect of absolute conveyances of personality, including assignments of choses in actions and executed sales. The assignment, sale, or conveyance, if valid where made, will be upheld, as between the parties, in every jurisdiction in which it is called in question; if invalid where made, it will not be sustained elsewhere.

Minor, Conflict of Laws, 294.  
Kerr vs. Urie, 86 Md. 72, 37 Atl. 789.  
Marvin Safe Co. vs. Norton, 45 N. J. L. 412, 37 Am. Rep. 566.  
Weinstein vs. Freyer, 93 Ala. 257, 9 South 285.  
In re Dalpay, 41 Minn. 532, 43 N. W. 564.  
Fred Miller Brew. Co. vs. De France, 90 Iowa 395.

### CONCLUSION.

The authorities cited in this humble brief show that a transfer in violation of the Bulk Sales Law is valid as between the parties, its only defect being the probability of intervention on the part of creditors; that its irregularity in this respect does not constitute a defense to an action based upon some other ground; and that the validity of conveyances of personality is to be determined by the *lex loci contractus*.

I respectfully submit that for the errors which, in my belief, have been pointed out with sufficient clearness in this brief, the judgment of the court below should in all things be reversed.

CHARLES P. J. MOONEY, Jr.  
Attorney for the Appellant.

## BRIEF OF WALTER A. RICE IN CASE OF WAGNER vs. PARKER.

Supreme Court of Notre Dame.

John Wagner, Appellant

vs.

Nathan Parker, Appellee.

Brief for Appellee.

The statement of the record as contained in appellant's brief is correct and requires no comment or amendment from appellee.

We proceed at once to a statement of the points and authorities relied upon by appellee to sustain the

judgment and decision of court below.

### POINTS AND AUTHORITIES

#### I.

Statutes regulating the sale and purchase of goods in bulk exist in twenty-two states and territories. The most common form as to notice of creditors is that the purchaser must notify the creditors, either personally or by registered mail, at least five days before the contemplat-

ed sale or before the purchase price has been paid.

Hirth. Krause Co. vs. Cohen, 177 Ind. 1, 97 N. E. 1.

Kidd D. & P. Co., vs Musselman, 217 U. S. 461., 30 Sup. Ct. 606.

## II.

Under Burn's Ann. St. 1914 Sec. 7471. a. relating to bulk sales of merchandise, which in substance is identically the same as the Bulk Sales Law of Michigan, the question as to whether a fraudulent intent in fact existed and entered into the transfer is not material and if it be found that the purchaser complied with the statute, the court can say as a matter of law that the purchaser had no intent to defraud the seller's creditors; but if the purchaser failed to comply with the statute, then the transaction is tainted with a fraudulent intent as a matter of law.

Geo. Kraft Co., vs. Heller, 125 N. E. 208.

McGreenery vs. Murphy, 76 N. H. 338, 82 Atl. 720.

Peck vs. Hibben, 185 Ind. 623, 114 N. E. 216.

The rule in relation to a conveyance given to defraud creditors and without consideration, is that the law will not aid either of the parties committing or attempting the fraud, but will leave them where they placed themselves, without relief. If the contract is executory, it will not be relieved against. If it has been performed in part the law gives it effect so far as executed, and holds it void so far as it remains unexecuted.

## III

Williams vs. Clink, 51 N. W. 453, 90 Mich. 297, 30 A. S. R. 443.

## IV

Where parties enter into an agreement to defraud creditors, neither

can maintain an action upon it, or sue to recover the property conveyed.

Acheman vs. Peters, 36 So. 923, 113 La. 156.

## V.

Where the parties to a fraudulent contract have fully executed it themselves, courts of equity will not interfere to unravel their doings, but, considering them in *pari delicto*, will leave them bound as they found them.

In re Simmons Estate, 20 Pa. 450.  
Rich vs. Hayes, 58 Atl. 62, 99 Me. 51.

## VI.

And where both parties are in the wrong a court cannot balance the equities between them, nor give a complainant relief against his own vice and folly.

Rozell vs. Redding, 26 N. W. 498, 59 Mich. 331

## VII.

One to whom a debtor disposes of his property to defraud his creditors, which is notwithstanding seized and sold by them cannot recover of the debtor the value of the property so subjected.

Surlott vs. Beddow, 19 Ky. 109.

## VIII

A sale void as to creditors cannot be made to operate to give the vendee a lien for the money he has paid.

Farrer vs. Lonsby Lumber Co. 112 N. W. 726.

State Bank vs. Niles, 41 Am. Dec. 575.

## IX

*"In Pari Delicto Melior est conditio Possidentis."* A maxim meaning: "When the parties are equally in the wrong the condition of the possessor is the better."

Bouvier's Law Dictionary (citing Broom Leg. Max. 325.)

*"In Pari Delicto Potior est Conditio Defendentis."* A maxim meaning: "Where both parties are equally in fault, the condition of the defendant is preferable." Bouvier's Law Dictionary.

### ARGUMENT

The principal error assigned by the appellant is failure of consideration. The appellee contends that there is no failure of consideration since title and possession passed to the buyer but that the appellant through his own fault in failing to comply with the bulk sales law suffered the creditors to seize the property.

But regardless of whether or not there was a failure of consideration, the appellant is barred from bringing this action to rescind the contract and to cancel the note for the law as laid down in the above cited case of Kraft vs. Heller, that the question as to whether a fraudulent intent in fact existed and entered into the transfer is not material, and if it be found that the purchaser complied with the statute, the court can say as a matter of law that the purchaser had no intent to defraud the seller's creditors; but if the purchaser failed to comply with the statute the transaction is tainted with a fraudulent intent as a matter of law. Applying this rule of law to the case at bar, the court will have to find that as a matter of law the appellant had intended to defraud the creditors of the appellee, for it was shown by a preponderance of the evidence that the appellant had failed to comply with the statute. An examination of the evidence will disclose that the appellant himself testified that he did not demand a list of the names of the cred-

itors, nor a list of the indebtedness as required by the statute, he also testified that he did not notify the creditors either personally or by registered mail within five days before the contemplated sale or the payment of the purchase price. The creditors also testified that they had never received any notice of the sale from the appellant either personally or by registered mail, Applying the rule as laid down in the above case the court will have to find as matter of law that the contract was entered into with an intention to defraud creditors; and the rule in conveyance to a conveyance given to defraud, creditors is; that the law will not aid either of the parties committing or attempting he fraud, but will leave them where they have placed themselves, without relief. If the contrary is executory, it will not be relieved against. If it has been performed in part the law gives it effect so far as executed, and holds it void so far as it remains unexecuted. The above rule was upheld in the case of Williams vs. Clink, 51 N. W. 453, 90 Mich. 297, 30 Am. St. Rep. 443.

Whatever might have been the motive of the parties at the time of entering into this contract is immaterial. The law imposes upon the purchaser certain duties and a failure to perform such duties is a violation of the law. The appellant entered into the contract with knowledge of the existing statute and with an understanding of the consequences for failure to comply with it. After having suffered a loss because of his vice and folly he now comes into a court of equity with the metaphorical "unclean hands" and seeks to have the contract rescinded. Is the

court going to grant him relief from a situation he himself helped to create? The court will not allow him to allege his own turpitude. Where both parties are in the wrong a court cannot balance the equities between them, nor give a complainant relief against his own vice and folly. *Rozell vs. Redding* 26 N. W. 498, 59 Mich. 331. The statute imposes the duty upon both parties of observing its mandates and hence where the statute is violated by the plaintiff he does enter the court with unclean hands and should be denied relief. And further, the buyer is making his own violation of the statute the basis of his cause of action and the position of the defendant is the more advantageous.

It is one of the earliest principles established, that courts of justice will not lend their aid in enforcing contracts which are contrary to law. If, in transactions of this character,, either party has obtained advantage of the other, however great maybe the hardship of the case courts will not aid one violator of the law against the other, but will leave them as they are found. *State Bank of Mich. vs. Niles* 41 Am. Dec. 575.

The above principle was applied in a very early Kentucky case, *Surlott vs. Beddow*, 19 Ky. 109. In this case an action was brought by Surlott to recover the price for which a negro was sold under the execution of one Shanks, a judgment creditor of Beddow. About the time the judgment was recovered by Shank, Beddow, at the instance and request of Surlott executed a bill of sale to Surlott transferring to him all of his negroes. Shanks not regarding the bill of sale caused an execution to issue upon his judgment and had the same levied upon the negroes men-

tioned in the bill of sale and upon inquiry raised by the sheriff, a jury found the bill of sale to be fraudulent and the negroes subject to the execution, Beddow then tendered and entered into a replevin bond with Surlott and one Morehead, his sureties, for the debt of Shanks, and the negroes were restored to him by the sheriff, after the replevin bond became payable Shanks caused another execution to issue thereon against the estate of Beddow, Surlott and Morehead; and in virtue thereof seized upon one of the negroes and sold the same and applied the sale money to the satisfaction of Shanks execution. On the day of the sale Surlott was compelled to pay over to the sheriff the sum of \$209.50, the balance of the amount of Shanks' execution, as surety on the bond. And it is for this sum and for the return of the negroes that Surlott is seeking to recover.

The trial court returned a verdict in favor of Surlott for \$209.50. Surlott appealed.

The higher court held; the demand asserted by Surlott for the price for which the negro sold under the execution was founded in the fraudulent transfer and upon well settled principles, the action of *assumpsit* could not be sustained also held that: One to whom a debtor disposes of his property to defraud his creditors, which is notwithstanding seized and sold by them cannot recover of the debtor the value of the property so subjected.

The appellee wishes to cite to the court a case in which the identical question is involved, namely the bulk sales act, and which is the only question to be decided in the case at bar. The question is raised in the case of *Farrar vs. Lonsby Lumber Co.*, 112

N. W. 726. It appeared a corporation sold its stock in trade in bulk giving a bill of sale and receiving notes for the price. No delivery was made. Thereafter a receiver was appointed for the corporation at the instance of a stockholder. The purchaser brought a bill to establish his title to the property covered by the bill of sale. The court said: "A sale void as to creditors cannot be made to operate to give the vendee a lien for the money he has paid. Courts of justice will not lend their aid in enforcing contracts which are contrary to law."

#### CONCLUSION

In conclusion the appellee believes

that the decision of the lower court was correct on the theory; that the execution of the contract in question was in violation of the Bulk Sales Act of Michigan and contrary to law and that therefore appellant should not be allowed to make his own wrong the basis of his complaint.

Wherefore the appellee prays that the decision of the lower court be in all things affirmed.

All of which is respectfully submitted to the Honorable Supreme Court of Notre Dame.

WALTER RICE,

Attorney for Appellee.