be a matter of fact to be submitted to the jury for its determination." In this form the bill says nothing about being able to stop within the assured clear distance ahead. Although the intent of the author of the bill seems to be plain to one who knows the history of the statute, it may be questioned whether, for the sake of clarity, he should not have included another sentence.

D. M. POSTLEWAITE.

Bankruptcy

FRAUDULENT TRANSFER BY INSOLVENT DEBTOR—RIGHTS OF CREDITORS TO SUE AFTER ADJUDICATION OF BANKRUPTCY AND APPOINTMENT OF A TRUSTEE

In *Winter's National Bank and Trust Company* v. *Midland Acceptance Corporation*, 47 Ohio App. 324, 191 N.E. 889 (1934, previously annotated on another point, "Chattel Mortgages and the Bulk Sales Act," 7 Ohio Bar May 6, 1935), a creditor brought his action to set aside a conveyance alleged to be in violation of the Bulk Sales Act, Section 1102, General Code, after the adjudication in bankruptcy and the appointment of the trustee. The latter, on the following day, filed his intervening petition. In their opinion the court said, "The right to institute the action which the plaintiff (creditor) sought to prosecute was, by the adjudication of Gessaman, the bankrupt, and the appointment of a trustee, vested in the representative of all of Gessaman's creditors, the trustee," and so dismissed the plaintiff's suit.

This raises the problem of under what circumstances a creditor may sue to set aside allegedly fraudulent transfers by an insolvent debtor.

When a creditor sues prior to bankruptcy to set aside a fraudulent conveyance, his right is not interfered with by the filing of a petition in bankruptcy and the subsequent appointment of a trustee unless the latter intervenes. *Walker* v. *Connell*, 54 Sup. Ct. 251, 24 Am. B.R. (n.s.) 229 (1934). A similar result would seem to follow when the creditor sues subsequent to bankruptcy but prior to the apopintment of the trustee. *Frost* v. *Latham*, 181 Fed. 866 (1910). And where a trustee was not appointed after a debtor had been adjudicated a bankrupt, a creditor has been permitted to sue in his own name. *Guarantee Title and Trust Co.* v. *Pearlman*, 144 Fed. 550, 16 Am. B.R. 461 (1906). However, the trustee, after he is appointed, may intervene and collect the assets for the benefit of the estate. *Matter of Vadner*, 42 Am. B.R. 465 (1918); *In Re Rogers*, 125 Fed. 169, 11 Am. B.R. 79 (1903). After the

intervention of the trustee, a creditor, through the operation of section 64b [11 U.S.C.A. 104b] of the bankruptcy act, is reimbursed for his reasonable services. *Frost* v. *Latham*, supra.

After an adjudication in bankruptcy and the appointment of a trustee, the general rule as stated in the *Midland Case*, supra, gives the right to bring suit to the trustee, to the exclusion of the creditor. *Glenny* v. *Langdon*, 98 U.S. 20, 25 L. Ed. 43 (1878); *Remington*, Section 2222; *Colliers* (13th edition) page 1777. Where the trustee refused to bring suit, one court has permitted a creditor to sue in the trustee's name. *Exchange National Bank of Montgomery* v. *Stewart*, 158 Ala. 396, 48 S. 487 (1909). Another has permitted him to sue in his own name. *Googins* v. *Skilling*, 108 At. 50, 44 Am. B. R. 378 (1919); *Matter of Vadner*, supra. Or to make the trustee a party defendant, *Casey* v. *Baker*, 212 Fed. 247, 32 Am. B.R. 311 (1914). And see Dictum in *In re Schenk*, 116 Fed. 554-6, 8 Am. B.R. 727, 729 (1902).

The thory upon which the *Midland Case* rests is the supersedence by the National Bankruptcy Act of the rights given to creditors by the State law. Under the National Act, the property and powers of the bankrupt as set out in Section 70a [11 U.S.C.A. 110a] and the "rights, remedies, and powers" of creditors, as mentioned in Section 47a-2 [11 U.S.C.A. 75a-2] are vested in the trustee. See comment "Suits by Bankrupts on Pre-Bankruptcy Claims," 7 *OHIO BAR* 731 (March 25, 1935). Similarly Sections 60b and 67 (c), (e), and (f), [11 U.S.C.A. 96b, 107 (c), (e), (f)] confer direct powers on a trustee to set aside voidable preferences and liens. But under Section 70e [11 U.S.C.A. 110e], and see Section 67b [11 U.S.C.A. 107b], the trustee's right is derived by subrogation from the rights of the creditors as created by State law. *In Re Gray*, 47 N.Y. App. Div. 554, 3 Am. B.R. 647 (1900). See 32 Mich. Law Review 369 for power of trustee to sell or assign these rights.

The cases referred to above show that the appointment of a trustee in bankrupcy does not necessarily divest a creditor of his rights to sue. However, the authority is overwhelming that in ordinary situations, after appointment of a trustee, a creditor may no longer sue upon a claim which vests in a trustee under Section 70e of the Bankruptcy Act. *Ruhl-Koblegard* v. *Gillespie*, 56 S.E. 898, 22 Am. B.R. 643 (1907); *MacMahon* v. *Pithian*, 166 Iowa 498, 147 N.W. 920 (1914); *Chatfield* v. *O'Dwyer*, 101 Fed. 797, 4 Am. B.R. 313 (1900); *In Re Kohler*, 20 Am. B.R. 89 (1908). This is not based upon the wording of the Act, but upon a desire to prevent creditors from obtaining more

than their proportionate share of a bankrupt's estate, and to encourage the creditors to inform the trustee of voidable transfers. *Trimble* v. *Woodhead*, 102 U.S. 647, 26 L. Ed. 290 (1880).

It would seem, therefore, that the rule as stated in the *Midland Case* was correctly applied upon its facts though the rule, itself, is not as absolute as intimated by the court in their opinion.

HARRY A. GOLDMAN.

Chattel Mortgages

BULK SALES ACT — CHATTEL MORTGAGE ACT — LIEN AND TITLE THEORY — FRAUD

The recent case of *Winter's National Bank and Trust Co.* v. *Midland Acceptance Corporation*, 47 Ohio App. 324, 17 Abs. 146, 40 O.L.R. 308, 191 N.E. 889 (1934), raises the problem of whether the Bulk Sales Act, Section 11102 of the General Code, applies to a chattel mortgage, a question of first impression in Ohio. One F. H. Gessaman had executed and delivered to the defendant, one of several creditors, a chattel mortgage which covered the entire equipment of his new and used auto sales establishment. The consideration was deferring legal action on a note of $15,000, the note being due and unpaid as to principal and interest. Plaintiff bank, as a creditor of Gessaman, sought to subject certain chattel property to a trust in the hands of the defendant, upon the claim that the defendant took the property by sale or transfer from Gessaman in violaion of the provisions of Section 11102, et seq., General Code. The statute provides in substance that the sale, transfer or assignment, in bulk of any part or the whole of a stock of merchandise, otherwise than in the ordinary course of trade of the seller, transferer or assignor, shall be void as against his creditors, unless the purchaser, transferee, or assignee, demands and receives from the seller, transferrer or assignor, a certified list of names of his creditors, with the amount of indebtedness owing to each, and gives certain specified notice to them five days before taking possession.

The jurisdictions which have been confronted by this problem have split in their decisions, with the decided weight of authority holding that the giving of a chattel mortgage on a stock of goods for a bona fide debt, whether it be a lien or title given as security, does not constitute a sale, transfer or assignment in violation of the Act. Although special grounds for reaching the same result have been found by some courts, the most common basis for such a holding is that the words, "sale, trans-