

DOCKET NUMBER: 96-13704

ADV. NUMBER: None

JUDGE: M. A. Mahoney

PARTIES: Richard E. Neville, Jr., R. E. Neville, Jr. Antiques

CHAPTER: 7

ATTORNEYS: L. C. Williams, J. D. Banks. H. A. Callaway, III, M. E. Wynne, L. B. Chunn, G. W. Finkbohner, Jr., B. A. Friedman, R. W. Eaton, P. E. Skidmore

DATE: 2/4/97

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

RICHARD E. NEVILLE, JR.
a/k/a R. E. NEVILLE, JR.
f/d/b/a R. E. NEVILLE, JR.
ANTIQUES

Case No. 96-13704-MAM-7

Debtor.

**ORDER DETERMINING CERTAIN ISSUES REGARDING INTEREST
OF VARIOUS OBJECTORS IN ALLEGED INVENTORY OF DEBTOR**

Lionel C. Williams, Mobile, AL, for the Trustee, Lonnie Mixon
J. Donald Banks, Mobile, AL for Donald S. Ball, Newton Crouch, Robert M. Hicklin, Jr.,
David Petty, James R. Gore, Sr., Jim Blackburn
Henry A. Callaway, III, Mobile, AL for the Bank of Mobile
Marion E. Wynne, Fairhope, AL for Frank Berry/Berry's Trading Post
L. Brian Chunn, Bay Minette, AL for E. C. Dyas, IV
George W. Finkbohner, Jr., Mobile, AL for James E. Mulkin, Jr., Jonathan P. Mulkin,
Joel W. Mulkin, collectively known as the Mulkin Trust, and Jim Ed Mulkin
and Jane Mulkin
Barry A. Friedman, Mobile, AL for Roberts Adams, Dr. Charles H. Jordan and
Janie B. Jordan
Rocky W. Eaton, Mobile, AL for Wendall Bruffett
Paul E. Skidmore, Tuscaloosa, AL for The Board of Trustees of the University of
Alabama
Van Koppersmith, Pro se
William L. Beard, Pro se
Meigs Brainard, Pro se
Austin Sheheen, Pro se

This matter is before the Court on the objections of the parties listed below to the sale of the inventory in the Debtor's store by the Trustee. The Trustee and the Bank of Mobile allege that all of the inventory located at the Debtor's shop is subject to a first lien of the Bank of Mobile pursuant to ALA. CODE § 7-2-326 (1975) and a second lien of the Trustee pursuant to 11 U.S.C. § 544(a) which are superior to any interest claimed by the objectors. The objectors

allege that certain pieces of the inventory are not property of the estate because Neville had no ownership interest in the items at all and the items are not held for sale. The objectors allege that the truly consigned items are not subject to the liens because Neville was generally known to be substantially engaged in selling consigned goods. The parties to this proceeding consented to the Court hearing two issues common to the objectors' cases prior to other issues. The issues are those set forth in the Court's order dated January 8, 1997. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). For the reasons indicated below, the Court holds that the items listed in David Petty Exhibit A, and the two statues owned by Jane Mulkin, and the gemstones of E. C. Dyas, IV and Wendall Bruffett, are not subject to the liens of the Bank of Mobile or the Trustee and are not property of the Debtor's estate. All remaining items in Debtor's place of business are subject to the lien of the Bank of Mobile pursuant to ALA. CODE § 7-2-326(3)(b) (1975) and the lien of the Trustee pursuant to 11 U.S.C. § 544(a).

PROCEDURAL HISTORY

An involuntary chapter 7 bankruptcy case was commenced against R. E. Neville, Jr. ("Neville") on October 8, 1996. An order for relief was entered on November 6, 1997. On December 3, 1996, the chapter 7 trustee appointed in the case, Lonnie L. Mixon, noticed a public sale of Neville's property, including the contents of his business located in Fairhope, Alabama. Numerous objections to the sale were filed pursuant to the Court requirement for the filing of the same by January 6, 1997. Some objectors appeared at the hearing and orally objected but had not filed written objections. They were given several additional days to file them. Several

objectors had contacted the trustee directly in writing and those objectors were treated as having timely filed objections.

The Court set hearing dates for the objectors who were found to have properly perfected objections. The following objectors were found to have common issues and the Court held a hearing on issues pertaining to them on January 27 and 31, 1997 and February 3, 1997. The objectors are:

Newton Crouch
Robert M. Hicklin, Jr.
David Petty
Frank Berry/Berry's Trading Post
E.C. Dyas, IV
Van Koppersmith
James E. Mulkin, Jr., Jonathan P. Mulkin, Joel W. Mulkin, collectively known as the
Mulkin Trust, and Jim Ed Mulkin and Jane Mulkin
Dr. Charles H. Jordan and Janie B. Jordan
Wendall Bruffett
William L. Beard
James R. Gore, Sr.
Jim Blackburn
Robert Adams
Meigs Brainard
The Board of Trustees of the University of Alabama
Austin M. Sheheen

Other than the Mulkin objectors, David Petty, E. C. Dyas, IV and Wendall Bruffett, all of the objectors claim that their goods were consigned to Neville. The Mulkins claim that certain of their goods were placed with Neville for storage and Neville was a bailee only, and, as to the remainder of the goods, that they were consigned to Neville only. David Petty contends that all of his items were held by Neville for research into the background of the items. E. C. Dyas, IV and Wendell Bruffett claim that Neville held their gemstones only for appraisal purposes.

The Trustee and the Bank of Mobile assert that the goods are security for the loan of the Bank to Neville pursuant to ALA. CODE § 7-2-326 (1975) and are subject secondarily to the

lien of the Trustee which arises at the filing of the bankruptcy case pursuant to 11 U.S.C. § 544(a).

FACTS

R. E. Neville, Jr., was a highly regarded antiques dealer specializing in Civil War items. One witness stated he was one of the top three experts in the world in Civil War items. He had been in the antiques business for over 30 years. Until a few years ago, he had a retail shop in Mobile. He then moved to Fairhope, Alabama, and operated his store there until October 2, 1996. On that date he disappeared. He sent letters to people indicating he had a serious illness. Later in 1996, he was picked up by the police in Mississippi, and turned over to the Tennessee authorities. He has been released on bail pending proceedings against him.

Twenty eight people testified about the manner in which Neville conducted his business. The testimony was given by his long time employee, the Chapter 7 Trustee, his banker, people who had loaned him money, and people who had consigned items to him. No one person had a clear picture of all aspects of his business. Neville was very circumspect about discussing his business with others.

Testimony of J. Brantley Calvit. Mr. Calvit worked for Neville for nearly 10 years from November 10, 1986 to October 2, 1996. He was Neville's sole full time employee for that period. Calvit's main job was salesperson, although he did whatever needed to be done. He did a little bookkeeping, drove Neville to shows, and picked up merchandise. Antique shows were Neville's main business. They yielded approximately 75 percent of his sales. Neville participated in about 30 shows per year. Approximately two were coin shows, five or six were antique shows, and the remainder were Civil War shows. Calvit attended the shows with Neville.

Calvit believes that approximately 10 percent of Neville's merchandise was held under consignment arrangements. He saw Neville buy and sell goods. "Most of his business was buying and selling." Neville had a form consignment agreement on the computer. Calvit had to print it when it was used because Neville could not operate the computer. It was not used often. No goods were ever tagged as consignment goods or separately displayed or held. There was no sign or banner in the store indicating consignments were taken. Advertisements of Neville never indicated that he dealt in consignments.

Calvit testified that almost every antiques dealer does some consignment business. Some did more than others. Neville did very little. People who left things with him more often instructed him to "sell it as you can" rather than consignment. Neville kept track of his inventory in a notebook which Calvit thinks is still in the possession of Neville. Calvit's belief as to ownership of the inventory is based upon what Neville told him, not upon any documentation.

Neville told him that he had \$1,600,000 of inventory at cost. Calvit believes that the value at Neville's disappearance was lower, about \$1,000,000 at cost. This value was consistent through 1994 and 1995 as well.

Calvit did testify that he believed certain items were held by Neville on consignment or for storage or appraisal or repair:

- Coin collection - University of Alabama (consignment)
- Several long arm guns and a painting - David Petty (held for research)
- Paintings - Robert M. Hicklin, Jr. (consignment)
- Roulette Wheel - Frank Berry (consignment)
- Guns and walking sticks - James R. Gore, Sr. (consignment)
- 3-4 Gemstones - Wendall Bruffett (held for appraisal only)
- 1 Diamond - E.C. Dyas, IV (held for appraisal only)
- Statues - Jane Mulkin (held for repair)

Testimony of Alleged Consignors. The consignors had known Neville from 5 to 40 years. The consignment arrangements testified to by the witnesses were varied. Some had oral consignment agreements. Four parties, the University of Alabama, Frank Berry, Robert Hicklin and James Gore had written agreements containing consignment type language. Many of the consignors had consigned more than one item to Neville in several transactions. Many of the consigned items have been sold. Some of the consignors saw Neville at shows. At least Frank Berry had never seen Neville purchase anything. Others like the Mulkins, Sheheen and Blackburn had purchased items from him and some like Hicklin, Crouch and Blackburn had sold items to him. Blackburn also traded with him.

The alleged consignors, if they gave estimates, estimated that between 70 and 90 percent of Neville's merchandise was consigned goods. Hicklin only knew that all of Neville's "fine art" inventory was consigned. The consignors' estimates are based upon their own consignments to Neville and others of which they were aware. None of them had more than 20 percent of their own inventory in consigned goods if they were dealers.

The Mulkins purchased over \$100,000 in merchandise from Neville since 1989. They also loaned him over \$100,000. Mr. Mulkin testified that most of those loans were to purchase merchandise. The debtor paid David Petty over \$130,000 on consigned French folding knives after April 1996. Neville sold \$225-300,000 of the University of Alabama's coin collection during the period from 1986 to 1996. Many of these sales were made on the University of Alabama premises—not at Neville's shop. He never had the entire collection in his possession. All of the University of Alabama coins were in individual envelopes with an identifying number on each envelope and a University of Alabama identification. The envelopes were stored in trays stating "University of Alabama" on them.

The Internal Auditor for the University of Alabama who testified also indicated that he knew Neville from gun shows held by the Alabama Gun Collectors Association as well as through his relationship with Neville on the University's behalf. Neville had offered to take a sword on consignment from him and told him items he was selling at trade shows were consigned. Three other gun collectors told the auditor they had consigned items with Neville. The auditor's opinion was that Neville dealt almost exclusively in consignments. He based his opinion on Neville's seeking a consignment from him, others' consignments to Neville of which the auditor was aware, and Neville's statements about going to look at and selling various collections. The auditor also was solicited by Neville to invest to purchase a collection.

E. C. Dyas, IV testified that he had consigned merchandise to Neville. He also gave him a diamond for appraisal only. Dyas had a loan of \$60,000 outstanding to Neville at filing. He and Neville had engaged in joint venture asset purchases and loans to buy specific assets over a period of time. Earlier loans or joint ventures had been repaid. Neville told Dyas that he owned \$1,000,000 in inventory. Even so, Dr. Dyas thought a substantial portion of Neville's inventory was consigned.

Newton Crouch had been paid \$2,900 in July and August 1996 on consigned goods. He purchased a \$1,750 item from Neville in June 1996. Neville also told him he was looking for outside investors for joint ventures.

Blackburn had three consignments with Neville throughout their relationship. They also traded items. Sometimes Neville could not trade with Blackburn because he had to pay for the item. Blackburn assumed this meant that Neville had the item on consignment. Blackburn also loaned \$116,000 to Neville in 1996 to buy inventory.

James Gore had a one-time consignment with Neville for five guns. He knew of no other consignors.

George C. Esker, III bought from and sold to the Debtor. He never heard that Neville ever took consignments. Stephen Lister bought from him and never knew of consignments taken by the Debtor even though he talked to and knew a number of other dealers.

Robert L. Moore, Jr., who bought from and sold to Neville had consigned several small items to Neville. He believed five percent or less of Neville's business was consignment.

Testimony of Noteholders. The noteholders collectively were owed \$401,500 at filing (as to those who testified to amounts loaned). The typical note was a written promissory note at 20 percent per four month period or 60 percent per annum. Neville told most of the noteholders that he had \$1-1,800,000 in "paid for" inventory. He stated that he utilized these nonbank loans because he needed cash quickly at times to buy specific merchandise and banks were uneasy with large loans on his type of inventory. C. Gary McNorton and Rodney Pilot visited the shop to look at the inventory. Neville gave no indication that any of it was not his. Many of the noteholders were told their money was to be used to purchase a knife collection.

Neville refused to take consignment merchandise four times from three of the noteholders: Donald Bryan, Steven Baker and Benjamin Newman. He said he did not want to be competing against himself. Bryan, who is himself a collector, testified that it is generally known among buyers and sellers that antique dealers use consignments at times. Inventory is expensive to acquire.

Bryan purchased items from Neville and traded items with Neville on occasion. Bernard Crooke also purchased from and traded with Neville. McNorton purchased items from Neville.

John Cottier loaned money to Neville, made two consignments to Neville and bought items from Neville.

Robert Adams conducted trade shows in Early American items. He saw the Debtor buy items at shows “constantly.” Neville usually paid by check. Neville did not like consignments according to Adams and refused to take one from him. Adams loaned Neville \$50,000 to buy inventory. Adams never saw Neville take a consignment. He believes Neville only did it when the consignor insisted on such an arrangement. Adams wouldn’t allow consignment goods to be sold at his shows. He does not know what Neville had at his shop.

General Testimony. No witness ever saw any banner or sign at the Debtor’s shop or at shows indicating that Neville dealt in consigned goods. No advertisement or mailing indicated any consignments, although other ads in the same circulars do state that the dealers deal in consigned goods. All of the witnesses talked of Debtor’s past reputation as “spotless,” “like a pillar of the church,” and “trustworthy.” It is unclear what the value of the consigned merchandise is as compared to the remaining merchandise.

The Trustee has found 98 persons or entities he believes may be creditors of the Debtor. There are various types of creditors—alleged consignors, individual lenders, Bank of Mobile, a landlord, credit card companies and utilities companies. At least 15 of the witnesses who testified did not know or believe that Neville dealt substantially in the consigned goods.

The Bank of Mobile has a valid perfected security interest in inventory and accounts receivable of the Debtor as well as two vehicle loans. The bank officer, Mr. Brandau, had a 20-year banking relationship with Neville. He believed Neville owned all of his inventory. Neville never told him he did not own it. He visually inspected the merchandise and saw thousands of items in the store. He saw no evidence of consignments. The Bank never did its

own physical inventory because of the need for several experts to do it and the number of items involved. Also, the value of Neville's inventory, as stated by the Debtor and confirmed by Brandau's visual inspection, vastly exceeded the \$100,000 loan limit.

Mulkin and Petty Contention re Bailment

The Mulkins contend that items listed on Exhibits A and B to their objection were not consigned to Neville at all. The items were only given to him for storage. Six items are left. David Petty contends that he left four items with the Debtor for research into their origin. The items were the painting and three rifles listed in Petty Exhibit A. E. C. Dyas, IV and Wendall Bruffett claim that gemstones they gave to Neville were taken by him strictly for appraisal.

Calvit Testimony. Brant Calvit, Neville's full time employee, testified that all of the Mulkin items at the shop (except the statues) were for sale. He never saw any written documents as to the assets. All but six of the items allegedly to be stored were sold. The items were not segregated in the shop or specially tagged. Two statues were taken by Neville from the Mulkin home strictly for repair and not for sale. Calvit agreed that Petty's painting and rifles were only held for research, not sale. He also agreed that Bruffett and Dyas' gemstones were taken for appraisal only.

Mulkin Testimony. The Mulkins contend that the items on Exhibits A and B were never to be sold. When the Mulkins purchased the bulk of them for \$100,000 in 1989, from estate proceeds of Mr. Mulkin's mother, they asked Neville to hold the assets for them. They were holding the items strictly as investments and awaiting appreciation. With the price they had paid, they felt free storage was an understandable request. The Mulkins were, in Mr. Mulkin's words, "probably R.E.'s best customer." Neville had a safe, a security system, and climate control so that the items would remain in better shape. The Mulkins did not check on the items

often. Neville assured them the assets were safe when they asked him. The documents held by the Mulkins consist of appraisals, invoices, and receipts listing the assets at issue. Exhibit 3 states that on 4/25/89 Neville had “the following items which belong to the Mulkin Trust in my possession.” Exhibit 5 discusses a joint venture purchase made by Mr. Mulkin and Neville. It details the manner in which the assets are to be marketed and sold. Exhibits 2, 4, and 9 are appraisals of assets owned by the Mulkins. They state nothing about storage, consignment or marketing arrangements. Exhibit 8 gives details of the purchase of one Mulkin item, a Confederate soldier’s uniform. Trustee’s Exhibit 13 shows a joint venture agreement in 1987. Exhibits 14, 15, and 16 list items sold or for sale by the Mulkins. Trustee’s Exhibit 18 is a loan of \$35,000 from the Mulkins to Neville.

Petty Testimony. Petty, an English antiques dealer, had left the painting and three rifles with Neville so that research could be done on their background. He never intended Neville to hold them for sale.

Dyas Testimony. Dyas testified that he asked Neville to get an appraisal of a diamond for him. Neville took the stone to do so.

LAW

This case has two issues to be decided. They are the two issues listed in the order of January 8, 1997.

1. Did James Edward Mulkin, David Petty, E. C. Dyas, IV and Wendall Bruffett deliver items to the Debtor for sale or not?
2. Was the Debtor “generally known by his creditors to be substantially engaged in selling the goods of others” as that term is used in ALA. CODE § 7-2-326(3)(b) (1975)?

The Court will address the issues in order.

1.

As stated in the case of *First Nat. Bank of Birmingham v. Young*, 530 So.2d 834, 837

(Ala. Civ. App. 1988):

It is evident from every case that, in order to apply Section 7-2-326(3), the threshold requirement is that there must be a delivery of goods to a 'person for sale.'

There can be no application of ALA. CODE § 7-2-326(3) (1975) to property not held by a debtor for sale. If the items are not in a debtor's possession for sale, then the transactions are outside the consignment arena and may not be subject to liens on the debtor's property.

The Mulkins, David Petty, E. C. Dyas, IV and Wendall Bruffett consider certain property that Neville held for them as held for other than sale. The items listed on Mulkin Exhibits A and B were held for storage and the items listed on Petty Exhibit A were held for research. The gemstones of Dyas and Bruffett were held for appraisal. Brant Calvit, Petty, Dyas and Bruffett agree on the intention of the parties as to the Petty, Dyas and Bruffett items. Calvit and the Mulkins disagree as to the intention of the parties as to the Mulkin items except the two ceramic statues of Mrs. Mulkin held by Neville for repair.

The case law holds that clear bailments do not give creditors of the bailee rights in the bailor's goods. "[T]here are a number of circumstances in which goods may be on the premises of the bankrupt party and not be subject to the interests of creditors . . . [W]e agree that section 2326 'is not a cure-all for all hidden ownership interests.' Moreover, modern commercial lenders do not extend credit based on a debtor's 'ostensible ownership of merchandise.'"

Glenshaw Glass Co. v. Ontario Grape Growers' Marketing Board, 67 F.3d 470 (3d Cir. 1995).

However, the cases "generally hold . . . that where a debtor gains possession of collateral pursuant to an agreement endowing him with any interest other than naked possession, the

debtor has acquired such rights as would allow the security interest to attach.” *Morton Booth Co. v. Tiara Furniture, Inc.*, 564 P.2d 210, 213 (Okla. 1977).

To determine what rights a debtor/bailee has acquired in property, the Court should consider “the outward appearance of the debtor’s rights of ownership and control in the collateral.” *Brown v. U.S., By and Through Farmers Home Admin. of Dept. of Agriculture*, 622 F. Supp. 1047, 1049-51 (D.S.D. 1985); *American National Bank v. Joy (In re Joy)*, 169 B.R. 931, 936 (Bankr. D. Neb. 1994). In this case, the Mulkin items were all held together with the inventory Neville had for sale. The items were not specially tagged, stored or segregated, except for the statues which were wrapped in blankets in the back of the store. No Mulkin document nor Petty Exhibit A establish clearly that the relationship between the Debtor and the Mulkins or Petty was a bailment. There were no documents for Dyas or Bruffett. The testimony of Calvit and the Mulkins conflict as to all but the statues. Calvit, Petty, Dyas and Bruffett agree on their items.

It is the objectors’ burden to establish their claims by a preponderance of the evidence once the perfected security interest of the Bank of Mobile and the hypothetical lien creditor status of the Trustee were established. With Calvit’s testimony, the Petty storage for research, and Mulkin statue bailments and Dyas and Bruffett holding for appraisal are established, even though documents are not present to clearly support the claims. However, the other Mulkin bailment claims fail. The evidence is at best in equipoise. Calvit and the Mulkins disagree about the bailment status. When the other facts are added to the testimony, the bailment is not established. The Debtor sold most of the items the Mulkins claimed were bailed over a period of years. The items were not tagged as “Not for Sale” nor segregated. The documents include invoices and appraisals, but nothing which says anything about a non-sale arrangement. In fact

the documents are not different from some of the documents in the Mulkin Exhibits which relate to items the Mulkins admittedly consigned. For these reasons, the Court finds all but the statues are items the Mulkins consigned to Neville.

Unlike the cases cited by the Mulkins that held items were not held by a bailee for sale, the bailee in this case, Neville, was in the business of selling what the Mulkins put into his possession. In the *Riviana Foods* case and the *First National Bank* case, the courts found that the items were not held for sale in part because it was not the bailee's normal course of business to sell similar items. *First National Bank of Birmingham v. Young*, 530 So. 2d 834 (Ala. Ct. Civ. App. 1988); *Walter E. Heller & Company Southeast v. Riviana Foods, Inc.*, 648 F.2d 1059 (5th Cir. 1981). When the Debtor sells similar items, the proposition that items are held for sale is harder to overcome. The Mulkins' evidence is not sufficient.

2.

The remaining objectors' goods are consigned to Neville. Some have clear consignments with written documents to support it. Others have oral consignments in which the consignors relied on Neville's reputation and their friendship. The law is the same in both situations. ALA. CODE § 7-2-326(3)(b) (1975) requires 2 things to be established to prevent a perfected lien from priming any consignor's interest in consigned goods. The consignee must be (1) "generally known by his creditors" to be (2) "substantially engaged in selling the goods of others."

"Generally known by his creditors" requires actual notice by the creditors, not constructive notice. ALA. CODE § 7-1-201(25)(c) (1975). Therefore, whether other antique dealers generally dealt in consignments, or whether creditors could have known that Neville dealt in consignments is not enough. In fact, the testimony did not establish that most other antique dealers always or usually dealt in consignments. The testimony did not establish that

creditors should or could have known that Neville dealt in consignments either. At least 15 of the 28 witnesses did not know he engaged substantially in consignment sales. Many creditors indicated Neville was very circumspect about his business affairs. Others had him refuse consignments. No evidence in the shop indicated any consignment arrangements except the University of Alabama one. However, the markings on the University of Alabama goods were mainly visible only if one looked in one of Neville's four safes.

Also, generally known would require that more than other antique dealers knew of the consignment arrangements. As established at trial, Neville had as many as 98 creditors, many of whom did not deal in antiques at all. There were 28 witnesses at the trial. Of those, more than one half were unaware of the alleged substantial consignment business of Neville. This does not establish "general" knowledge. *In re Creative Goldsmiths of Washington, D.C.*, 178 B.R. 87 (Bankr. D. Md. 1995); *In re Fabers, Inc.* 12 U.C.C. Rep. Serv. 126 (Bankr. D. Conn. 1972); *United Agri-Products Financial Services, Inc. v. O's Gold Seed Co.*, 733 P.2d 252 (Wyo. 1987).

The second issue is whether Neville was "substantially engaged in selling the goods of others." Essentially, to be "substantial," the consignment sales must be "considerable" or "large in amount or degree" according to Webster's Dictionary. Case law indicates that the amount of consignments must be more than 10 percent. *Matter of High-Line Aviation, Inc.*, 149 B.R. 730 (Bankr. N.D. Ga. 1992), and *In re Arthur A. Everts Co.*, 35 B.R. 706 (Bankr. N.D. Tex. 1984). The Court does not believe that the amount of consignment sales must be over some exact or threshold percentage or dollar amount; however, the objectors have the burden of proving that the consignments represent a lot of the business of Neville.

In this case, the proof of the amount of consignments vis à vis owned goods was not clear. At least \$400,000 had been loaned to Neville to purchase merchandise. A substantial

portion of that sum had been loaned to Neville in 1996. The evidence is clear that he did own some merchandise as many of the witnesses sold it to him. There was no overall value placed upon the merchandise in the shop and the value of all of the alleged consignments. The banker, Russell Brandau, and the Trustee, Lonnie L. Mixon, testified that there were thousands of items in the shop. The objectors items, although numerous, do not number in the thousands. Without more definitive valuation numbers or an actual inventory to count physical numbers, the Court cannot find by a preponderance of the evidence that the amount of consignments was “substantial” although that may well have been the case.

The consignors have not proven the facts necessary to establish that their goods should be excepted from the liens of the Bank of Mobile and the Trustee under ALA. CODE § 7-2-326(3) (1975) and 11 U.S.C. § 544(a). The items in the place of business of R. E. Neville are subject to these liens.

THEREFORE IT IS DECLARED that:

1. The statues owned by Jane Mulkin, the items listed in David Petty Exhibit A, and the gemstones of E. C. Dyas, IV and Wendall Bruffett are not items held by the Debtor “for sale” or “resale” as those terms are used in ALA. CODE § 7-2-326 (1975); and

2. All other items at the place of business of the Debtor at 72 Fairhope Avenue, Fairhope, Alabama, are deemed to be on sale or return because it was not established that R. E. Neville was “generally known by his creditors to be substantially engaged in selling the goods of others” as that term is used in ALA. CODE § 7-2-326(3)(b) (1975).

Dated: February 4, 1997

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE