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Isidore E. Goldberg

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NOTES AND COMMENT

Constitutional Law: State bankruptcy or insolvency laws; Statutes dealing with the voluntary assignment for the benefit of creditors and the federal bankruptcy act.—When these United States were formed and the Constitution drawn up, the underlying plan was to give the Federal government certain express and implied powers. What was not given either expressly or impliedly to the Federal government the individual states reserved to themselves.

There were certain powers granted the Federal government, which were to be exercised by the Federal government only—such as coining money, declaring, making treaties and the like. These are the subjects over which Congress has exclusive jurisdiction. On the other hand there were certain powers given the Federal government which it might exercise, and on which the individual states could also pass legislation. These were subjects over which each had concurrent jurisdiction.

Where concurrent jurisdiction existed over any subject matter, and Congress failed to exercise its power, the laws passed by the individual states were effective. However, when Congress exercised its right, and enacted legislation upon the same subject, then the Federal law was to take precedence and be controlling. The state legislation in so far as it conflicted with the Federal law was suspended during such time as the Federal law was in effect. When, if ever, the Federal law was repealed the state act was revived, *ipso facto*. In other words where Congress had power to legislate, and exercised such power the Federal law was supreme to any passed by the states.

Article I, section 8, paragraph 4, of the United States Constitution provides, that Congress shall have the power "To establish an uniform rule of naturalization, and *uniform laws* on the subject of *bankruptcies* throughout the United States."

Therefore, in accord with the above discussion, should Congress exercise its power to enact bankruptcy laws, these are to be not only supreme to those of any state, but they are to be the only laws dealing with bankruptcy in the United States.

Under this Constitutional provision Congress has enacted four separate and distinct bankruptcy laws. Each similar to the other in purpose but different in detail.

Congress passed the first bankruptcy act in 1800 and repealed it in 1803; the second was passed in 1841, repealed in 1843; the third, passed in 1867, was repealed in 1879 and the fourth and final act was passed in 1898, and is the law in force and effect today.

During the periods when there existed no Federal bankruptcy law, individual states passed insolvency laws and laws for the "voluntary assignment for the benefit of creditors." The right and practice, however, of such assignments, being inherent in the right of ownership and existing at common law without the aid or intervention of statute.

These laws were not only passed during the period when the Federal government had no bankruptcy act, but they were in existence and in operation during the time that the various Federal bankruptcy laws were in effect and are in existence today.

Our own state, Wisconsin, has such a law governing and regulating the voluntary assignment for the benefit of creditors; Chapter 128, Statutes 1925.

The first important question arising is, whether or not the voluntary assignment statute is a bankruptcy law? If these voluntary assignment regulations are to be construed as being a bankruptcy law then according to the rule, in situations where both the state and Federal government have concurrent powers and such powers are exercised, then the state laws are to be suspended; and all actions and proceedings under such laws are null and void. If such laws are not insolvency acts what effect, if any, has the "discharge" feature upon them?

Though the Federal act has been in effect for more than twenty-five years, and many states have had voluntary assignment regulations, which have been in active operation during that time, still there has been no Federal case to determine whether or not such acts are void, and inoperative. In effect, however, the following cases: *Parmenter Mfg. Co. v. H. Warren Hamilton*,¹ *In Re Smith*,² *R. H. Herron Co. v. Superior Court*,³ *Mauran v. Crown Carpet Lining Co.*,⁴ have held that the Federal bankruptcy act suspends and supersedes all state insolvency laws relating to bankruptcy that conflict with the Federal act.

At this point it might be well to discuss the legal significance and distinction of the two words "bankruptcy" and "insolvency," for strictly speaking and at common law there is a distinction between the two.

The former state at early common law necessitated the debtor to be a trader and the proceedings must have been brought *against*, and not *by*, him; while in the latter situation the proceedings were instituted *by* him.⁵ This distinction was slightly lessened and only the nature of the institution of the proceedings, whether by or against the party, determined whether it was bankruptcy or insolvency. On the continent of Europe the distinction between the two still exists.

However, as used in American law today, the distinction between a bankrupt and an insolvent is not generally regarded.

In 32 C. J. 811, it is stated: "Insolvent laws belong to the same family and are often, nearly, if not altogether, identical with what, by way of eminence, are called bankrupt laws."⁶

In *Kunzler v. Kohans*⁷ the court held that the meaning of bankrupt as used in the Constitution was not the technical early English rule but was commensurate with insolvency.

The word bankrupt in the first Federal Bankruptcy act of 1800 was used in the strict sense of the word. The distinction became much less observed however, and was finally broken down and abandoned by the act of 1841. Marshall C. J. in *Sturges v. Crowninshield*.⁸

¹ 172 Mass. 178, 51 N. E. 529, 70 Am. St. Rep. 258.

² (D. C.) 92 Fed. 135.

³ 136 Cal. 279, 68 Pac. 814, 89 Am. St. Rep. 124.

⁴ 23 R. I. 324, 50 Atl. 331.

⁵ Bouvier's Law Dict. 3rd Revision, 8th edition.

⁶ *Cook v. Rogers*, 31 Mich. 391.

⁷ 5 Hill (N. Y.) 317.

⁸ 4 Wheat 122.

The present act clearly uses the loose construction for it provides for the voluntary and involuntary "bankruptcy" which, according to the strict construction, is "insolvency" and "bankruptcy." The two words are used interchangeably throughout the act.

Even though the New York court in the *Kunzler* case (*supra*), said that the word bankrupt as used in the constitution was not the strict technical use of the word, which would only entail involuntary proceedings, the framers of the constitution must so have intended, for that was the construction placed upon the word at the time the constitution was drawn. We are prone to give the framers of the constitution too much credit for their foresight in framing the constitution and to place the interpretation and construction of the words in the constitution to suit our needs and not according to the import those words bore at that time.

Therefore were one to become very technical, he would insist that the present Federal Bankruptcy act was unconstitutional in so far as it is providing for voluntary proceedings, and that the individual states only could legally discharge the debtor who voluntarily commenced the proceedings. However, assuming that the framers of the constitution understood and intended the present construction of the word bankruptcy, it follows that the Federal Bankruptcy act *suspends* all "bankruptcy" and "insolvency" acts that conflict with it.

The next questions which should be clarified and are: whether the statutes on voluntary assignments for the benefit of creditors are insolvency laws, and therefor suspended, and of what effect is the discharge feature of those statutes.

It was said, earlier, that at common law a voluntary assignment for the benefit of creditors was valid, and recognized. We have recognized them in the United States; a large number of the states have passed statutes similar to those of Wisconsin, regulating such assignments.

In 32 C. J. 811-12 it is stated:

There is no analogy between an insolvent law and a statute which for the better protection of creditors prescribes a mode for the administration of the estates of insolvents under assignments made by the debtors themselves.

But a general assignment law of a state which provides for a *release* of an insolvent assignor is an insolvent law, and is, for instance, such a law as is suspended by a Federal bankruptcy act.⁹

In 32 C. J. 812 footnote 63a it is stated that

It seems that at common law in an assignment for the benefit of creditors, a release of the debtor was void.¹⁰

It follows that: 1. A statute, regulating the voluntary assignment for the benefit of creditors is not within those laws classed as insol-

⁹ Citing *Pelton v. Sheridan*, 74 Ore. 176, 144 Pac. 410; *Haijek v. Luck*, 96 Tex. 517, 74 S. W. 305; *Boese v. King*, 108 U. S. 519.

¹⁰ Citing *Ingraham v. Wheeler*, 6 Conn. 277; *Grover v. Wakerman*, 11 Wend (N. Y.) 185, 25 Am. D. 624; *Atkinson v. Jordan*, 5 Ohio, 293, 24 Am. D. 281; *Security Trust Co. v. Dodd*, 173 U. S. 624, 633.

veny or bankruptcy laws, and therefor is not suspended by the Federal Bankruptcy Act. 2. Where the voluntary assignment laws contain a release of the debtor from his personal liability on those debts, after one year, etc., that part is clearly within the insolvency feature and is suspended during the operation of a Federal act.

The Wisconsin Supreme Court in *In Re Tarnowski*¹¹ answered these questions to the same effect. In that case, the debtor, pursuant to the statute assigned all his property for the benefit of his creditors; all of them came in and received their *pro rata* share; at the end of the year the debtor, under sections 128.19 and 20 Statutes, 1925, sought to be discharged from personal liability on the debts. One of the creditors, who had received his share, objected to the discharge on the ground that the circuit court had no jurisdiction and that the section was suspended so long as the Federal Bankruptcy Act was in force.

Our court in upholding this contention said, that the laws regulating voluntary assignments do not come within the purview of the bankruptcy act, therefore, those sections are still in operation; while that part of the statutes which discharge the debtor is part of the bankruptcy act, and that though there could be a voluntary assignment for the benefit of creditors, there could be no discharge of the debtor from his debts by the circuit court judge as chapter 128 of the statutes provides.

The reasoning of the court was based on preceding Wisconsin cases¹² which held to the effect that at common law the right to a voluntary assignment existed but did not, *ipso facto*, discharge the total debt, being merely a release of the amount paid. However, the discharging of the debtor's personal liability changed the voluntary assignments aspect and had the legal effect of making that part of the assignment law a bankrupt law.

The practical effect of this decision will be: 1. The circuit court of Wisconsin will no longer find voluntary assignment cases on its calendar, because the only effect in the future, of such a proceeding would be to decide the claims of creditors, and add to the burdens of the debtor; he will no longer be able to be released from personal liability for his debts, which, after all, is the only object sought by this proceeding. 2. The composition of creditors, whereby all the creditors come in, and consent to take an agreed *pro rata* share, for the release of the debtor's further liability, will be used more extensively. 3. The Federal bankruptcy proceedings will be more frequently used, even though they are slower and more costly.

ISIDORE E. GOLDBERG

On October 25, 1926, the Supreme Court of the United States ruled on an unusually close constitutional question,¹ the facts of the case being substantially as follows: One Meyers was appointed, by and with the consent of the Senate, to be a postmaster of the first class in Portland, Oregon, for a term of four years. The appointment was made on July 21, 1917, and on January 20, 1920, his resignation was demanded by the President. Myers refused to leave office. The Post-

¹¹ 210 N. W., 836, 190 Wis.

¹² *Duryea v. Muse*, 117 Wis. 339, 94 N. W. 365.

Segnitz v. Garden City, B. & T. Co., 107 Wis. 176, 83 N. W. 329.

¹ *Myers v. United States*, 71 L. ed. (adv. 27).