A Challenge to the Validity of Certain Sections of Wisconsin's Chapter 128

Thomas W. Bertz
A CHALLENGE TO THE VALIDITY OF CERTAIN SECTIONS OF WISCONSIN'S CHAPTER 128

INTRODUCTION

Conflicts of legislative authority are an inherent consequence of a federal system of government. An aspect of one of the conflicts stemming from this dichotomy of legislative power is a legal struggle in the area of the debtor-creditor relationship. The center of the dispute in this area is a controversy concerning the power of a state legislature to pass laws with respect to the debtor-creditor relationship when Congress has enacted a bankruptcy act. The enactment of a national bankruptcy law by Congress extinguishes the power of the state to legislate in the area covered by the act. To what extent a bankruptcy act restricts the state's power to provide remedies to creditors and debtors is not completely settled. However, a line of judicial decisions extending over a century and a half has established certain principles which confine the state's power over these matters. When a state statute is in question, these principles are applied in the determination of whether the legislature has transgressed the limitations which have been placed upon it.

The Wisconsin Legislature, as the legislatures of other states, is involved in the struggle of trying to retain control over certain areas of the debtor-creditor relationship without running afoul of the Bankruptcy Act.1 However, in 1956 Judge Swaim of the Seventh Circuit discovered that the Wisconsin Legislature had exceeded its powers with respect to certain provisions of Chapter 128 of the 1951 Statutes.2 One year later, the Wisconsin Legislature amended Chapter 128 in an attempt to eradicate those provisions which had been held to be inoperative due to the existence of the Bankruptcy Act.3 In order not to relinquish control over the debtor-creditor relationship in this particular area, the Legislature has afforded a different remedy to creditors in place of the deleted one. Viewing this substituted statutory remedy in the light of past judicial decisions, a determination can be made that the same fate will befall it that occurred to the former one.

A conclusive determination as to what constitutes a conflict between the bankruptcy act and a statute of a state has not been formulated despite the many decisions on the subject. Therefore, to ascertain

---

whether the Wisconsin provisions run contrary to the provisions of the Bankruptcy Act, a brief review of the history of bankruptcy laws in the United States and an examination of the National Bankruptcy Act and its interpretations are necessary.

An accurate determination of the doubtful provisions of the Wisconsin Statute is best served by analyzing them and by fitting their various features into the existing pattern of case law. But since the numerous features are dependent upon each other and form one remedy, they shall also be considered as a whole. In both instances, the questionable provisions will be contrasted to the limitations which, by the course of judicial decisions, have been placed upon the state’s power to legislate in the area of the debtor-creditor relationship.

Although it has yet to be established by any court that the Wisconsin Statute is in conflict with the Bankruptcy Act, if there be a determination that the Statute is suspended, it shall be incumbent upon the Legislature to again amend Chapter 128. Consequently, an incidental purpose of this article is to propose certain recommendations which will place the Wisconsin Statute in harmony with the Bankruptcy Act.

THE EFFECT OF THE BANKRUPTCY ACT ON STATE STATUTES

A preliminary condensation of the legal theory derived from a multitude of judicial decisions shall serve as a frame of reference in the discussion of the Wisconsin Statute. The purpose of this legal framework is to place in proper perspective the various arguments proposed against the validity of the Statute.

A state’s power to enact laws concerning the debtor-creditor relationship when a national bankruptcy act is in effect is controlled and regulated by a superstructure of legal rules. This theoretical stratum is composed of an operational structure and a legal structure. The former structure consists of the basis by which the state law in conflict with the Bankruptcy Act is rendered void, whereas, the latter structure is composed of the tests which determine whether the laws do conflict with the Bankruptcy Act.

The basis of the operational structure is the authority of Congress to enact bankruptcy laws. This Congressional power stems from Article 1, Section 8, Clause 4, of the Constitution which gives the national legislature the broad power “to establish ... uniform laws on the subject of bankruptcies throughout the United States.” This power is effectuated by the general grant which confers on the Congress the authority “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers. ...”4 Prior to the formation of the Union, each state had the power to enact bankruptcy legislation. Upon the adoption of the Constitution, the power was then vested in Congress

as supreme and exclusive,\(^5\) but the states still retain the authority to enact bankruptcy legislation if Congress does not have an act in force.\(^6\) The enactment of a national bankruptcy law by Congress merely suspends the power of the state to pass similar legislation.\(^7\) Conversely, the repeal of a bankruptcy law would remove the disability of the state and it could then provide remedies for creditors and debtors which cover the same subject matter as a Congressional enactment.

The history of bankruptcy legislation by Congress began at the turn of the 20th century. The present Bankruptcy Act is a composite of the Act of July 1, 1898,\(^8\) and sixty amendatory acts. Three previous bankruptcy acts had been enacted, but each of them were of short duration.\(^9\)

The application of the operational structure to state statutes regulating the debtor-creditor relationship is not overwhelmingly complex. Once the legal structure has been found to apply, the operational structure is set in motion. By this rigid mechanical procedure, the state statute is rendered inoperative. The various theoretical steps in the operational structure follow in succession as they are logically applied. The first step is the determination that the state statute is suspended inasmuch as it is in conflict with the national bankruptcy act. After that process, the statute is then declared void,\(^10\) the result of its suspension. Following this sequence is the pronouncement that the provisions of the statute are inoperative.

As pointed out previously, a statute of a state cannot be rendered void unless it has been found to be in conflict with the national bankruptcy act. A state statute is in conflict with the act if it is determined that it is an insolvency law. This determination is conducted by the application of the legal structure to the state statute. Unlike the operational structure, this process is more intricate due to the various tests which compose the legal structure. These tests which have been developed by the courts over a number of years vary principally in the degree

\(^5\) 6 AM. JUR. Bankruptcy §11 (1950).
\(^7\) Ogden v. Saunders, 7 U.S. (3 Wheat.) 213 (1827). This view was early recognized by some states: Baxter County Bank v. Copeland, 114 Ark. 316, 169 S.W. 1180 (1914); Rockville National Bank v. Latham, 88 Conn. 70, 89 Atl. 1117 (1914); Pelton v. Sheridan, 74 Ore. 176, 144 Pac. 410 (1914); Duryea v. Muse, 117 Wis. 399, 94 N.W. 365 (1903); Hasbrouck v. La Febre, 25 Wyo. 367, 152 Pac. 168 (1915). For a discussion of some earlier views, see 11 Mich. L. Rev. 60 (1912).
\(^8\) Supra note 1.
\(^10\) International Shoe Co. v. Pinkus, 278 U.S. 261 (1929). For a criticism of this case, see 27 Mich. L. Rev. 696 (1929). Cf., 42 Harv. L. Rev. 823 (1929). However, there are two views with respect to the effect of suspension. One view holds that the state law is void. 29 Colum. L. Rev. 519 (1929); 11 Marq. L. Rev. 101 (1926). The other view holds that the state statute is not rendered entirely void. 49 Yale L. J. 1090, 1091, n. 12 (1940).
of their generality. Arranging these standards according to their universality, figuratively speaking, causes the legal structure to have a veneer-like quality. Nevertheless, these tests are consistent with one another, and their differences are attributed to the fact that they approach the state's power from divergent but not unassociated bases. The application of these tests to particular statutes illustrates their functionability as well as their over-lapping nature. For instance, if a criterion lower in the legal structure is applicable to a state statute, another test situated higher in the structure can likewise apply. Yet, if one test is not pertinent, the state statute can fall under the purview of a more general test. In any event, a state statute is suspended because it is in the realm of one of the tests regardless of which gauge applies. The consequence of having a state law considered in the sphere of the legal structure is the determination that it is in conflict with the aims and purposes of the national bankruptcy act.

The basis of the legal structure is the classification of each remedy provided by the state legislature into either an insolvency law or a non-insolvency law. An insolvency law arises from an invalid exercise of the state legislature whereby the state enacts a statute which conflicts with the national bankruptcy act. Hence, the mere existence of the national bankruptcy act suspends such laws.

On the other hand, the state has power to pass certain statutes which give the debtor and the creditor rights which are not affected by the mere passive presence of the bankruptcy act. However, actions performed pursuant to such state laws must be completed within four months prior to an invoking of the national bankruptcy act.\(^{11}\) The state statute itself is not suspended by the operation of the bankruptcy act; however, the acts done pursuant to the statute within the four month period are affected.

The jurisdiction of the trustee in bankruptcy is extinguished in this latter type of statute by the passage of four months. However, under an insolvency law, the trustee in bankruptcy never loses his jurisdiction. Consequently, the controversy usually arises when the trustee in bankruptcy attempts to set aside certain acts of the debtor and creditor on the ground that they were performed under an insolvency law. The debtor or creditor shall respond to this argument by contending that the state statute was not an insolvency law and that the four month period has passed, thus expiring the jurisdiction of the trustee over these matters.

The determination of whether a state statute is insolvency legislation is dependent upon the tests employed by the courts. Therefore, the commencement of the discussion of the Wisconsin Statute necessitates a review of the judicial tests which comprise the legal structure.

It must be pointed out that an application of these broad tests to the provisions of Chapter 128 will not prove to be illuminating. However, these tests must be considered in the light of the specific statutory provisions from which they were derived. It has already been discussed that the purpose of these tests is the determination that the state statute is insolvency legislation, and to ascertain this fact thereby renders the state law in conflict with the aims and purposes of the Bankruptcy Act.\textsuperscript{12}

One of the criterion employed is whether the statutory proceeding was valid at common law.\textsuperscript{13} Another is whether the object sought to be accomplished and the end attained is the same in effect as that sought to be achieved by the bankruptcy court.\textsuperscript{14} A test which has particular value is whether the state law is an involuntary proceeding.\textsuperscript{15} A general touchstone is whether the same subject matter covered by the Bankruptcy Act is contained in the state statute.\textsuperscript{16} More meaningful is the standard which determines that the state law contains the elements of insolvency legislation.\textsuperscript{17}

Research will reveal other tests that are employed by the courts, but they are usually subsidiary to and branch out from the ones enumerated above. An example of such a secondary test is one which ascertains whether the basic characteristic of the state statute is the insolvency of the individual or corporation against whom the proceeding is directed.\textsuperscript{18} Another is whether the state law offers a choice to the creditor of either proceeding under the state statute or the Bankruptcy Act.

Voluntary Assignments for the Benefit of Creditors

Chapter 128 is entitled “Creditors’ Actions” and is primarily concerned with the regulation of voluntary assignments for the benefit of creditors. Such an assignment is defined as a voluntary transfer by a debtor of his property to an assignee in trust to apply the property or proceeds thereof to the payment of his debts and the return of the surplus, if any, to him.\textsuperscript{19} Although a voluntary assignment is the fourth act of bankruptcy\textsuperscript{20} the courts have uniformly and consistently held that

\textsuperscript{12} In re Wisconsin Builders Supply Co., supra note 2; International Shoe Co. v. Pinkus, supra note 10; Stellwagen v. Clum, 245 U.S. 605 (1918).
\textsuperscript{13} In re Wisconsin Builders Supply Co., supra note 2; Johnson v. Star, 287 U.S. 529 (1933); Boese v. King, 108 U.S. 379 (1883).
\textsuperscript{14} In re Salmon & Salmon, 143 Fed. 395 (W.D. Mo. 1906).
\textsuperscript{15} In re Wisconsin Builders Supply Co., supra note 2; In re Weedman Stave Co., 199 Fed. 948 (E.D. Ark. 1912); Mayer v. Hellman, 91 U.S. 496 (1875).
\textsuperscript{16} In re Wisconsin Builders Supply Co., supra note 2; First Nat. Bank in Albuquerque v. Robinson, 107 F.2d 50 (10th Cir. 1939). Cf., Kreft, What is the “Subject of Bankruptcies”?, 6 Temp. L.Q. 141 (1932).
\textsuperscript{17} In re Weedman Stave Co., supra note 15.
statutes concerning them are merely regulatory in nature and are not to be considered insolvency legislation. Consequently, those provisions of Chapter 128 which systematize voluntary assignments for the benefit of creditors are not drawn into question.

Since the state then has the authority to legislate with respect to this aspect of the debtor-creditor relationship, the theory which sustains this power becomes significant in the determination of the doubtful provisions of Chapter 128. The reason for the validity of such statutes is that assignments for the benefit of creditors existed at common law long before the adoption of the Constitution and the subsequent passage of the Bankruptcy Act. Inasmuch as the enactment of the Bankruptcy Act did not abrogate the common law right to assign for the benefit of creditors, statutes regulating this common law right were not suspended by the Act. This reasoning, which had been adopted by an early Texas Court, was approved by the Supreme Court when it quoted the Texas Court:

"The statute in question . . . proscribes a mode for the administration of the estates of insolvents under assignments made by the debtors themselves, which would be good at common law, unaidered by the statute, and, like any other trust, could be enforced in a court of equity in the absence of a statute providing a mode of administration."  

The relationship of the National Bankruptcy Act to state statutes regulating the voluntary assignments was further clarified in another state decision,

The word 'assignment' had, at the time this statute was adopted, a well defined meaning, understood by all the people, and it has no different meaning in said act. . . . According to the common acception of the term, it is a transfer without compulsion of law by a debtor of his property to an assignee in trust, to apply the same or the proceeds thereof to the payment of his debts, and return the surplus, if any, to the debtor.

Although a state has the power to regulate voluntary assignments for the benefit of creditors, this power is not without limits. The extent to which such statutes can furnish rules of procedure has not been settled, and it was stated that

---


22 In re Wisconsin Builders Supply Co., supra note 2.


[t]here is no clear-cut definitive test by which to determine whether a state statute dealing with assignments for the benefit of creditors is so essentially a bankruptcy law as inherently to conflict with, and be suspended by the Federal Act.\textsuperscript{25}

The general limitation which has been placed upon this type of statute is that its provisions cannot expand the contractual aspects of the common law assignment by purporting to discharge the debtor upon compliance with the terms of the debtor's instrument of assignment. Whatever procedural steps are specified, extinguishing debt liability, or any remaining portion thereof, the state law gets into the realm of bankruptcy legislation.\textsuperscript{26}

Although a state statute regulating voluntary assignments establishes a comprehensive system of administering and distributing estates of insolvents to the creditors, this system has escaped the ominous effect of the Bankruptcy Act since such voluntary assignments were valid at common law.\textsuperscript{27} Therefore, the provisions of Chapter 128 which regulate voluntary assignments for the benefit of creditors are not in conflict with the Bankruptcy Act.

Be that as it may, Sections 128.08 and 128.17, coupled with related sections, cannot be sustained by the above argument because they do not purport to regulate a voluntary assignment. Instead, upon certain acts of the debtor, Section 128.08 provides for a proceeding through which the creditor has the property of the debtor sequestrated by the court. Likewise pursuant to this section, the property is transferred to a receiver who distributes it among the creditors under Section 128.17. In effect, these provisions operate as a forced assignment of the property of the debtor to his creditors and are as comprehensive as the sections regulating voluntary assignments. However, the theory which sustains the validity of the state statutes regulating voluntary assignments cannot be invoked with respect to Sections 128.08 and 128.17. The common law does not provide the creditor with the right to proceed against a debtor and to have the property distributed among the remaining creditors. These rights are purely statutory and have no basis in the common law, and since they in effect operate similarly to the Bankruptcy Act, a determination can be made upon this ground that the state legislature does not have the power to provide the creditor with these rights.

**Provision for Discharge**

It must be noted that Chapter 128 does not contain a discharge provision whereby the debtor's obligations are abolished once he or the

\textsuperscript{25} 5 Remington, Bankruptcy §2114 (1953).
\textsuperscript{26} Ibid.
\textsuperscript{27} Pobreslo v. Joseph M. Boyd Co., supra note 21. For a discussion of the effect of the Bankruptcy Act on state statutes regulating voluntary assignments for the benefit of creditors, see 24 Va. L. Rev. 66 (1937); 42 Yale L. J. 1140 (1933).
creditor takes advantage of the statute. No searching issue exists as to what effect the Bankruptcy Act has on a statute which has a discharge provision—it is unquestionably fatal! The reason that this test is conclusive is that the discharge provision is a subject matter of the Bankruptcy Act, and its existence will *ipsa facto* render the state law void as an insolvency law. 28 The absence of a discharge provision and its consequences with respect to the state statute is a reoccurring theme in decisions concerning insolvency laws. The courts, however, have no difficulty in dispensing this ubiquitous issue. They, along with legal writers, are in agreement that a discharge provision is not an essential element of an insolvency law; a state statute can be considered an insolvency law on any one of the various grounds. 29 Therefore, the failure of the Wisconsin Legislature to include a discharge provision in Chapter 128 does not, of itself, cause the Statute to be valid.

**INVOLUNTARY PROCEEDINGS**

One of the grounds upon which to sustain the invalidity of a state statute is to prove that it is an involuntary proceeding. 30 At one time there was a split of authority as to whether involuntary proceedings were suspended by the Bankruptcy Act; 31 however, the present tendency of the federal courts is to hold that involuntary proceedings are suspended. 32

As to what constitutes an involuntary proceeding is ascertained by analyzing the Bankruptcy Act and the decisions concerning this test. Drawing from the provisions of the Bankruptcy Act, proceedings are classified as voluntary and involuntary. 33 Voluntary proceedings are initiated by the debtor, and, on the other hand, involuntary proceedings are initiated by a creditor or by creditors. 34 Therefore, proceedings are considered from the standpoint of the debtor and not from that of the creditor.

A distinction, however, must be made between involuntary proceedings (which cause a statute to become an insolvency law) and provisions

---


29 In re Lanquist, 70 F.2d 929 (7th Cir. 1934). See, also, 49 Yale L. J. 1090, 1092 (1940).

30 In re Wisconsin Builders Supply Co., supra note 2.


33 1 Collier, Bankruptcy §3.03 (1956). The elements of an involuntary proceeding are the presence of the ratable distribution along with an involuntary suit. 8 Wis. L. Rev. 282 (1933).

34 1 Collier, Bankruptcy §3.03 (1956).
of a statute which afford a creditor a means by which he can enforce his judgment against the debtor. Such latter rights are singular in nature; they do not extend the rights of the creditor to the point whereby he has the entire property of the debtor distributed among all the creditors.

Viewing Sections 128.06 and 128.17 as a whole, they fall under the characteristics of an involuntary proceeding. These sections bestow more than the mere right of a creditor to enforce a judgment against the debtor; they contemplate the antithesis of a voluntary proceeding. Section 128.06 is available only to the creditor, and under this section he has the right to have the property of the debtor sequestrated. Such a proceeding from the standpoint of the debtor is highly involuntary. The other characteristic is fulfilled inasmuch as Section 128.17 provides for the distribution of all of the property of the debtor to both secured and unsecured creditors.

Comparison of the Present Statute with the Former Valid One

In the comparison of the provisions of the present statute with the invalid one of 1951, particular attention should be paid to the case of *In re Wisconsin Builders Supply Co.* This case held that Sections 128.06 and 128.08 of the 1951 Statutes were suspended for the reason that they provided for an involuntary proceeding. Under Section 128.06(1951), the creditor could maintain a proceeding against the insolvent debtor who had committed one of the five enumerated acts, which acts were five of the six acts of bankruptcy as defined by the Bankruptcy Act. Pursuant to this section, the petitioned court initially had to find whether the debtor was insolvent and whether he had instituted a proceeding to vacate the attachment, execution or garnishment, or whether he secured a release of it. After this finding and upon the petition of two or more creditors whose debts were $200 or over, the court would appoint a receiver and distribute the property pro rata among the creditors. Circuit Judge Swaim found that there was no doubt that this section was suspended because it was in conflict with the subject matter covered by the federal law.

In the comparison of the two statutes, close attention must be paid to the Wisconsin definition of insolvency, which has not changed since 1937. A significant feature of the Wisconsin definition under Section

---

35 *Supra* note 2.
37 *In re Wisconsin Builders Supply Co.*, *supra* note 2, at 654. The validity of the 1951 Statute was challenged in the same year that the Wisconsin Legislature enacted the law creating the Statute. 24 VA. L. REV. 66 (1937).
128.04 is that it not only covers the same subject matter as the Bankruptcy Act definition, but it also states that a person shall be deemed insolvent "if an execution be returned unsatisfied or if he shall make an assignment for the benefit of creditors." The importance of this definition, which is broader than the Bankruptcy Act definition, shall be illustrated in the proceedings brought against corporations.

Under Section 128.08(1) of the 1951 Statutes, the court was given the power to sequestrate the property of a debtor and to appoint a receiver therefor when a petition under Section 128.06 was filed. Sequestration and the appointment of a receiver could be done also when an execution against a domestic corporation was returned unsatisfied in whole or in part. With respect to Section 128.08, the court summarily dismissed it as being invalid in so far as it was interrelated with Section 128.06.

It must be pointed out that both the 1951 Statute under Section 128.06 and the present Statute under Section 128.08 combined with Section 128.17 provided for the administration of the debtor's property. Disregarding for the present Section 128.17(1959), an analysis and comparison of the former sections and their effect upon the debtor reveals that they are closely akin to the present provisions of Section 128.08. Of particular significance in the line of approach to the analysis and comparison is the court's consideration of Section 128.08(1951). Judge Swaim stated that, "In so far as Section 128.08 is interrelated with Section 128.06 it is subject to the same objection as this later one." [Emphasis supplied.] It then must be borne in mind that since Section 128.06(1951) was invalid in its entirety, each section of it was invalid. Following this line of reasoning, if any present section is found to be similar to any previously held invalid section, it, likewise, is invalid. Consequently, the analysis and comparison shall proceed with the intricacies of relating the two sections of 1951 and comparing them with the present section. Since Section 128.08(1959) is generally worded as Section 128.08(1951), these two sections shall be the basis of analysis. From this basis, the analyzed parts of Section 128.08(1959) shall be compared with Section 128.06(1951). This basis of comparison shall be the grounds upon which the creditor can proceed against the debtor.

The remedies provided by Section 128.08(1)(1959) and Section 128.08(1)(1951) are the same and the first paragraph of the two sections is worded exactly like:

The court within the proper county may sequestrate the property of a debtor and appoint a receiver therefor.  

---

40 Supra note 38.
41 In re Wisconsin Builders Supply Co., supra note 2, at 654.
42 Wis. Stat. §128.08(1) (1959) and Wis. Laws, 1937, ch. 431 which created Wis. Stat. §128.08(1) (1951) hereafter referred by the latter citation.
However, the grounds for obtaining the remedies under the two sections are dissimilar:

[1959] When an execution against a judgment debtor is returned unsatisfied in whole or in part.43

* * * *

[1951] When a petition under Section 128.06 shall be filed.44

Relating now to Section 128.06(1951), a petition under that section can be filed when two or more of his creditors owning claims of not less than two hundred dollars in the aggregate against an insolvent debtor whenever such debtor shall have within four months prior to the commencement of such action: [The Statute then listed the five acts any of which would have been a ground for commencing the suit.]45

Although these acts have been abolished, act (c) under the invalid Statute is similar in effect as a ground in Section 128.08(1)(a) (1959) since (c) read:

Suffered or permitted, while insolvent, any creditor to obtain a lien through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such lien vacated or discharged such lien;46

Comparing Section 128.08(1)(a)(1959) with Section 128.06(1)(c)(1951), it is readily observed that the ground for procuring the remedy under the present section is broader than the ground under the former one. Under the present section, the limitations and qualifications which the former section contained no longer have to be complied with by the creditor. All that is required is that the execution against a judgment debtor be returned unsatisfied in whole or in part. Thus, since Section 128.08(1)(a)(1959) is broader in effect than Section 128.06(1)(c)(1951), the present section will have the same objection as the former one. More simply stated, since a creditor could not have proceeded under Section 128.08(1)(a)(1951) and use Section 128.06(1)(c)(1951) as a ground for the suit, neither can a creditor proceed under Section 128.08(1)(a)(1959) because the ground here is more comprehensive than the previous invalid one.

Using the same basis of approach to Section 128.08(1)(b)(1959), which deals with corporations, will yield the same results.

The court within the proper county may sequestrate the property of a debtor and appoint a receiver therefor:47

43 Wis. Stat. §128.08(1)(a) (1959). Note that when an execution is returned unsatisfied, the debtor is classified as an insolvent under the purview of Section 128.04 (1959).
44 Wis. Stat. §128.08(1)(a) (1951).
45 Wis. Stat. §128.06(1) (1951).
46 Wis. Stat. §128.06(1)(c) (1951).
47 Supra note 42.
When a corporation has been dissolved or is insolvent or is in imminent danger of insolvency or has forfeited its corporate rights.\textsuperscript{48}

* * * * *

When an execution against a domestic corporation is returned unsatisfied in whole or in part.\textsuperscript{49}

Comparing Section 128.08(1)(b) (1959) with Section 128.08(1)(b) (1951) reveals that the present provision is more liberal because there are four situations listed in the present section to only one enumerated in the former one.

The Wisconsin definition of insolvency now plays an important role in proving that the former invalid Statute was more limited in scope than the present Statute. Under the former section, insolvency was not a ground upon which a creditor could bring a proceeding against a corporation. It was pointed out earlier that to have an execution returned unsatisfied was included in the definition of insolvency. In addition to this former limited ground, a creditor now can proceed against a corporation,

whenever the aggregate of [its] property, exclusive of any property which he may have conveyed, transferred, concealed or removed or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation be sufficient in amount to pay his debts... or if [it] shall make an assignment for the benefit of creditors.\textsuperscript{50}

It must be remembered that a corporation could also be proceeded against under Section 128.08(1)(a) (1951) by employing Section 128.06 (1)(c) (1951) as the basis for bringing the suit. With respect to Section 128.08(1)(b) (1959), the corporation merely has to be in one of the four enumerated situations. Comparing these situations with the acts under Section 128.06(1)(1951) it is readily perceived that the creditor can proceed against the debtor sooner under the present Statute than he could under the former one. Employing the present Statute, the corporation merely has to be in imminent danger of insolvency or at least be insolvent before the creditor can proceed. Hence, the creditor now can commence his action prior to the commitment of an act (of "bankruptcy") which was needed under the former invalid Statute. From this standpoint, the creditor has a longer period in which to bring the suit than the Bankruptcy Act itself provides. Since the former Statute covered the same subject matter as the Bankruptcy Act and was considered invalid, the present Statute which bestows the creditor with more extensive coverage than the latter Statute is also invalid.

Another comparison can be made with the limitations placed upon

\textsuperscript{48} Wis. Stat. §128.08(1)(b) (1959).
\textsuperscript{49} Wis. Stat. §128.08(1)(b) (1951).
\textsuperscript{50} Supra note 38.
creditors in Section 128.06(1) (1951) and the lack of these limitations in Section 128.08(1) (b) (1959). Under the former section, there had to be two or more creditors who had claims of "two hundred dollars" or more, and the "act" had to have been completed within four months. Alleging these facts, the creditor could then proceed under the section to seek his relief. However, under Section 128.08(1) (b) (1959) there are no limitations, and one creditor can proceed against the corporation despite the smallness of his claim or the length of time of the corporation's financial difficulties.

A close comparison of the acts enumerated in the invalid Section 128.06(1951) with the grounds enumerated in Section 128.08(1)(b) (1959) will disclose that the bases upon which to bring actions are considerably extended by the latter section. But in no instances are the bases in the present Statute limited as they were in the former Statute.

Comparing the first "act" under the invalid Section 128.06(1)(a) (1951) with the first portion of the Wisconsin definition of insolvency will reveal that they are worded exactly alike.

[1951] Conveyed, transferred, concealed or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay or defraud his creditors, or any of them;51

The distinction between the two sections is that under Section 128.06 (1)(a) (1951) it was a ground for bringing a suit against a corporation whereas, in the definition, the amount of this property is excluded in determining the insolvency of the corporation. The fact remains, however, that if a corporation committed the "act" described in Section 128.06(1)(a) (1951) and this amount of property was excluded from the corporation's assets, it is doubtful if it would have sufficient assets left to pay its remaining debts. If this fact be the case, the corporation is considered insolvent, and the creditor's suit arises. Thus, in effect, to proceed against a corporation under Section 128.08(1)(b)(1959) by alleging insolvency as the basis would be similar as using the invalid Section 128.06(1)(a) (1951) as the basis.

Three other acts listed in former Section 128.06(1)(1951) concern insolvent corporations. Under these sections an insolvent corporation could be proceeded against if it,

[1951] (b) Transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or52

(c) Suffered or permitted, while insolvent, any creditor to obtain a lien through legal proceedings, and not having at least five days before a sale or final disposition charged such lien; or53

51 Wis. Stat. §128.06(1)(a) (1951).
52 Wis. Stat. §128.06(1)(b) (1951).
53 Wis. Stat. §128.06(1)(c) (1951).
Admitted in writing his inability to pay his debts and his willingness to be adjudged insolvent on that ground. However, under the purview of Section 128.08(1)(b) (1959) the corporation does not have to commit any of these "acts" in addition to being insolvent. The fact of insolvency alone is a sufficient basis upon which to proceed against the corporation.

A detailed comparison is unnecessary to disclose the fact that the ground of being in imminent danger of insolvency would greatly extend the basis of the proceeding.

Inasmuch as the Wisconsin definition of insolvency includes the making of an assignment for the benefit of creditors, a corporation can be proceeded against under Section 128.08(1)(b) (1959) if the corporation has made such an assignment. By comparing this basis with the "act" contained in Section 128.06(1)(d) (1951), it shall be illustrated that that ground was more limited than the present ground. Under the invalid section, the assignment for the benefit of creditors had to be made fraudulently or collusively. Since these two elements have been eliminated by Section 128.08(1)(b) (1959), the extention of this basis is salient.

In a summary of these comparisons, the discovery is that former invalid Section 128.08 (1951) compared with Section 128.08 (1959) are substantially the same, with the important exception that the present Statute offers the creditor more liberal grounds. This discovery bears true when the former invalid sections are compared with the present sections concerning corporations. With respect to corporations, the bases for the creditors suit under Section 128.08(1)(b) (1959) is broader in scope than the "acts" enumerated in the former invalid Section 128.06(1)(1951). Since the invalid section was considered to cover the same subject matter as bankruptcy, the same objection is made to the present section.

The difficulty with analyzing and comparing the present Statute with the former one is that the forest may not be seen due to the closeness of the trees. The main obstacle to the validity of the former Statute is that it provided for an involuntary proceeding. Another obstacle in its path is the fact that it covered the same subject matter as did the Bankruptcy Act. These same objections are contended in regard to the present Statute. Therefore, the value of the analysis and comparison is not diminished by this intricate approach since it has illustrated that the differences between the invalid Statute and the present one are minimal and, in certain aspects, nominal.

**Provision for Distribution**

As pointed out, there are a variety of tests which are employed in

\[54\text{ Wis. Stat. §128.06(1)(e) (1951).}\]
the determination of whether a state statute regulating the debtor-creditor relationship is an insolvency law. The over-lapping nature of these tests is illustrated in the following discussion of the effect of distribution of the debtor's property on state statutes with respect to the Bankruptcy Act. An application of three tests discloses that a provision for distribution causes the state statute to be an insolvency law. The term distribution for the purposes of the following discussion means the administration of the debtor's property to both secured and unsecured creditors.

Section 128.08 provides for the appointment of a receiver, and the duty of the receiver according to Section 128.10 is to "administer [the] estate pursuant to the provisions of this chapter." This administration is performed under Section 128.17. Consequently, the power of the Wisconsin Legislature to provide for administration shall now be brought into focus.

At the outset, a distinction must be made between distribution under the provisions governing voluntary assignments for the benefit of creditors and distribution pursuant to Section 128.08 related with Section 128.17. Noted previously, the passage of the Bankruptcy Act did not abrogate the common law rights of creditors and debtors to have voluntary assignments. Therefore, state statutes regulating such assignments are valid. An essential feature of a voluntary assignment is the orderly distribution of the debtor's property to all classes of creditors. Thus, the regulation of distribution by statutes controlling voluntary assignments is also valid. Their validity is sustained under the theory that it was valid at common law to distribute the debtor's property in voluntary assignment cases. However, outside of this instance, the courts have not discovered distribution to be an essential element in the operation of any other common law remedy.

A provision for distribution runs afoul of the test of whether the object sought to be accomplished and the end attained is the same in effect as that sought to be achieved by the Bankruptcy Act. The National Bankruptcy Act provides that the bankruptcy court should

[c]aused the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto.

... [Emphasis supplied.]\(^5\)

The Bankruptcy Act has two purposes, the discharge of the debtor and the distribution of his assets to his creditors.\(^7\) Prior discussion leads to the conclusion that a state statute which provides for the discharge of the debtor is clearly an insolvency law, but that this test of insolvency

\(^5\) Wis. Stat. §128.06(1) (d) (1951).
\(^7\) Burlingham v. Crouse, 228 U.S. 459 (1913); In re Munford, 255 Fed. 108 (E.D. N.C. 1919).
is not the sole one.\textsuperscript{58} Reflecting this principle again is the case of \textit{In re Leslie}\textsuperscript{59} in which the court stated:

The main purpose of the bankrupt law is to prevent preferences, and \textit{secure a fair and an equitable division of the bankrupt estate among the creditors}, not to grant discharges. [Emphasis supplied.]\textsuperscript{60}

The conclusion that distribution is the main purpose of the Bankruptcy Act is also brought out by a leading secondary source which states that "distribution" is the "ultimate aim and goal of the entire proceeding."\textsuperscript{61}

Viewing the provision for distribution in the light of case law and text writers, a state statute which provides for the distributing of the estate of the debtor to all creditors in effect achieves the same end or purpose as that sought by the Bankruptcy Act. Therefore, distribution as provided for by Section 128.08 and Section 128.17 is insolvency legislation.

Judicial interpretations of the Bankruptcy Act and the application of the second test in determining whether a state statute is an insolvency law also leads to the conclusion that the provision for distribution of the assets of the insolvent debtor is the subject matter of the Act. In \textit{Hanover National Bank v. Moyses},\textsuperscript{62} the Supreme Court stated that,

[\textit{t}he subject of "bankruptcies" includes the power to discharge the debtor from his contracts and legal liabilities, as \textit{well as to distribute his property}. [Emphasis supplied]\textsuperscript{63}

Inasmuch as discharge is not essential, distribution as provided by the Wisconsin Statute is insolvency legislation because it covers the same subject matter as the Bankruptcy Act.

The third test in this discussion of the effect of distribution is whether the state law contains the elements of an insolvency law. Generally speaking, all the elements of an insolvency law must be present in order for it to be considered invalid. However, the element of distribution is particularly significant in that its absence in certain situations is the test for the validity of the statute.

Distribution of the assets of the debtor among the creditors is an element of an insolvency law.\textsuperscript{64}

The elements of an insolvency law are insolvency, surrender of property, \textit{its administration by a receiver or trustee}, distribution

\textsuperscript{58} \textit{Supra} note 29.
\textsuperscript{60} Id. at 410.
\textsuperscript{61} \textit{6} \textit{Remington, Bankruptcy} §2777 (1952).
\textsuperscript{62} \textit{Supra} note 28.
\textsuperscript{63} Id. at 188.
\textsuperscript{64} \textit{In re Weedman Stave Co.}, \textit{supra} note 15.
of the assets among the creditors, and a provision for priorities or other matters not permissible in the absence of such a statute. [Emphasis supplied.] 65

In the Weedman decision, the court also stated that a provision for discharge of the debtor from the unpaid balances of his debt is not essential to an insolvency law. 66

There is a striking similarity of the provisions of the Arkansas Statute considered in the Weedman case and the provisions of Sections 128.08 and 128.17. The Arkansas Statute provided that where a debtor became insolvent, a creditor could petition the court to have it appoint a state receiver which would distribute the property of the debtor among the creditors:

By reference to the statutes of Arkansas . . . it will be found that this act contains every one of these [insolvency] essentials. Section 949 provides for preferences for wages and salaries of laborers and employés and prohibits all others; section 750 authorizes the court to take charge of all of the assets of the insolvent corporation and distribute them pro rata among the creditors after paying the wages and salaries due laborers and employés; section 951 directs all preferences obtained within 90 days whether by attachment, confession of judgment, or otherwise, to be set aside by the chancery court, and the creditor be required to release his preferences and accept his pro rata share in the distribution of the assets of the insolvent corporation; and section 952 requires notice to be given to the creditors to present their claims within 90 days or be barred. 67

A detailed comparison of the Wisconsin Statute with the Arkansas Statute need not be made for the purpose of illustrating the similitude between their essential characteristics. Inasmuch as the Arkansas Statute had the essentials requisite of an insolvency law, it follows that the Wisconsin Statute does as well.

Conversely speaking, a statute which does not provide for the distribution of the assets of an insolvent debtor but merely provides for a creditors' proceeding for the enforcement of liens is not an insolvency law. 68 This principle was alluded to by the Supreme Court in the consideration of a West Virginia Statute. This Statute provided that after creditors have obtained and docketed judgments constituting liens on the real estate of a debtor they have a right to institute a creditors' suit

65 Id. at 950.
66 Ibid. With respect to insolvent private state banks, the Bankruptcy Act confers upon courts of bankruptcy jurisdiction the exclusive and paramount power to adjudge private bankers bankrupt and to administer their property. State laws assuming to confer upon state officers or courts authority to administer the property of such banks are suspended and must give way to the Bankruptcy Act. In re Sage, 224 Fed. 525 (E.D. Mo. 1915), aff'd, 236 Fed. 644 (8th Cir. 1916).
in a state court to marshal and enforce the liens and sell the real estate subject thereto. The court held that it was not an insolvency statute because

[italics]his statute says nothing about a distribution of assets amongst general creditors... It is merely a proceeding in equity to do what would be done by a sheriff or marshal under an appropriate writ for the sale of real estate in execution at law. [Emphasis supplied.]\(^{69}\)

However, the Wisconsin Statute does contain a provision for distribution, and it is not a mere proceeding whereby creditors' liens are enforced. Therefore, the element of distribution in the provisions of Sections 128.08 and 128.17 cause these sections to be insolvency legislation.

**Winding Up the Affairs of a Corporation**

Another legal ground for suspending a state statute because it is insolvency legislation is that it has the same operation and effect as the Bankruptcy Act. The operation of Section 128.08 and Section 128.17 against an insolvent corporation or a corporation which is in imminent danger of insolvency is similar to the winding up the affairs of a corporation. Although the corporation exists after the proceeding, it has only nominal existence for it does not have any assets. A dissolution proceeding could easily erase the name of the corporation from the record books. Also, the distribution of the corporate property would in effect discharge the debts of the corporation from any remaining liabilities.\(^{70}\) Inasmuch as the defunct corporation after a suit under Sections 128.08 and 128.17 has no assets, it would be futile to bring an action against it. And once the corporation is wiped off the books, it would be impossible to bring actions against it since it has no legal existence.

The parade of decisions with respect to statutory proceedings which wind up the affairs of insolvent corporations strongly holds that they are suspended by the Bankruptcy Act.\(^{71}\) Therefore, the Wisconsin Statute can be defeated upon the ground that it has the same effect as a statute which provides for the winding up of the affairs of an insolvent corporation.

\(^{69}\) Id. at 329.

\(^{70}\) In re Wisconsin Builders Supply Co., supra note 2, at 652. See 27 Miss. L. J. 230, 234 (1956).

\(^{71}\) First Nat. Bank in Albuquerque v. Robinson, supra note 16, at 53; In re Watts and Sachs, 190 U.S. 1 (1903). For other cases holding this position, see 5 REMINGTON, BANKRUPTCY §2118 (1953). "State laws providing for the dissolution of a corporation are not suspended as in conflict with the Federal Bankruptcy Act, where insolvency or bankruptcy is not within the terms or contemplation of the law as a ground for dissolution." [Emphasis supplied.] 6 AM. JUR. BANKRUPTCY §11 (1950). Flying in the face of these holdings is a Connecticut Statute which provides that the affairs of a corporation can be wound up in a proceeding by a creditor upon either of two grounds, an unsatisfied execution or an insolvency admission. CONN. GEN. STAT. ANN. §33-382(5) (1960).
I. General

The doubtful provisions of the Wisconsin Statute, the involuntary proceeding and the distribution of the property of the debtor, were analyzed and were fitted into the existing pattern of case law. The determination of the invalidity of these provisions were viewed through the eyes of the many tests which have been developed by the courts. However, Section 128.08 provides for two remedies, receivership and sequestration, which must be considered before the determination becomes conclusive. It must be remembered that the passage of the Bankruptcy Act did not suspend the state's power to enact laws which had their foundation in the common law. Another principle that must be kept in mind with respect to the discussion of receiverships and of sequestration is that the state legislature cannot provide for remedies that did not exist at common law and which conflict with the Bankruptcy Act. The question then arises, how far can the legislature of a state extend the rights given through common law proceedings without stepping out of its legislative boundaries.

II. Receiverships

A general discussion of receiverships and the power of the legislature to provide for them would be too far afield from the purpose of this article. However, the appointment of receivers plays an important role in so far as the rights of creditors are concerned.

The remedy of appointing a receiver originated at an early date in the English courts of Chancery, and, consequently, the power of the state to provide for them has not been suspended by the passage of the Bankruptcy Act. A general definition of a receiver is that he is a person, natural or artificial, appointed by a court to take custody, control, and management of the property or funds of the debtor pending judicial action concerning them. However, receiverships are not considered a final remedy but rather a temporary remedy or status. Therefore, appointing a receiver is only part of the entire relief asked, and it is merely an ancillary or provisional remedy which is used in connection with an action pending for some other purpose.

The traditional concept of a receiver limits his use as merely an immediate agency through which the rights of a creditor are secured. The appointment of a receiver does not automatically clothe him with the power to distribute the property of the debtor. This power must be given to him by further legislation. The power of a receiver, then, is dependent upon the rights of the creditors or debtors whom he in a

---

74 75 C.J.S. Receivers §2 (1952).
sense is representing. It shall not be questioned that the receiver does have some power to distribute the property of the debtor in certain situations. However, this power is limited to only the situation where the creditor has a lien on the property. Therefore, if the creditor is secured, the state then has the power to provide him with a receiver to enforce his rights gained under the lien.

This right of the secured creditor exists independently of whether the debtor is solvent or insolvent. To extend this singular right of the creditor to the point that through a receiver he has the power to have all of the property of the debtor distributed pro rata is going far beyond his common law right to enforce his lien. And to bestow upon creditors, secured and unsecured alike, the right via a receiver to have all of the assets of an insolvent corporation administered amongst them is also greatly increasing their common law rights.

With respect to the Wisconsin Statute, Section 128.08 provides for the appointment of a receiver by the court for the purpose of administering the property of the debtor by distributing it among the creditors. Standing alone, receiverships are valid since they existed at common law; however, if

the receivership or trusteeship is initiated under a state statute which is in effect a state insolvency law tantamount to the bankruptcy legislation, then such receivership will be superceded by bankruptcy, whether or not within the four-month limit prescribed by clause (21), as such proceedings are utterly null and void.75

There are many facets of receiverships that shall not be examined but the preceding discussion has implied that the existence of the receiver under Section 128.08 can be discounted upon two grounds. The first ground is that the creditor at common law did not have the right to have the property of the debtor distributed among all the creditors. Therefore, the receiver who obtains his rights from the creditors and debtors is without this power. However, Section 128.08 contemplates that the receiver will administer the property of the debtor to both secured and unsecured creditors. The second ground alludes to the previous discussion. Since the purpose of the receiver in the Wisconsin Statute is for the same purpose as that of the Bankruptcy Act, namely, the distribution of the assets of the debtor, the receiver's powers are suspended by the Act. That is, the remedy of receivership is only ancillary to the main purpose of the Statute. If the ultimate remedy consists of an insolvency law, the provisional remedy (receivership), likewise, is invalid.

75 1 Collin, Bankruptcy §2.78 (1956). "Nor are provisions for a receivership of a corporation suspended as in conflict with the Federal Bankruptcy Act, where they create simply ordinary proceedings to enforce liens against the property of the defendant. . . ." 6 Am. Jur. Bankruptcy §11 (1950).
III. Sequestration

Generally, sequestration fits into the same category as receiverships. It is also a mere auxiliary remedy by which the court obtains possession and control of the property of the debtor. Historically speaking, sequestration was a process in Chancery proceedings by which the property of the debtor was taken into custody by the court for the purpose of creating a lien thereon. However, the writ which originated in England has all but vanished from the list of devices used by the courts in modern practice.

Sequestration by itself offers no relief, but it is employed in contemplation of giving relief by other measures in the final disposition of the proceeding. As receiverships, sequestration is inextricably interwoven into the purpose for which the proceeding is brought. Since this remedy is also dependent upon the ultimate purpose for which it is employed, if the legislature cannot enact laws with respect to a particular purpose, the means by which such a purpose is achieved, likewise, fails to be available to them.

The very nature of the sequestration causes the entire proceeding under Section 128.08 to become involuntary. It is this initial involuntariness that has raised the objection to this Section. Mere involuntariness does not suffice; it must be coupled with the administration of the assets of the debtor. Taken together, these two elements constitute what has traditionally been considered an involuntary proceeding. Therefore, since the Wisconsin Statute does provide for these two elements, it is suspended. Consequently, the remedy of sequestration as well as the remedy of receivership falls.

A. Sequestration of Corporate Assets

In addition to the above objection to sequestration as a whole, with respect to corporations which are insolvent or in imminent danger of insolvency, this remedy as provided in Section 128.08 is still unwarranted when it is viewed in its historical perspective. At common law the only way of enforcing a decree in Chancery was by attachment and sequestration. However, this method of attaching the property of the debtor has been abandoned inasmuch as modern statutes permit equity decrees to be enforced by execution in the same manner as judgments at law. Hence, this remedy had its roots in the common law and is not suspended by the Bankruptcy Act which retains the state legislature's power to provide for the remedy in state statutory form.

Prior to the passage of the 4th Act of Bankruptcy, it was the practice of some states to provide for the sequestration of an insolvent cor-

---

\footnotesize{\textsuperscript{76} 47 Am. Jur. Sequestration §2 (1943); 79 C.J.S. Sequestration §1 (1952).  
\textsuperscript{77} 79 C.J.S. Sequestration §1 (1952).  
\textsuperscript{78} Ibid.  
\textsuperscript{79} 79 C.J.S. Sequestration §1 (1952).}
poration's property and to provide for the winding up of the affairs of the corporation. This type of proceeding was initiated by a creditor after he had an execution returned unsatisfied or when the corporation was insolvent. An example of this type of statute was passed by the Tennessee Legislature. Under this statute a creditor of a corporation has the right to proceed against an insolvent corporation for the purpose of winding up the affairs of the corporation. Because there was no bankruptcy act in effect at the time of these state statutes, the Tennessee Legislature had full power to provide for this type of proceeding, and the provision for sequestration to aid this proceeding was also valid. However, upon the enactment of the Bankruptcy Act, not all states repealed their statutes concerning the sequestration of the insolvent corporation's assets and the distribution of the assets among the creditors. As late as 1917, the State of North Dakota had a statute which read:

Whenever a judgment shall be obtained against any corporation incorporated under the laws of this state and an execution issued thereon shall have been returned unsatisfied in whole or in part, the judgment creditor, or his legal representative may maintain an action to procure a judgment sequestrating the property of a corporation and providing for a distribution thereof. [Emphasis supplied.]

Litigation developed involving this Statute, and although the question never was raised whether the Bankruptcy Act suspended this Statute, the Supreme Court of North Dakota considered the purpose of the Statute as follows:

The statutes, in short, are sequestration statutes. Their purpose is to provide a means for collecting into a general fund all of the assets of the insolvent corporation so that not only the debt due to the petitioner but, if desired, its other debts, may be paid, and also, if desired, its affairs may be wound up. [Emphasis supplied.]

The similarity of the North Dakota Statute to the Wisconsin Statute is readily apparent save that the Wisconsin Statute is more extensive with respect to the grounds upon which to proceed against the corporation. By analogy to the North Dakota Statute, the purpose of the Wisconsin Statute can also be discovered—the winding up of the affairs of the corporation. Running the risk of being repetitious, the Wisconsin

---

80 19 C.J.S. Corporations §1429 (1940).
81 13 Am. JUR. Corporations §1281 (1938).
84 Id. at 561.
85 Note also the similarity between the North Dakota Statute and Section 128.08 (1951).
Legislature does not have this power since it was suspended by the passage of the Bankruptcy Act.

Soon after the passage of the Bankruptcy Act, there occurred a period in which some states recognized they had insolvency laws on their books. These state courts then passed upon their own laws and adjusted them so as to have them be in conformity with the Act. Of importance in this epoch was the suspension of a Maine Statute for the reason that it was insolvency legislation. An examination of the Maine Statute considered in the Moody case will disclose that the insolvency provisions there are very much akin to the doubtful provisions of Chapter 128. Although the exact remedy of sequestration was not provided by the Maine Statute, the court in which the creditors filed their petition had the authority to exercise broad equity powers. Sequestration, it must be recalled, is one of the equitable remedies not suspended by the operation of the Bankruptcy Act. And if the Maine court had broad equity powers, it would have had the inherent power to sequestrate the property of the debtor. In place of the narrow remedy of sequestration was the court's power to "take charge of the estate of a corporation."

Comparing the Maine statute with the Wisconsin Statute, one of the very grounds upon which the corporation could be proceeded against betrays their similarity; namely, "Whenever any corporation shall become insolvent, or be in imminent danger of insolvency. . . ." The relief granted by the Maine Statute is characteristic to that granted by the Wisconsin Statute, namely, the appointment of a receiver after the court obtained control of the property. The receiver then was vested with "plenary power over all the assets of the company, and [was] required to distribute the assets as provided" in another section. The Supreme Judicial Court of Maine recognized that the law of their state was insolvency legislation, and Justice Spear passing upon it stated:

While chapter 85 of the Laws of 1905 is not an insolvency law in title or express terms, it yet operates as such in all essential features of taking charge of the property, bringing suits in law or equity, discharging the liabilities, barring all claims not presented, and distributing the assets of the corporation. . . . [Emphasis supplied.]

References:
87 Moody v. Port Clyde Development Co., 102 Me. 365, 66 Atl. 967 (1907).
88 Me. Public Laws 1905, ch. 85, §1.
89 Moody v. Port Clyde Development Co., supra note 87, at 973.
90 Supra note 88.
91 Me. Public Laws 1905, ch. 85, §3.
92 Moody v. Port Clyde Development Co., supra note 87, at 972.
Even at this early date when the laws regarding the distinction between insolvency legislation and valid legislation had not yet been refined to the extent it is today, the Maine court did not find the issue confusing nor the solution complex:

The principle of law applicable to the case under consideration is clear and succinctly stated in 5 Cyc. 240, D, note 16. "So far as the state law administers upon the estate of the insolvent as a proceeding in the courts, the proceeding deriving its potency and force from the law itself, and not from the voluntary act of the debtor, and, where the estate is wound up judicially and the debtor discharged, the state law is undoubtedly suspended by a national bankruptcy act. . . ." It will be seen, however, that it is not an essential element of an insolvency law that the debtor be discharged.93

The court then struck down the Statute because it contained the elements of an insolvency law which are

authorizing a court to appoint an officer to take charge of the estate of a corporation and collect and distribute its assets, and that bars the debts which are not filed within the time ordered by the court, is an insolvent law, but also that it is not necessary for the act, in order to operate as such a law, to provide for the discharge of the debtor. [Emphasis supplied.]94

Needless to say, the similarity between the Wisconsin Statute and the Maine Statute is salient. The disclosure of their likeness can be made without tedious scrutiny. Both provide for the taking of the property by the court upon the petition of a creditor if the corporation is insolvent or is in imminent danger of insolvency. The Maine court could obtain control of the property by exercising its equity powers; the Wisconsin court would, more specifically, by sequestration which is also an exercise of the court's equity powers. A receiver is appointed to take charge of the property in both Statutes. The distribution of the assets of the corporation is done pursuant to both Statutes, and neither provide for the discharge of the debts of the corporation. Finally, both Statutes make provision for the barring of claims after a certain period, Maine under Section 4 and Wisconsin under Section 128.14(2).95

Despite the grant of equity power to the state court by the Maine Statute, this power did not include the authority to perform the acts subsequent to the taking control of the assets of the corporation. Hence, the entire Statute was struck down as being insolvency legislation. The Wisconsin Statute follows the Maine Statute almost to the letter. And the mere fact that the Wisconsin court exercises its equity powers, as did the Maine court, is not a sufficient reason to save it since the equity

93 Ibid.
94 Moody v. Port Clyde Development Co., supra note 87, at 973.
powers do not include the power to perform all the acts provided by the Statute.

Sequestration is a very harsh remedy and the extent to which the state can provide for this remedy without contravening the Bankruptcy Act is brought out by the case of In re Schwartz Bros.96 The Minnesota Statute in this case provides as follows:

Upon complaint of a person obtaining judgment against a corporation or his representatives, made after the return unsatisfied of an execution issued thereon, the Court may sequestrate the stock, property... and appoint a receiver of the same, and upon final judgment upon any such complaint the Court shall order the property remaining, or the proceeds thereof, to be disposed of under its direction. ... [The Statute then provided for the distribution of the property.]97

Upon careful consideration of the provisions of this Statute the Federal Court upheld it on these grounds:

If the proceeding under section 8013 is a proceeding to enforce a lien obtained more than four months before the bankruptcy petition was filed, and if such proceeding is not an insolvency proceeding, then it must follow that the subject of such proceedings is not a part of the bankruptcy estate and therefore not subject to the jurisdiction of this Court.98

* * * *

Certainly, one of the basic characteristics of an insolvency statute is insolvency of the individual or corporation against whom the proceedings are directed. But this statute applies equally to solvent corporations. It will be noted that the right of a judgment creditor to obtain the appointment of a receiver is not dependent upon the insolvency of the corporation.99

* * * *

Moreover, it would seem that the salient purpose of the statute is to aid a judgment creditor in the collection of his debt, and for that purpose the assets are sequestrated. ...100

One distinction between the Minnesota Statute and the Wisconsin Statute is that the latter applies only to insolvent corporations or to ones that are imminently in danger of insolvency whereas the former applies to corporations regardless of their financial status. Another distinction is that the purpose of the Minnesota Statute is to enforce liens and not to administer the assets of a bankrupt estate.101

It must be noted that this Statute dangerously approaches the area considered as the subject matter of bankruptcy. It was saved by the fact that the statutory purpose is to enforce liens, and that it applies to in-

---

96 In re Schwartz Bros., supra note 18.
98 In re Schwartz Bros., supra note 18, at 763.
99 Id. at 765.
100 In re Schwartz Bros., supra note 18, at 765.
101 Id. at 764.
solvent individuals as well as insolvent corporations. However, with respect to the creation of liens the court stated,

It seems clear, therefore, that upon the appointment of a receiver under Section 8013 a lien is created in favor of the creditors.  

Yet, in certain instances, the statutory creation of liens also conflicts with the subject matter of the Bankruptcy Act:

True, if the proceedings which created the lien are insolvency proceedings which are null and void because of conflict with the Bankruptcy Act, then it must follow that the liens are likewise void. But the trustee herein does not contend that the proceedings under Section 8013 are null and void.

This tacit caution by the court indicates that where a statute provides for receiverships which create liens for all creditors, it can conflict with the Bankruptcy Act. The purpose of such a statute would be the achievement of a result indirectly which could not be achieved directly. Therefore, this case should be viewed in the light of the existing facts and the issues thereby raised from these facts.

Viewing sequestration then in its modern context and with respect to corporations, the Wisconsin Statute exceeds the two limitations which surround the validity of a state statute. The first limitation is over-stepped because Section 128.08 provides that sequestration is to be brought only against corporations that are insolvent or are in imminent danger of insolvency. The second limitation is transcended since Section 128.08 does not provide for the enforcement of liens.

B. Sequestration of Individual Debtor's Property

In so far as the individual debtor is concerned, the same objection can be raised against the provisions that was raised when considering sequestration of corporate property. The remonstration to the provisions is based on the ground that they do not provide for the enforcement of liens. Under Section 128.08(1)(a), there does not have to be an existing lien on the property for the benefit of the petitioning creditor in order for him to proceed against the debtor. All the creditor needs is to have an execution returned unsatisfied. The return of an execution unsatisfied in effect means that the sheriff could not find any property

102 In re Schwartz Bros., supra note 18, at 763.
103 Id. at 764.
104 The decision in this case is criticized in 30 Minn. L. Rev. 638, 640 (1946): "[T]he court might well have found that this statute created powers in the court beyond those inherent in a court of equity and held this to be an insolvency statute suspended by the national bankruptcy act."
105 A Maine Statute providing for an involuntary proceeding against an insolvent individual debtor was held to be an insolvency law. Littlefield v. Gay, 96 Me. 422, 32 Atl. 925 (1902). Note that under Section 128.08 (1959) the proceeding is also against an insolvent debtor. The debtor is insolvent because the ground upon which he is proceeded against is also the basis for classification as an insolvent.
COMMENTS

on which to levy the execution. Even if the creditor had a lien on real estate when the judgment was docketed, he would not be assured of retaining it if he proceeded under Section 128.08. Further, not all of the creditors participating in the proceeding are expected to have liens prior to the operation of the section. There is definitely no lien created for all the creditors by the mere appointment of a receiver. The Statute is silent in that regard. Continuing along this line, to hold that the Statute did give all the creditors liens would be to construe the Statute contrary to its express terms and purposes. In the order of distribution of the property of the debtor, Section 128.17(f) provides for the payment of debts entitled to priority before the payment of debts under Section 128.17(g). Under the latter section, the property of the debtor is distributed to the "creditors generally, in proportion to the amount of their claims, as allowed." [Emphasis supplied.] Those creditors who have valid liens prior to the proceeding under Chapter 128 will obtain the satisfaction of them before the unsecured creditors have the opportunity to obtain any relief. In other words, the unsecured creditor must present a claim which claim can be contested both as to its existence and as to its amount.

The fact that Chapter 128 provides for secured and unsecured creditors implies that one type does not have a lien on the debtor's property. Since some creditors will not have liens after the commencement of a suit, it is not the purpose of Section 128.08 to create liens for the creditors. Therefore, the provision for sequestration is not for the purpose of the enforcement of liens. However, the purpose of this remedy is to enable the court to seize the property of the debtor for the ultimate purpose of administering it to secured and unsecured creditors.

Interwoven into the discussion of the creation of liens for unsecured creditors by the operation of Chapter 128 is the problem concerning the invalidity of a statute which would give all unsecured creditors liens. The purpose of such a statute viewed in the light of case law can be conflicting with the Bankruptcy Act. Applying this principle to the

---

106 Under Section 128.13(3), a creditor who had obtained a lien within four months of the proceeding under Chapter 128 will have it dissolved. Therefore, if a secured creditor desires to retain his lien, he must wait four months after he acquired it before he can take advantage of Section 128.08. Note the similarity between Section 128.18(3) and Section 67(a) of the Bankruptcy Act.

Under Section 70(c) of the Bankruptcy Act, the trustee in bankruptcy has the powers of a lien creditor at the time of the filing of the petition. However, Chapter 128 does not give the receiver the same powers as the trustee in bankruptcy. Section 128.19 grants to the receiver the title of the debtor's property. He also can avoid any transfer that any creditor could have avoided. Yet, he is not in the same position as a lien creditor.

107 Wis. Stat. §128.17(1)(g) (1959), created by Wis. Laws 1957, ch. 274, §6. The classification of debtors according to whether or not they are secured or unsecured is a significant feature of an insolvency law. 27 Miss. L. J. 230, 234 (1956).

108 In re Schwartz Bros., supra note 18, at 764.
Wisconsin Statutes, it is obvious that even if all the creditors obtained liens by the mere commencement of the proceedings and these liens were enforced by giving each creditor a pro rata share, the statute would be as comprehensive as the Bankruptcy Act. Thus, construing the Wisconsin Statute in this fashion would still not overcome the objection that it is insolvency legislation.

In conclusion, the purpose of sequestration under Section 128.08 goes beyond the meaning which has been well defined by the usage of the remedy both at common law and in modern practice. As to corporations and as to individual debtors, the Wisconsin Legislature has provided a remedy that in no sense can operate to the extent that the Statute purports it can. Therefore, the inclusion of the remedy of sequestration does not rescue the Statute from being suspended by the Bankruptcy Act. On the contrary, the manner in which sequestration is used in the Statute becomes an additional reason for determining the Statute invalid.

The fact that sequestration and distribution cause a statute to become insolvency legislation was discovered by Professor Williston early after the turn of the century. In a discussion of certain state statutes, among them being a former Wisconsin Statute, Professor Williston reached this conclusion:

A particular form of statute is in force in a few States which in certain instances operates as an involuntary transfer of the debtor's property. . . . The state law as a punishment of the debtor or redress to his creditors for an act which is contained in all bankruptcy statutes as an act of bankruptcy, enforces the very consequences which are provided for in the bankruptcy act; namely, the sequestration and distribution of the debtor's property. [Emphasis supplied.]

The Professor continued his analysis by saying that these statutes are suspended by the Bankruptcy Act. His reasoning when applied to the present Wisconsin Statute certainly shall yield the same result since this Statute provides for both sequestration and distribution of the debtor's property.

Separation of the Invalid from the Valid Provisions

The determination in the foregoing discussion that there are certain provisions in Chapter 128 that are insolvency legislation suggests the necessity of altering the Chapter for the purpose of having it be in harmony with the Bankruptcy Act. Without being presumptuous and for the purposes of the following discussion, it is postulated that Section 128.08 together with the other provisions in the Chapter upon which it is dependent are the insolvency provisions. Applying the rules of statutory

110 Id. at 560.
construction in regard to the invalid provisions poses no insurmountable obstacles. On the other hand, close attention must be paid to these rules if an effective method of amending the Chapter is desired. If there is a possibility to sever the invalid provisions from the valid provisions, this alteration must be considered. However, if the invalid provisions are so interrelated with the valid ones that they cannot be eliminated without destroying the efficacy of the remaining sections, the entire Chapter falls. These questions are resolved by the application of the rules of construction, which are derived from the interpretation of the statute, and from the discovery of the legislative intent.

Considering Chapter 128, the general purpose of it is to regulate voluntary assignments for the benefit of creditors. The Chapter is not insolvency legislation to the extent it provides for this purpose. To eliminate the invalid provisions would not hinder the operation of the Chapter in this regard if the invalid provisions can be considered to have a dual character. That is, can the same sections which are invalid when a proceeding is commenced under Section 128.08 be considered valid when a proceeding is brought under Section 128.01.

The source of the invalidity of the sections in Chapter 128 is Section 128.08. The other invalid sections become invalid because Section 128.08 makes reference to them and is interrelated with them. However, the same sections which Section 128.08 incorporates are the sections which Section 128.01 needs in order for it to operate. Therefore, the provisions which Section 128.08 is dependent upon are the same provisions upon which Section 128.01 is dependent. Consequently, these incorporated sections serve a dual purpose; namely, they facilitate voluntary assignments for the benefit of creditors and expedite involuntary proceedings.

It must be further noted that Section 128.01 is not dependent upon Section 128.08 since both sections provide for the commencement of two different suits. A proceeding under Section 128.01 and the sections which it incorporates affords a complete remedy. In other words, creditors need not resort to Section 128.08 in order to have a voluntary assignment.

Drawing these conclusions together, the invalid provisions of Chapter 128 can be severed from the valid provisions without destroying the efficacy of the latter. The severance can be performed by merely eliminating Section 128.08 because that section is the source of the invalidity of the other invalid sections.

The Wisconsin Legislature has provided the legal machinery whereby the insolvency provisions can be extirpated from the valid ones:

Construction of Laws; rules for. In construing Wisconsin laws the following rules shall be observed unless construction in ac-

\[\text{In re Wisconsin Builders Supply Co., supra note 2, at 656.}\]
cordance with a rule would produce a result inconsistent with the manifest intention of the legislature.¹¹²

* * * * *

Severability. The provisions of the statutes are severable. The provisions of any session law are severable. If any provision of the statutes or of a session law is invalid or if the application of either to any person or circumstance is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provisions or application.¹¹³

In conclusion, Chapter 128 lends itself to severability and severance can be accomplished by applying the above statutory provisions.

Since the invalid provisions of Chapter 128 can be deleted, it is recommended that Section 128.08 be repealed. Notwithstanding the rights granted to the creditors under this section are invalid, the Legislature would undoubtedly desire to retain some control over this area of the debtor-creditor relationship. Supplementary to the criticism of Chapter 128 is a recommendation that the Legislature afford the creditors with a different remedy. A substituted remedy must, however, be in keeping with the powers of the Legislature. To define the limits of legislative authority would be to harp back to the tests which have been formulated by the courts. The Wisconsin Legislature, therefore, must follow the boundaries which the courts have prescribed in the application of the tests to specific statutes.

THE PRACTICAL OPERATION OF THE STATUTE

Aside from the theoretical reasoning that determines the doubtful provisions of the Wisconsin Statute suspended, these provisions can be criticized from the harsh consequences that flow from the operation of the invalid provisions. Although not legally controlling, these significant practical effects must be considered in determining the merits of the Statute.

The operation of this Statute places the individual debtor and the corporation in a most unfavorable position with respect to the debtor-creditor relationship. Hypothetically, a large corporation which is found to be insolvent by a small claim creditor is subject to the purview of the Statute. For instance, if the corporation is insolvent, although only temporarily, and owes a creditor only one dollar, it can have all of its assets sequestrated by the court upon the petition of this creditor. This action by the creditor would tie up the operations of the business. But more disastrous is that upon the insistence of this creditor, the entire corporation will have its assets distributed to all of the remaining creditors.

This hypothetical situation becomes more realistic when viewed in the stringent world of business where corporations are vying with both

¹¹² WIS. STAT. §990.001 (1959).
their creditors and their competitors. The drafters of the Bankruptcy Act realized that unless certain safeguards were given the corporation and the individual debtor the above example would not be merely academic. Consequently, they provided that no involuntary proceeding was available to the creditor unless the corporation or the individual debtor committed an act of bankruptcy. In addition to an act, there had to be three creditors who have debts totaling $500 or more, and the debtor has to owe debts to the amount of $1,000 or over. Even the former Wisconsin Statute, which was considered invalid, contained precautions. Considering the limitations under the Bankruptcy Act which affords the corporation at least with some protection and comparing it with the unlimited and unqualified involuntary proceeding under Section 128.08 certainly is cause for alarm.

The individual debtor is also placed in the same precarious position as the corporation. In addition, the remedy afforded by Section 128.08 is not complete since it does not discharge the debtor from his liabilities. In contrast to the corporation which is in effect discharged when it has its assets administered, a debtor who has his estate distributed among his creditors still owes the remaining debt. In order to relieve himself of the existing obligations he will naturally file a petition in bankruptcy. If the Statute be valid and the four month period has not passed, the remedy under Section 128.08 becomes inefficient since now the property has to be transferred from the state receiver to the trustee in bankruptcy. If the debtor is still in receivership or the property has been administered, this procedure results in a loss of time. The value of the property during the transition from the receiver to the trustee will probably decrease. The creditors are now placed in another unfavorable position. They will have to pay an additional fee to the trustee and will have to suffer the loss of the property devaluation.

These policy factors against the wisdom of Section 128.08 can also be considered in the theoretical arguments against the validity of the Statute. The purpose of the Bankruptcy Act is to provide uniformity in this area of the debtor-creditor relationship. However, this Statute provides for a conflicting remedy which competes with the Bankruptcy Act and which frustrates the purpose of the latter. This argument is bolstered by the principle that a state statute cannot afford the creditor a choice between a state statute and the Bankruptcy Act. Considering this principle, if the creditor desires to sequestrate the property of the debtor and have it distributed among the other creditors he is confronted with a choice of proceeding under the Bankruptcy Act or under Section 128.08.

SUMMARY

The application of the legal structure and its various tests explained earlier synthesizes the various proposals of the challenge to the validity of certain sections of Chapter 128. Previous discussion revealed that unlike the sections regulating voluntary assignments for the benefit of creditors, Section 128.08 and related sections are not part of the common law. Also fitting underneath this criterion was the determination that sequestration and receivership as provided by Section 128.08 go beyond the traditional meaning they had in historical usage and have in modern practice. The object sought and the end attained by the doubtful provisions of the Wisconsin Statute are the same in effect as those of the bankruptcy court. This fact was proved by showing that the object and the end of Section 128.08 and related sections are the distribution of the estate of the individual debtor and the winding up of the affairs of the corporation. These two objects and ends are the same in effect as that of the Bankruptcy Act. A more descriptive criterion elucidated in the foregoing material was the involuntary proceeding test. It was shown that the Wisconsin Statute provides for a proceeding contrary to the debtor's volition whereby the property of the debtor is administered amongst the creditors. Comparing the invalid Statute of 1951 with the present Statute revealed that both cover the same subject matter covered by the Bankruptcy Act. The standard which determines that the state law contains the essential elements of an insolvency was found to apply to the Wisconsin Statute; namely, the property of the debtor is sequestrated and then is distributed to the creditors. Other subsidiary tests were demonstrated, and, although not theoretically controlling, the Statute was criticized from the standpoint of its wisdom.

The application of any one of the tests is sufficient to conclusively determine the Wisconsin Statute an insolvency law. But since it is salient that the Statute is in conflict with the Bankruptcy Act, the other judicial tests became applicable. This latter fact emphasizes and substantiates the position that Section 128.08 and related sections constitute insolvency legislation. Following from this conclusion was the recommendation that only Section 128.08 needs to be repealed because Chapter 128 can be severed.

CONCLUSION

The hyperbole of opening Pandora's Box accurately describes the situation in which one is placed in challenging the validity of certain provisions of Chapter 128. Yet despite the sundry issues which fly out of the Box, none of them are particularly unique or novel. Each one is resolved by simply applying the principles which have been delineated by judicial decisions. Be that as it may, proceedings under Section 128.08 are still being instituted because no judicial determination of these sections has been made. Regardless of the difficulties in predicting
the fate of the Wisconsin Statute, it must be considered because the rights of both creditors and debtors will be affected by any judicial challenge or by any legislative change.

Generally, there are five possibilities that could occur which would influence the existence of the Wisconsin Statute. Weighing these five possibilities, however, only one enters into the realm of actually occurring. The remotest possibility is that Congress will repeal the Bankruptcy Act which would thereby eliminate any question of the validity of the Statute. A more feasible, but nonetheless distant, occurrence is that no court will ever pass upon the Wisconsin Statute. Thus, the cloud of doubt which surrounds this law will never disappear. However, with the ever increasing amount of litigation in this field, this possibility cannot be seriously considered. Sooner or later, a trustee in bankruptcy, or another interested party who is adversely affected by the operation of this Statute, will contend that it is suspended.

More feasible than the prior two contingencies is that the Wisconsin Legislature will change Chapter 128 by repealing Section 128.08. The happening of this event is dependent upon the statutory policy of the Wisconsin Legislature. If the Legislature considers the Statute an insolvency law and desires to avoid having it so pronounced by a court, it will undoubtedly repeal it. On the other hand, if the policy of the Legislature is to retain on their books laws regulating the debtor-creditor relationship regardless of their doubtful validity, no legislative action will be taken. Judging from the fact that the invalid provisions of the 1951 Statute remained on the books since 1937, it would be reasonable to conclude that the latter policy is the one which the Wisconsin Legislature will follow.

The previous discussion indicated that a court will pass upon the Wisconsin Statute. A determination by a court will, of course, have two possible outcomes; either the Statute is considered valid or it is considered insolvency legislation. Viewing these two possibilities together, the most probable course of action will be that the Statute will be determined insolvency legislation. This possibility is predicated on the fact that it is more reasonable to conclude that the Statute is insolvency legislation than it is to conclude that it is valid. In viewing the Statute, a court can apply any one of a myriad of tests in order to find the law suspended. However, if the Statute is held valid, a court will have to overrule the long list of tests which have been carefully formulated. Another manner in which the Statute could be saved is if a court would distinguish the Wisconsin provisions from the provisions of other state statutes which were considered invalid. However, it is difficult to visualize that plausible distinctions exist.

The legal hazards which surround Section 128.08 and related sections can be effectively eliminated by judicial determination and then
by legislative amendment. But during the interim, persons relying on this Statute must be aware that they are placing themselves in a very vulnerable position.

THOMAS W. BERTZ