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EFFECT OF THE CHANDLER ACT UPON GENERAL ASSIGNMENTS AND COMPOSITIONS

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Of the various devices for the administration of insolvent estates, most important for the corporate debtor have been receiverships, reorganizations under the Bankruptcy Act, and sometimes, straight bankruptcy. For the smaller debtor common-law compositions, general assignments, compositions under the Bankruptcy Act, and straight bankruptcy have been most frequently utilized. In recent years two tendencies have become strikingly apparent: (1) there is a definite swing away from the employment of state agencies toward an increasingly exclusive use of devices available under the Federal Bankruptcy Act; (2) methods of rehabilitating, as distinguished from liquidating, an insolvent debtor, are being looked to first. Liquidation through straight bankruptcy is being utilized more often only where rehabilitation seems hopeless.¹

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1. Not to be overlooked is, of course, the widespread development in recent years of "friendly adjustments", which are administered on a nationwide scale by credit bureaus. The device employed is a round-the-table, extra-legal adjustment between embarrassed debtors and their creditors. By a careful selection of "honest debtors" who are often still capable of financial rehabilitation, these credit bureaus have had remarkable success. They claim a record of achieving larger dividends for creditors than could be obtained through the medium of bankruptcy. This is achieved (1) by a saving in administrative expenses, (2) by the use of a permanent staff of experts, and (3) by an ability to realize more on resale of a debtor's assets than could be obtained in the "forced sale" which is alleged to be characteristic of bankruptcy. The bureaus also purport to avoid corrupt, fee-grabbing activities said to be prevalent in bankruptcy proceedings. The "friendly adjustment" is outside the scope of this paper which is aimed rather at a discussion of the legal aspects of the evolution of legislative and judicial devices for the administration of insolvent estates.

The Chandler Act, revising the Bankruptcy Act of 1898,² purports to overhaul and improve the means of rehabilitating debtors by the addition of chapters entitled "Arrangements".³ Arrangements have their origin in the common-law devices of compositions and general assignments.⁴ These latter might have enjoyed more frequent use had they been more widely understood by the bar at large.⁵ They may still have advantages over proceedings under the Bankruptcy Act.

The purpose of this paper is twofold: (1) to describe the evolution and development of the common-law and state statutory devices, pointing out their advantages and disadvantages, and (2) to discover, if possible, the extent to which these legal tools may continue to be used, and the extent to which they may be superseded by the arrangement provisions of the Chandler Act.

Common-law compositions and general assignments possessed the desirable attributes of cheapness, quickness, and simplicity. They avoided the stigma of bankruptcy. To creditors they offered larger dividends than could be obtained in bankruptcy; to debtors, the hope of financial rehabilitation. Bankruptcy seldom offered either.⁶ Yet these common-law devices had certain disadvantages which hampered their effectiveness and impaired their usefulness.⁷

For discussions of the advantages of the "friendly adjustment" over bankruptcy proceedings, see Billig, *What Price Bankruptcy: A Plea for "Friendly Adjustment"* (1929) 14 CORN. L. Q. 413; Billig, *Extra-Judicial Administration of Insolvent Estates: A Study of Recent Cases* (1930) 78 U. OF PA. L. REV. 293. In reply to Professor Billig, see Gamer, *On Comparing "Friendly Adjustment" and Bankruptcy* (1930) 16 CORN. L. Q. 35.

2. BANKRUPTCY ACT OF 1938, 52 STAT. 840-940, 11 U. S. C. A. (Supp. 1938), amending BANKRUPTCY ACT OF 1898, 30 STAT. 544 (1898), 11 U. S. C. A. (1927).

3. In a rough sense, the Arrangement (and Corporate Reorganization) Chapters attempt rehabilitation of debtors, as distinct from pure liquidation in straight bankruptcy. BANKRUPTCY ACT OF 1938, cc. X-XIV, 52 STAT. 883-940, 11 U. S. C. A. §§ 501-1103 (Supp. 1938). See also J. I. WEINSTEIN, *THE BANKRUPTCY LAW OF 1938* (1938); J. B. Weinstein, *The Debtor Relief Chapters of the Chandler Act* (1938) 5 U. OF PITTSBURGH L. REV. 1. Corporate reorganizations are beyond the scope of this article. See, as to that subject, Gerdes, *Corporate Reorganizations—Changes Effected by Chapter X of the Bankruptcy Act* (1938) 52 HARV. L. REV. 1; Heuston, *Corporate Reorganizations under the Chandler Act* (1938) 38 COL. L. REV. 1199; Levi, *Corporate Reorganization and a Ministry of Justice* (1938) 23 MINN. L. REV. 3.

4. GLENN, *LIQUIDATION* (1935) § 84.

5. General discussions of the subject are rare. See BURRILL, *VOLUNTARY ASSIGNMENTS* (6th ed. 1894); GLENN, *LIQUIDATION* (1935) cc. IX, X.

6. A debtor seldom becomes a bankrupt until he is so hopelessly insolvent as to be beyond hope of rehabilitation. The expenses of administration in bankruptcy are so great that dividends to creditors are often little more than trifling in amount. For a fact-study, see Billig, *What Price Bankruptcy: A Plea for "Friendly Adjustment"* (1929) 14 CORN. L. Q. 413, 419.

7. Not included herein are the difficulties of discovering concealment of assets and upsetting fraudulent conveyances made by a debtor. Interest is centered mainly around the honest debtor seeking a discharge for himself and larger dividends for creditors than could be obtained through the medium of bankruptcy. If a debtor, under a common-law composition, granted secret preferences, innocent creditors were permitted to treat the composition as void, and sue for the balance of their claims. See *infra* note 33. Under a common-law assignment, fraudulent conveyances and prior preferences could

COMMON-LAW GENERAL ASSIGNMENTS

The general assignment at common law was a non-bargaining transaction, being purely voluntary on the part of the debtor. Hard-pressed by his creditors, a debtor would transfer legal title to his non-exempt assets to an assignee in trust for the benefit of the creditors. Upon liquidating the assets, the assignee would usually distribute the proceeds among the creditors upon a *pro rata* basis.

The distinct advantage of this device was that the transfer of legal title to a third party immediately immunized the assets from attachment and execution by creditors.⁸ In other words, it halted a race by diligent creditors. All shared alike. It was not subject to attack as a fraudulent conveyance on the ground that it was made to hinder, delay or defraud creditors.⁹ The advantages of a *pro rata* distribution were considered paramount; the delay to creditors, incidental and *de minimis*.¹⁰ Since the common-law assignment was a non-bargaining transaction, it was likewise non-consensual. Objection by creditors was immaterial and ineffective.¹¹ That dominion which the common law gave to a debtor over his property included the power of forcing a general assignment upon the creditors, whether they liked it or not.¹²

not be touched by the assignee, whose powers were limited by the deed of assignment. But a creditor can set aside the fraudulent conveyance under § 9 of the Uniform Fraudulent Conveyances Act. See Note (1938) 47 YALE L. J. 944, 956.

8. Fenton v. Edwards & Johnson, 126 Cal. 43, 58 Pac. 320 (1899); Johnson v. Sharp, 31 Ohio St. 611 (1877); Missimer v. Ebersole, 87 Pa. 109 (1878); Gillespie v. Keating, 180 Pa. 150, 36 Atl. 641 (1897). See also RESTATEMENT, CONFLICT OF LAWS (1934) § 263, which changed tentative § 284; GLENN, LIQUIDATION (1935) §§ 110, 112; Note (1938) 47 YALE L. J. 944, 947. See *infra* notes 69, 70, 71.

9. Reed v. McIntyre, 98 U. S. 507 (1878); GLENN, LIQUIDATION (1935) § 106.

10. "But where its provisions were consistent with an honest purpose to deal fairly and justly with them,—the deed reserving for the benefit of the debtor or his family no control over or interest in the property, and imposing no improper restrictions upon its speedy sale and distribution in satisfaction of the debts,—the consequent temporary interference with the prosecution by particular creditors of their claims by the ordinary legal remedies, was regarded at common law as a necessary and unavoidable incident in the discharge by a debtor of his duty to creditors. . . . Such interference was not regarded as hindrance and delay, within the meaning of the statutes against fraudulent conveyances." Reed v. McIntyre, 98 U. S. 507, 510 (1878).

On the same question, an English court referred to the assignment as "an act of duty rather than of fraud", and said, "It seems to me that this conveyance, so far from being fraudulent, was the most honest act the party could do." Pickstock v. Lyster, 3 M. & S. 371, 375, 376 (K. B. 1815), cited and quoted approvingly in Reed v. McIntyre, *supra*.

11. Tompkins v. Wheeler, 16 Pet. 104 (U. S. 1842); Nicoll v. Mumford, 4 Johns Ch. 522 (N. Y. 1820); Brockton Shoe Mfg. Co. v. Schenkman, 146 Misc. 119, 261 N. Y. Supp. 740 (Sup. Ct. 1932); Hyde v. Olds, 12 Ohio St. 591 (1861). In England and Massachusetts, however, the assent of creditors is required. Widgery v. Haskell, 5 Mass. 144 (1809). See (1916) 29 HARV. L. REV. 449. For a discussion of the ramifications of the Massachusetts doctrine, see GLENN, LIQUIDATION (1935) § 108; Hall, *Voluntary Assignments and Insolvency in Massachusetts* (1894) 8 HARV. L. REV. 265.

12. "The right of a debtor at common law to devote his whole estate to the satisfaction of the claims of creditors results, as Mr. Chief Justice Marshall declares, 'from that absolute ownership which every man claims over that which is his own.'" Reed v. McIntyre, 98 U. S. 507, 509-510 (1878); Brashear v. West, 7 Pet. 608 (U. S. 1833); Mayer v. Hellman, 91 U. S. 496 (1875); *In re Tarnowski*, 191 Wis. 279, 285, 210 N. W. 836 (1926).

Parenthetically, that dominion extended beyond the power to make a general assignment upon a purely *pro rata* basis. A debtor could convey all of his assets to one creditor in satisfaction of a claim; he could make a partial assignment for some creditors, to the exclusion of others;¹³ and he could make a general assignment containing preferences to favored creditors.¹⁴ Others were powerless to attack; they could only wait in hope that the debtor would subsequently acquire additional assets.¹⁵

For present purposes, however, interest is centered upon the honest debtor who made a general assignment of all his non-exempt assets for *pro rata* distribution among all his creditors. By thus immunizing the property from attachment, he achieved an economical and speedy means of paying his creditors. There was, however, one serious defect for the debtor: since the transaction was non-consensual, it did not operate to discharge him from the balance of the claims of his creditors.¹⁶ Thus, if in a particular general assignment, sufficient was realized to pay a dividend of 40 per cent. to all creditors, they retained claims for 60 per cent. against the debtor, which might be satisfied out of any subsequently acquired non-exempt assets.¹⁷ From the debtor's point of view, this defect rendered very desirable the development of a device whereby the creditors would consent to discharge their claims upon receipt of the 40 per cent. dividend, thereby giving the debtor his desired fresh financial start. The common-law composition, to which reference will next be made, suggested itself as a possible means of effectuating a discharge.

COMMON-LAW COMPOSITIONS

Unlike the general assignment, a common-law composition was a consensual, bargaining transaction between a debtor and his creditors.¹⁸ Therefore, an attempted composition lacking the elements of a legally effective contract, such as offer, acceptance and consideration, was subject to attack by creditors.¹⁹

13. An assignment is "partial" when it acts upon less than all the debtor's non-exempt property or when it omits to make all the creditors beneficiaries of the trust.

14. *Reed v. McIntyre*, 98 U. S. 507 (1878); *Crawford v. Krueger*, 201 Pa. 348, 50 Atl. 931 (1902). See GLENN, *LIQUIDATION* (1935) § 114.

15. GLENN, *LIQUIDATION* (1935) §§ 117, 121. See *supra* note 8; *infra* note 17.

16. *Howlett v. Mills*, 22 Ill. 341 (1859); *Little v. Sturgis*, 127 Iowa 298, 103 N. W. 205 (1905); *Limbocker v. Higenbotham*, 52 Kan. 696, 35 Pac. 783 (1894).

17. See cases cited *supra* note 16; *Allen v. Roosevelt*, 14 Wend. 100 (N. Y. 1835); *Sanborn v. Norton*, 59 Tex. 308 (1883).

18. See *Wilson v. Samuels*, 100 Cal. 514, 518, 35 Pac. 148, 149 (1893); *Bailey v. Boyd*, 75 Ind. 125, 127 (1881); GLENN, *LIQUIDATION* (1935) §§ 84, 85.

19. *Rosen v. Indiana Flooring Co.*, 240 Mass. 500, 134 N. E. 247 (1922); *Sondhelm v. Scalera*, 161 N. Y. Supp. 291 (Sup. Ct. 1916); *Laird v. Campbell*, 92 Pa. 470 (1880); *Crawford v. Krueger*, 201 Pa. 348, 50 Atl. 931 (1902); *Chittenden v. Woodbury*, 52 Vt. 562 (1880).

The usual transaction took the form of an offer by a debtor to pay his creditors, or such of them as consented, a specified dividend, in consideration for which they agreed to discharge the balance of their claims.²⁰ Of course, if only a single creditor accepted the offer, the agreement lacked consideration.²¹ However, a properly worded proposal would become binding upon those consenting as soon as two had manifested their assent.²² Difficulties of consideration in such cases were effectively hurdled by the courts.²³

20. *Norton v. Clayton Hardware Co.*, 149 Ala. 248, 43 So. 185 (1907); *Crawford v. Krueger*, 201 Pa. 348, 50 Atl. 931 (1902); GLENN, *LIQUIDATION* (1935) § 85.

21. Usually, an agreement by one creditor to release his claim if the debtor agrees to pay a smaller sum in cash is held lacking in consideration, under the frequently criticised rule of *Foakes v. Beer*, 9 App. Cas. 605 (1884). This rule is applied where the creditors are dealt with individually and not collectively. *Sondhelm v. Scalera*, 161 N. Y. Supp. 291 (Sup. Ct. 1916); *Laird v. Campbell*, 92 Pa. 470 (1880). However, adequate consideration might be found in the surrender by the debtor of his privilege to file a petition in bankruptcy.

22. Generally, an offer of a composition is treated as not requiring the consent of all the creditors unless expressly so worded. Consequently it becomes binding on assenting creditors when two have manifested their acceptances. *Norton v. Clayton Hardware Co.*, 149 Ala. 248, 43 So. 185 (1907); *Farmers' Bank v. Sellers*, 167 Ark. 152, 267 S. W. 591 (1925); *Laird v. Campbell*, 92 Pa. 470 (1880); *Crawford v. Krueger*, 201 Pa. 348, 50 Atl. 931 (1902). But see *M. A. Seed Dry-Plate v. Wunderlich*, 69 Minn. 288, 72 N. W. 122 (1897). Apparently, in Massachusetts the offer is treated as requiring the assent of all creditors, unless it is expressly worded otherwise. *Rosen v. Indiana Flooring Co.*, 240 Mass. 500, 134 N. E. 247 (1922).

23. Courts seem to have avoided difficulties of consideration by treating the transaction as though all creditors accepted simultaneously. Or the mutual promises, though technically open to question, have been treated as adequate consideration. "Such an agreement is not with the debtor only, but between creditors as well, each acting on the faith of the promises of the others to relinquish a part of his claim; and the benefit which each class may derive from the mutual concession is the consideration which sustains the agreement, and makes it an exception to the rule that a creditor is not bound by an agreement to accept less than the amount of an ascertained debt. . . . This was not a separate settlement with a separate creditor, but a joint agreement between them, and a good composition." *Crawford v. Krueger*, 201 Pa. 348, 350, 50 Atl. 931, 932-933 (1902); see also *Laird v. Campbell*, 92 Pa. 470 (1880); *Mellen v. Goldsmith*, 47 Wis. 573, 3 N. W. 592 (1879).

Technical difficulties of accord and satisfaction have also been sidestepped in order to uphold composition agreements. "The validity of such an agreement does not depend on the technical and strict rules which govern accord and satisfaction, release and discharge, but upon principles of equity, which treat the violation of or failure to execute such an agreement as a fraud not only upon the debtor, but more especially upon the other creditors, who have been lured in by the agreement to relinquish their further demands, upon the supposition that the debtor would thereby be discharged of the remainder of his debts. . . .

"Anything I could say in elaboration of this doctrine so authoritatively established and so tersely expressed by these great masters of the law, might weaken its force, and it is sufficient further to say that this equitable doctrine has been followed almost uniformly by the courts." *Mellen v. Goldsmith*, 47 Wis. 573, 579, 3 N. W. 592, 593 (1879). In that case a creditor, having assented to a composition, sued for the balance of his claim, alleging that the agreement was a mere accord, but the court treated it as an accord and satisfaction. See also GLENN, *LIQUIDATION* (1935) § 90. But see Note (1926) 26 COL. L. REV. 77.

Recent efforts have been made to treat "friendly settlements" between creditors and debtors, designed as "round-the-table" means of rehabilitating debtors and giving larger dividends to creditors by avoiding the expenses of bankruptcy, as economic problems, free from legal technicalities. Billig, *What Price Bankruptcy: A Plea for "Friendly Adjustment"* (1929) 14 CORN. L. Q. 413; Billig, *Extra-Judicial Administration of Insolvent Estates: A Study of Recent Cases* (1930) 78 U. OF PA. L. REV. 293. See also Gamer, *On Comparing "Friendly Adjustment" and Bankruptcy* (1930) 16 CORN. L. Q. 35.

It can be easily seen that the goal of the debtor was to secure the consent of all his creditors. This obtained, he was discharged from all his debts, and acquired a fresh start in financial ventures.²⁴ However, the assent of substantially all his creditors would often be of distinct advantage to him.

The common-law composition, then, offered the debtor what a general assignment could not give—a discharge from unsatisfied liability. It was simple, quick, and cheap, and it avoided the expense and delay of bankruptcy administration. Like the common-law general assignment, however, it had its unfortunate defects. During the period in which the debtor was attempting to secure the assent of creditors to a proposed composition, he remained in possession and control of his property. Diligent creditors, with writs of attachment in hand, might attack at any time, thereby defeating the purpose of the composition.

Thus the general assignment immunized assets from attachment, but failed to give the debtor a discharge. The converse was true as to a common-law composition. Complementing each other, they suggested a combination of the two to achieve both immunization and discharge for the debtor. The success of such attempts will be next discussed.

COMMON-LAW GENERAL ASSIGNMENTS WITH DISCHARGE

In order to immunize his assets from attachment and to achieve a release from his debts, a debtor transferred his property to an assignee, and in the same instrument provided that each creditor who accepted a dividend should grant a discharge in full to the debtor. The assent of all creditors would thereby effectuate the debtor's desired end.

Yet there were obvious difficulties. Recalcitrant creditors could refuse to participate, and, to the extent that they held substantial claims, could prevent the debtor from achieving his purpose. On the other hand, several factors operated in favor of the debtor. The assignment placed the property beyond the reach of non-assenting creditors.²⁵ All the assets would usually be used in satisfaction of the claims of consenting creditors, who, because of their willingness to grant releases, were preferred in distribution. Non-participating creditors retained their claims *in toto*, with the speculative hope of being able to realize upon them if there were a residue after paying consenting creditors, or if the debtor should subsequently acquire new assets.²⁶ The more for-

24. Often the arrangement permitted the debtor to remain in business, paying off instalments. If the debtor had been a good customer, creditors considered it wise business policy to aid him in rehabilitating himself.

25. See *supra* note 8.

26. See *supra* note 17.

lorn this hope appeared to be, the greater the incentive for all creditors to participate in the assignment. It seems hardly arguable that the dividends to creditors under such a scheme would usually be substantially larger than could be obtained should the debtor elect bankruptcy as an alternative. Thus, it was of distinct advantage to the creditors to participate in the general assignment with discharge.

Courts uniformly upheld the validity of common-law compositions, and of general assignments, when employed separately, provided that such devices were free from unfair elements, such as fraud.²⁷ But the combined assignment and composition never received such general judicial benediction. Though the question was never passed on in many jurisdictions, perhaps a slight majority refused to uphold the validity of general assignments with discharge.²⁸

Several reasons were given by the courts for this result. Most frequently it was said that the device gave the debtor too great a coercive power over his creditors, leaving the latter with little or no opportunity to object.²⁹ Since the creditors could not attach the assets, they had to grant releases or receive nothing. And the debtor's threat of bankruptcy, with correspondingly low dividends, was looked upon with disfavor.³⁰

The coercion argument is open to serious question. The debtor's threat of bankruptcy seems hardly objectionable, since he is entitled to voluntary bankruptcy as a matter of right.³¹ Nor is the threat being employed for an improper purpose. The general assignment with discharge achieves the same ends as bankruptcy, namely, liquidation, distribution and discharge, with a fresh start to the debtor. Since the assignment would probably result in larger dividends to the creditors than would bankruptcy, courts should be inclined to foster, rather than to curb, such advantageous devices. The contrary attitude of the seeming majority seems regrettable almost to the extreme. The coercive power of the debtor is counterbalanced by the fact that dissenting

27. See *supra* notes 9, 23.

28. Holding such attempts invalid: *Seale v. Vaiden*, 10 Fed. 831 (N. D. Miss. 1881); *Nelson v. Harper*, 122 Ark. 39, 182 S. W. 519 (1916); *Henderson v. Bliss*, 8 Ind. 100 (1856); *Sperry v. Gallaher*, 77 Iowa 107, 41 N. W. 586 (1889); *Hubbard v. McNaughton*, 43 Mich. 220, 5 N. W. 293 (1880); *Grover v. Wakeman*, 11 Wend. 187 (N. Y. 1833). See *McCord-Norton Shoe Co. v. Brown*, 131 Kan. 19, 25, 289 Pac. 417, 420 (1930); *Kobler v. Heins*, 189 Minn. 213, 215, 248 N. W. 698, 699 (1933); (1926) 74 U. OF PA. L. REV. 414; (1932) 41 YALE L. J. 603, 607-608.

29. See *supra* note 28; (1926) 74 U. OF PA. L. REV. 414; GLENN, LIQUIDATION (1935) § 119.

30. The creditors found themselves in a dilemma, having to accept a part payment as a release of the balance, or to hold the entire claim with little hope of realizing upon it sometime in the future. As a way out of the dilemma bankruptcy was undesirable to debtor and creditors alike.

31. BANKRUPTCY ACT OF 1938, § 4a, 52 STAT. 845 (1938), 11 U. S. C. A. § 22a (Supp. 1938).

creditors may institute involuntary proceedings attacking the general assignment as an act of bankruptcy.³² This latter power suggests more harm than good. It offers dissenting creditors a means of creating a nuisance power by which their claims might be bought off, or by which such creditors might receive secret preferences.³³ If they actually threw the debtor into bankruptcy, the results, in the form of smaller dividends, seemed bad for all concerned. The dissenters would have won a Pyrrhic victory. The situation creates doubts as to whether the general assignment should be continued as an act of bankruptcy.³⁴

Another reason given for refusing to uphold the general assignment with discharge is purely formalistic in character. If the instrument of assignment provided that the residue of assets, after all assenting creditors had been paid off, should be distributed among non-assenting creditors, the transaction was held unobjectionable.³⁵ But if the residue was to be returned to the debtor himself, the entire scheme fell.³⁶ Factually, this distinction will not bear up under close scrutiny. Usually there would be insufficient assets to pay consenting creditors in full. Consequently the existence of a residue would be rare. A distinction, causing the entire transaction to rise or fall, and based upon a contingency rarely existing, is hardly justifiable. And in the rare situation where a residue is found to exist, the distinction is almost equally bad. If the agreement provides that the residue be distributed among dissenting creditors, the latter share *pro rata*. If, on the other hand, the residue is returned to the debtor, it would be available to remaining

32. BANKRUPTCY ACT OF 1938, § 3a (4), 52 STAT. 844 (1938), 11 U. S. C. A. § 21a (4) (Supp. 1938). That creditors have frequently taken advantage of this, see 1 COLLIER, BANKRUPTCY (13th ed. 1923) 158-164; 1 COLLIER, BANKRUPTCY, REORGANIZATIONS AND ARRANGEMENTS (14th ed. soon to be published) § 3.401 *et seq.*

33. Secret preferences in common-law compositions invalidated the composition as to innocent creditors: Kullman v. Greenebaum, 92 Cal. 403, 28 Pac. 674 (1891); Burgess v. Simpson Groc. Co., 128 Ga. 423, 57 S. E. 717 (1907). See also Huntington v. Clark, 39 Conn. 540 (1873); Jackson v. Hodges, 24 Md. 468 (1866); Huckins v. Hunt, 138 Mass. 366 (1885); Hanover Nat. Bank v. Blake, 142 N. Y. 404, 37 N. E. 519 (1894).

34. Yet the general assignment has constituted an express act of bankruptcy continuously since 1898. See BANKRUPTCY ACT OF 1898, § 3a (4), 30 STAT. 546 (1898), 11 U. S. C. A. § 21a (4) (1927); BANKRUPTCY ACT OF 1926, § 3a (5), 44 STAT. 663 (1926), 11 U. S. C. A. § 21a (5) (1927); BANKRUPTCY ACT OF 1938, § 3a (4), 52 STAT. 844 (1938), 11 U. S. C. A. § 21a (4) (Supp. 1938). Curiously enough, as to corporate reorganizations, the Chandler Act provides that a petition under Chapter X against a corporate debtor is not filed in good faith, and is therefore subject to dismissal, if it appears that the interests of creditors and stockholders would be best subserved in a pending proceeding in another court: BANKRUPTCY ACT OF 1938, § 146 (4), 52 STAT. 887 (1938), 11 U. S. C. A. § 546 (Supp. 1938).

35. Beal Burrow Dry Goods Co. v. Baker, 136 Okla. 278, 277 Pac. 585 (1929); see also Isaacson v. Davis, 127 Me. 398, 143 Atl. 788 (1928); Note (1938) 47 YALE L. J. 944, 962.

36. Kobler v. Heins, 189 Minn. 213, 248 N. W. 698 (1933); Barrett & Co. v. Chilton, 304 Mo. 679, 264 S. W. 802 (1924); Brekke v. Crewe, 43 S. D. 106, 178 N. W. 146 (1920); see Note (1938) 47 YALE L. J. 944, 962.

creditors in a race by the diligent.³⁷ Such a distinction scarcely justifies such a radical difference in legal consequences. The common law has never exhibited any antipathy for races by the diligent where all creditors are contestants;³⁸ *a fortiori* it should not where the field is limited to dissenting creditors.

The other view, upholding the validity of a common-law general assignment with provisions for discharge, is known as the rule of *Brashear v. West*.³⁹ In that case a Pennsylvania debtor assigned all of his assets to a trustee, to be liquidated and distributed among the creditors. The deed of assignment expressly provided that all creditors who did not, within ninety days, execute a full release of all claims against the debtor, should not be entitled to share in the proceeds. Mr. Chief Justice Marshall, though apprehensive about the apparent coercive power such a scheme gave to the debtor,⁴⁰ felt bound to follow the law of Pennsylvania, which upheld the validity of such transactions.⁴¹ Significance is given to the decision when it is understood that at the time of the transaction there was no federal bankruptcy act.⁴² Hence, the threat of bankruptcy did not exist for either the creditors or the debtor. The coercive power, if any existed, was lodged solely in the

37. Usually, the original assignment included only the debtor's non-exempt property. Hence, a surplus of this would be attachable.

38. "Among creditors, the race is to the swift. The first to impress a lien upon the property of the debtor may satisfy his demand in full, to the exclusion of the less alert. While statutes have made consistent inroads upon this common-law doctrine, and the bankruptcy, assignment and recording acts evince an unmistakable public policy in favor of equality, the rule of the 'race for diligence' stubbornly persists. From the time that the first rumor of imminent insolvency is spread by the credit bureau, creditors are constantly jockeying for position." Note (1938) 47 YALE L. J. 944. When a common-law composition was voidable because of secret preferences, or because of fraudulent concealment by the debtor, the common law upheld races by the diligent. See cases cited *supra* note 33. And in some states, if a statutory assignment is voidable by creditors, the courts permit the same race, instead of bringing about a *pro rata* distribution. *Stevens v. Mosconi*, 5 Colo. App. 484, 39 Pac. 348 (1895); *De Graw v. King*, 28 Minn. 118, 9 N. W. 636 (1881); *Marks, Rothenberg & Co. v. Bradley*, 69 Miss. 1, 10 So. 922 (1891); *Montgomery v. Goodbar*, 69 Miss. 333, 13 So. 624 (1891).

39. 7 Pet. 608 (U. S. 1833).

40. "The objection is certainly powerful, that its tendency is to delay creditors. If there be a surplus, this surplus is placed, in some degree, out of the reach of those who do not sign the release, and thereby entitle themselves under the deed. The weight of this argument is felt. But the property is not entirely locked up. A court of equity, or courts exercising chancery jurisdiction, will compel the execution of the trust; and decree what may remain to those creditors who have not acceded to the deed. Yet we are far from being satisfied that, upon general principles, such a deed ought to be sustained." *Id.* at 615.

41. "But whatever may be the intrinsic weight of this objection, it seems not to have prevailed in Pennsylvania. The construction which the courts of that state have put upon the Pennsylvania statute of frauds must be received in the courts of the United States.

"In *Lippincott and Annesby v. Barker*, 2 Binney, 174, this question arose, and was decided, after elaborate argument, in favor of the validity of the deed. This decision was made in 1809; and has, we understand, been considered ever since as settled law." *Ibid.*

42. The Bankruptcy Act of 1800 was repealed in 1803. The next one was passed in 1841. See GLENN, LIQUIDATION (1935) § 107.

debtor.⁴³ Yet the device was upheld. Had the case been more generally followed, the general assignment with discharge might have been more widely utilized.

It appears, then, that in some jurisdictions this was an available and efficacious means of liquidating an insolvent estate.⁴⁴ Since in the great bulk of states the question was never passed upon, it is reasonable to assume that in many of them *Brashear v. West* would have been followed. The development, however, took a different direction because of the introduction of state statutes regulating general assignments. These raised new and different problems. It becomes desirable, therefore, to turn to a brief study of these enactments, and to discover their judicial fate.

STATUTORY ASSIGNMENTS

The power of a debtor to make a general assignment was an incident of his common-law power to control and dispose of his property pretty much as he saw fit.⁴⁵ In jurisdictions following *Brashear v. West*, this power was extended to permitting the debtor to exact releases from his creditors as a condition of their right to participate in the assignment. In jurisdictions holding contrary to *Brashear v. West* there was a corresponding curb upon this *ius disponendi*.

Statutes regulating general assignments, in some respects recognized and protected the debtor's *ius disponendi*, merely placing it under judicial surveillance, somewhat comparable to supervision of a trust estate.⁴⁶ In other respects they placed definite limitations upon a debtor's power of disposing of his assets.⁴⁷

There were probably two reasons for the widespread enactment of state assignment statutes. One was to place assignments under judicial and administrative scrutiny, curbing the debtor's power of utilizing this device for unfair purposes. That is, the assignments were regulated by legislation, and the statutes vary in the extent to

43. That is, the debtor, by the assignment, placed his assets beyond the reach of creditors. Their only alternatives were to participate and grant releases, or stay out and hope for the debtor to acquire new assets at some later date.

44. (1926) 74 U. OF PA. L. REV. 414; (1932) 41 YALE L. J. 603, 607-608. Cases following the rule of *Brashear v. West* are: *Isaacson v. Davis*, 127 Me. 398, 143 Atl. 788 (1928); *Beal Burrow Dry Goods Co. v. Baker*, 136 Okla. 278, 277 Pac. 585 (1929); *Brown Shoe Co. v. Beall*, 107 S. W. (2d) 456 (Tex. Civ. App. 1937); *Joel Bailey Davis Co. v. Augustus*, 105 Va. 843, 54 S. E. 985 (1906); *First State Bank v. Allen*, 151 Va. 93, 144 S. E. 474 (1928); *Fugate v. Allen*, 153 Va. 143, 149 S. E. 501 (1929); *McMillan v. Holley*, 145 Wis. 617, 130 N. W. 455 (1911).

45. See *supra* note 12.

46. "... legislation was passed by most states, not to discourage the making of such assignments, but by various salutary provisions to safeguard and expedite the administration of the insolvent's estate by the assignee in the interest of all the creditors." Note (1938) WIS. L. REV. 302, 304. See WIS. STAT. (1931) c. 128.

47. Most state statutes now prohibit preferences. For a discussion of provisions of various state acts, see GLENN, LIQUIDATION (1935) § 123; Note (1938) 47 YALE L. J. 944; (1933) 20 VA. L. REV. 222.

which they limit the debtor's *ius disponendi*.⁴⁸ The other reason was at that time more important. At various intervals in American legal history there has been no federal bankruptcy act.⁴⁹ During these periods the administration of insolvent estates was left largely to the control of the states. Consequently, state legislation was enacted to assume this function.

These laws were of two general types. The one, suggested by the repeal of a federal act, substituted a state bankruptcy statute. Such were usually designated "Insolvency Laws". They have present importance only insofar as it becomes necessary to distinguish them from state "Assignment Statutes".⁵⁰

A state insolvency act differs in one important respect from a federal bankruptcy law. The United States Constitution expressly confers upon Congress authority to pass uniform laws on the subject of bankruptcy.⁵¹ This power is not limited by any provision relating to impairment of the obligation of contract. In fact, federal bankruptcy acts, in enforcing compulsory discharge of bankrupt debtors, necessarily impair contractual rights and remedies of creditors.⁵² On the other hand, state legislation is subject to constitutional mandate prohibiting impairment of the obligation of contract.⁵³ It is, therefore, impossible for a state statute to force creditors against their will, to discharge a debtor's obligations upon receipt of a *pro rata* dividend from his estate.⁵⁴ This placed a serious limitation upon the effectiveness of state insolvency laws. As a result, such statutes usually provided that all creditors accepting dividends automatically consented to release the debtor from further obligation.⁵⁵ The creditors were privileged to refuse to participate, retaining their claims against the debtor *in toto*, in the hope that he might subsequently acquire valuable assets. This limi-

48. In addition to the succeeding text discussion in this article, see Legis. (1933) 20 VA. L. REV. 222; Note (1938) 47 YALE L. J. 944. See also GLENN, LIQUIDATION (1935) §§ 115, 123.

49. The Act of 1800 was repealed in 1803; that of 1841 in 1843, while the Act of 1867 lasted until 1878. The Act of 1898 lasted continuously in effect through 1938, when it was most recently amended by the Chandler Act.

50. Though in many instances remaining on the statute books, "Insolvency Laws" are suspended during the existence of a federal bankruptcy act. International Shoe Co. v. Pinkus, 278 U. S. 261 (1929); (1938) WIS. L. REV. 302, 303; (1933) 42 YALE L. J. 1140, 1142.

51. U. S. CONST. ART. I, § 8.

52. The deprive all creditors with provable claims with some exceptions of any further rights against the discharged debtor. BANKRUPTCY ACT OF 1938, § 17, 52 STAT. 851 (1938), 11 U. S. C. A. § 35 (Supp. 1938).

53. U. S. CONST. ART. I, § 10 (1).

54. Insofar as such a statute is retroactive, it clearly impairs the obligation of contract. It might not be subject to that objection insofar as it operates only *in futuro*. Future creditors may be said to contract subject to statutes existing when the contract is made.

55. See for example, PA. STAT. ANN. (Purdon, 1930) tit. 39, § 100; TEX. REV. CIV. STAT. (Vernon, 1935) tit. 12, art. 263.

tation might, however, in many instances prevent the debtor from obtaining a fresh start, free from his existing obligations. The state acts sometimes provided both voluntary and involuntary proceedings.⁵⁶

The other form of state legislation regulates common-law assignments. Differing widely in detail from state to state, these statutes are difficult to classify. Even today four states have no enactments on the subject.⁵⁷ A few others are substantially ineffective, leaving the assignment substantially a common-law enterprise.⁵⁸

As to formal requirements there is some unanimity. Usually the assignment must be recorded, notice must be sent to creditors, and frequently the assignee is required to file a bond.⁵⁹ Other provisions may require the debtor to file a statement of his assets and liabilities and a schedule of creditors, and may provide for his examination under oath.⁶⁰ Time limits may also be set within which creditors are permitted to file claims.⁶¹ Such provisions are aimed at securing adequate publicity and at the prevention of unfair conduct. They interfere little or not at all with the debtor's rights. In short, they may be said to be merely regulatory of the common-law assignment.

Other provisions, however, affect substantive matters and limit the debtor's *ius disponendi*. For example, most of the statutes prohibit preferences.⁶² They vary in the extent to which they require judicial supervision and control.⁶³ Likewise is there diversity in the powers given to the assignee to set aside fraudulent conveyances and preferences.⁶⁴ As these substantive requirements increase in number and in

56. See for example, PA. STAT. ANN. (Purdon, 1930) tit. 39, §§ 1, 31.

57. Louisiana, Maine, Oregon and Wyoming. See Legis. (1933) 20 VA. L. REV. 222, 223, n. 9.

58. For a general analysis of the various state statutes, see Legis. (1933) 20 VA. L. REV. 222.

59. *Id.* at 224.

60. See Note (1938) 47 YALE L. J. 944, 957, n. 89.

61. *Id.* at 959.

62. Compare Legis. (1933) 20 VA. L. REV. 222, 228, with Note (1938) 47 YALE L. J. 944, 950.

63. "In most states the court plays an important part in the administration of estates transferred for the benefit of creditors. It is expressly provided in many statutes that the assignee shall at all times be under the supervision and control of the court and he may be cited and compelled to abide by the orders of the court. The court can compel an accounting and is given power to remove the assignee for cause, and upon the death, resignation or removal of the assignee the court may appoint his successor. The court may at any time summon the debtor and force him to submit to an examination in regard to matters affecting the estate. In some states the court may authorize the continuance of the debtor's business." Legis. (1933) 20 VA. L. REV. 222, 227.

64. "Fifteen states . . . therefore confer authority upon a statutory assignee to regain any transferred or secreted assets which a creditor would be able to recover. Even if the fraudulently transferred assets already have been recovered by an individual creditor, the assignee may under the statute step in to recover the property and limit the levying creditor to a *pro rata* share. If the assignee is lethargic, any *cestui* of the trust may conduct the suit to set aside the conveyance, provided he turns over the increment to the general estate." Note (1938) 47 YALE L. J. 944, 956-957.

strictness of control, they place additional limitations upon the debtor's *ius disponendi*. And in the same manner they tend to make the assignment look less like the debtor's voluntary act, i. e., less like a common-law assignment, and more like a mandatory statutory proceeding, i. e., more like bankruptcy legislation.⁶⁵

For present consideration, of vital importance are the provisions relating to discharge. Here again there is considerable variation. A rough generalization, which is admittedly inexact, may be attempted. Some statutes, by express provision, or by judicial interpretation, permit the debtor to exact voluntary releases from assenting creditors.⁶⁶ These may be designated as "formal" statutes. Others provide for automatic discharge by all participating creditors.⁶⁷ Such may be called "substantive" statutes, for they attempt to limit substantive rights of creditors. Since, under the "formal" type, releases are exacted by voluntary agreement between the debtor and his creditors, the assignment is similar to a common-law transaction. Thus, it may be said that the assignment derives its force by virtue of the debtor's voluntary act, and not by means of the statute. The "substantive" type, however, resembles more closely bankruptcy legislation. It becomes more difficult to say that the assignment is, as at common law, the debtor's voluntary act. It becomes easier to say that the entire transaction derives its force from the statute. The significance of this distinction becomes apparent in subsequent discussion.

Under assignment statutes the debtor succeeds in immunizing his assets from attachment.⁶⁸ Other difficulties, however, prevent his achieving the desired end of a simple, speedy and inexpensive method of administering his estate. Those difficulties will be discussed in the following order: (1) To what extent are the statutes given extra-territorial effect, making possible complete and unified administration in a situation where the debtor may have assets and liabilities in jurisdic-

65. Giving the assignee power to avoid fraudulent conveyances and preferences is comparable to the powers of a trustee in bankruptcy. See BANKRUPTCY ACT OF 1938, §§ 60, 67, 70e, 52 STAT. 869, 875, 879 (1938), 11 U. S. C. A. §§ 96, 107, 110e (Supp. 1938). Some state statutes convert an attempted partial assignment into a general assignment. See ARIZ. REV. CODE ANN. (Courtright, Supp. 1936) § 176; PA. STAT. ANN. (Purdon, 1930) tit. 39, § 2. The recently enacted Wisconsin statute provides for involuntary proceedings in a manner similar to the Federal Bankruptcy Act. WIS. STAT. (1937) § 128.06. See Note (1938) WIS. L. REV. 302, 306. See also *supra* note 56.

66. See, for example, ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 178; ARK. DIG. STAT. (Pope, 1937) § 7610; VA. CODE ANN. (Michie, 1936) § 5278d. See Haijek & Simecek v. Luck, 96 Tex. 517, 74 S. W. 305 (1903), in which a voluntary release was given and upheld by the court, although the Texas Act of 1883, G. L. vol. 9, p. 352, provided for an automatic discharge.

67. COLO. ANN. STAT. (Courtright's Mills, 1930) § 267; and see *supra* note 55. But it is prudent to obtain a voluntary release from the creditors. See Haijek & Simecek v. Luck, 96 Tex. 517, 74 S. W. 305 (1903).

68. Boese v. King, 108 U. S. 379 (1883); Pobreslo v. Boyd, 287 U. S. 518 (1933); Johnson v. Star, 287 U. S. 527 (1933); Patty-Joiner & Eubank Co. v. Cummins, 93 Tex. 598, 57 S. W. 566 (1900).

tions other than the one in which the assignment is made; (2) To what extent, under the statutes, is the debtor prevented from securing a discharge, both because of unfavorable judicial decisions and the intervention of the Federal Bankruptcy Act?

EXTRA-TERRITORIAL EFFECT OF ASSIGNMENT STATUTES

A happy, but little investigated, feature of a common-law general assignment was that it was given extra-territorial effect.⁶⁹ The courts reasoned that since a debtor could voluntarily transfer the title of his assets, he could transfer legal title to an assignee, even though the property was located in another jurisdiction. This immunized the assets, wherever located, from attachment, and made possible a unified, undisturbed administration of the estate.⁷⁰ This was considered an incident of the debtor's *ius dispondendi*. A minority of jurisdictions gave extra-territorial effect to an assignment, only if local creditors were first taken care of, or else permitted local creditors to attach in spite of the assignment.⁷¹

Statutory assignments, however, encountered more serious extra-territorial difficulties. The majority of courts, attaching great importance to the term "statutory assignments", reasoned that the assignee received his title, not from the debtor's *ius dispondendi* but from the statute.⁷² Therefore, for the forum to give effect to the assignment

69. If the assignment complied with the formalities required by the jurisdiction in which the property was located, the assignee's legal title to the property was recognized and protected. *Coffin v. Kelling*, 83 Ky. 649 (1886); *cf. Pierce v. O'Brien*, 129 Mass. 314 (1880). See *supra* note 8.

70. *Stowe v. Belfast Sav. Bank*, 92 Fed. 90 (D. Me. 1897), *aff'd*, 92 Fed. 100 (C. C. A. 1st, 1899); *Fenton v. Edwards*, 126 Cal. 43, 58 Pac. 320 (1899); *Coffin v. Kelling*, 83 Ky. 649 (1886); *Roberts v. Norcross*, 69 N. H. 533, 45 Atl. 560 (1898); *Law v. Mills*, 18 Pa. 185 (1851). See GOODRICH, *CONFLICT OF LAWS* (1938) 421; GLENN, *LIQUIDATION* (1935) § 589; WHARTON, *CONFLICT OF LAWS* (3d ed. 1905) § 353 *et seq.* See also Laughlin, *The Extraterritorial Powers of Receivers* (1932) 45 HARV. L. REV. 429, 462; Sunderland, *Foreign Voluntary Assignments for the Benefit of Creditors* (1903) 2 MICH. L. REV. 112, 125; Notes (1939) 87 U. OF PA. L. REV. 328; (1932) 41 YALE L. J. 593; (1904) 65 L. R. A. 353; (1894) 23 L. R. A. 33.

The immunity from attachment is reinforced by the assignee's taking of actual possession. *Barnett v. Kinney*, 147 U. S. 476 (1893); *Ockerman v. Cross*, 54 N. Y. 29 (1873).

71. *Fox v. Adams*, 5 Me. 245 (1828); *Chafee v. Fourth Nat'l Bank*, 71 Me. 514 (1880); *Heyer v. Alexander*, 108 Ill. 385 (1884); *Smith v. Lamson*, 184 Ill. 71, 56 N. E. 387 (1900). See *Clark v. Williard*, 294 U. S. 211, 214 (1935), cited *infra* note 94, where Cardozo, J., implies that this is well-settled as the majority rule, and see also RESTATEMENT, *CONFLICT OF LAWS* (1934) § 263. But the assignee's title is recognized when he perfects it by taking actual possession. *Union Sav. Bank & Trust Co. v. Indianapolis Lounge Co.*, 20 Ind. App. 325, 47 N. E. 846 (1897). See *Woolson v. Pipher*, 100 Ind. 306 (1884); and *cf. Pierce v. O'Brien*, 129 Mass. 314 (1880); *Wales v. Alden*, 39 Mass. 245 (1839).

72. "The reason for the distinction is that a voluntary transfer, if valid where made, ought generally to be valid everywhere, being the exercise of the personal right of the owner to dispose of his own, while an assignment by operation of law has no legal operation out of the state in which the law was passed." *Cole v. Cunningham*, 133 U. S. 107, 129 (1890).

"... a transfer by legal proceeding possesses less solemnity than one made by the owner himself" *Crapo v. Kelly*, 16 Wall. 610, 622 (U. S. 1872).

would be to give extra-territorial enforcement to the statute.⁷³ In refusing so to do, they conceded that they would lend their aid as a matter of comity.⁷⁴ But comity would never be extended to the extent of prejudicing local creditors.⁷⁵ Hence, under the majority rule a foreign statutory assignment was valid except as against local creditors. Consequently, a statutory assignment could not bring about a unified administration where assets were attached by local creditors in a jurisdiction other than the place where the assignment was made.

The reasoning upon which such a conclusion is based is of questionable validity. The difficulty grows out of the premise that the assignment derives its force from the foreign statute rather than from the debtor's voluntary act.⁷⁶ To be sure, it has been found that all of the assignment statutes to some extent limit the manner in which a debtor may effect a voluntary assignment.⁷⁷ But to say that, because of minor limitations, the assignment derives its force from the statute rather than from the debtor's voluntary act, seems unwarranted. It places an undesirable curb upon the powers of a debtor who seeks honestly to distribute his estate equally among his creditors.⁷⁸ In effect, the statute merely tells the debtor that he may still make an assignment as at common law, but for the protection of all parties concerned, certain formalities must be observed in carrying out that assignment. Funda-

73. ". . . whilst the disposition of his movable property by the owner is respected by the laws of all States everywhere, the laws of any particular State and transfers by operation of law, have no extraterritorial force which other States will concede, except by comity." Dissent in *Crapo v. Kelly*, 16 Wall. 610, 642-643 (U. S. 1872). But see *Holmes v. Remsen*, 4 Johns. Ch. 460 (N. Y. 1820).

74. Comity is a form of interstate courtesy. An enforcement of a statutory assignment by comity is a denial of any legal obligation to do so. Foreign statutory assignments are upheld as against attachments by non-residents. *Thompson Co. v. Whitehead*, 185 Ill. 454, 56 N. E. 1106 (1900); *Covey v. Cutler*, 55 Minn. 18, 56 N. W. 255 (1893).

These cases should be based upon the constitutional obligation requiring each state to give full faith and credit to the acts of another state, and not upon comity. In other words, they are correct in result, but incorrect in reasoning.

75. *Happy v. Prickett*, 24 Wash. 290, 64 Pac. 528 (1901); *Johnson v. Parker*, 4 Bush. 149 (Ky. 1868); cf. *Borton v. Brines-Chase Co.*, 175 Pa. 209, 34 Atl. 597 (1896); *Disconto Gesellschaft v. Umbreit*, 208 U. S. 570 (1908); *Hurd v. Elizabeth*, 41 N. J. L. 1 (1879); *Warner v. Jaffray*, 96 N. Y. 248 (1884).

In *Security Trust Co. v. Dodd, Mead & Co.*, 173 U. S. 624 (1899), property located in Massachusetts, which was assigned in Minnesota under Minnesota "insolvency" statute, was held attachable by New York creditors. This is a denial, not only of extra-territorial validity, but also of interstate comity.

76. This fallacy arose in the early cases because assignment statutes were placed in the same category as state insolvency statutes and state bankruptcy statutes. See *Cole v. Cunningham*, 133 U. S. 107 (1890), and *Security Trust Co. v. Dodd, Mead & Co.*, 173 U. S. 624 (1899). No distinction was made between an assignment made by the debtor, which was regulated by statute, and an insolvency proceeding initiated by the debtor or his creditors, which involved an assignment by operation of law. See Note (1939) 87 U. OF PA. L. REV. 328, 332.

77. See discussion *supra* on "Statutory Assignments".

78. The results of this judicial hostility to statutory assignments is more keenly felt as, with the passage of time, business enterprises become more interstate in scope and statutory regulation becomes more prevalent.

mentally, then, the assignment remains the voluntary act of the debtor;⁷⁹ hence, the desirability of treating the statute as "formal" rather than as "substantive". As will be subsequently observed, for purposes of ascertaining the validity of discharge provisions, a majority of courts have upheld them on the theory that the rights under the assignment "are contractual and the statute merely regulates the creation and administration of the trust".⁸⁰ However some of the same courts say that a foreign assignment made in accordance with a similar statute is not entitled to extra-territorial enforcement as far as immunization of foreign assets is concerned because the assignment is "statutory".⁸¹ This inconsistency is unfortunate.

Behind the majority rule is the idea that a state has sole power to administer assets located within its boundaries, to which property the state has already afforded its protection.⁸² In addition is the desire to favor local creditors.⁸³ The rule is subject to two interpretations: (1) if a statutory assignment made in State *A* purports to affect property in State *B*, the latter jurisdiction will permit creditors residing therein to attach the assets, but will not accord the same privilege to citizens of other states; (2) that State *B* would permit creditors of all states to participate. The latter disregards a desire to protect local creditors, being based only on State *B*'s right to administer assets located within its boundaries.⁸⁴ The first seems clearly a violation of the equal privileges and immunities clause of the Federal Constitu-

79. *Weider v. Maddox*, 66 Tex. 379, 1 S. W. 168 (1886); *Weiss Co. v. Goodrich Co.*, 189 Wis. 413, 207 N. W. 956 (1926). See Bolles, *The Law Concerning Foreign Receivers* (1909) 18 YALE L. J. 488, 494. See also Notes (1939) 87 U. OF PA. L. REV. 328, 332; (1932) 41 YALE L. J. 593, 600.

80. *Legis.* (1933) 20 VA. L. REV. 222, 223. Under this reasoning the creditor is prevented by his release from recovering the balance of his claim in the courts of every state since the *lex loci contractus* will be applied.

81. Wisconsin, while upholding its own discharge provisions in its assignment statutes in *Hempsted v. Wisconsin Ins. Co. Bank*, 78 Wis. 375, 47 N. W. 627 (1890), has held a general assignment made voluntarily pursuant to a Minnesota statute providing for discharges to be inoperative as to Wisconsin property on the ground that it was a bankruptcy statute. *McClure v. Campbell*, 71 Wis. 350, 37 N. W. 343 (1888). New York refused to give extra-territorial effect to an assignment made under the Wisconsin statute on similar grounds. *Barth v. Backus*, 140 N. Y. 230, 35 N. E. 425 (1893).

Texas courts, however, consistently hold that regulatory assignment statutes are purely formal. They recognize the foreign assignee's rights in the assigned property. *Weider v. Maddox*, 66 Tex. 379, 1 S. W. 168 (1886). They also enforce discharges voluntarily given by the creditors in connection with the statutory assignment. *Hajjek & Simecek v. Luck*, 96 Tex. 517, 74 S. W. 305 (1903).

82. *Green v. Van Buskirk*, 5 Wall. 307 (U. S. 1866); *Green v. Van Buskirk*, 7 Wall. 139 (U. S. 1868).

83. See GOODRICH, *CONFLICT OF LAWS* (2d ed. 1938) 514, for a criticism of this attitude. The attempt to preserve local assets for local creditors has been quite successful in the administration of decedents' and receivership estates.

84. The jurisdiction in which the property is situated affords protection to the property. This being so, that jurisdiction asserts the right to administer the property, and to prescribe requirements for its transfer, either voluntarily or involuntarily, by levy, attachment, etc.

tion;⁸⁵ the second is free from that charge. When a state court, in these cases, expresses a disposition to protect local creditors, it is not clear which of the above meanings is intended. The constitutional issue is seldom raised, since local creditors are usually the only ones to attach.⁸⁶

Though the issues of full faith and credit and of equal privileges and immunities seem to overlap, the United States Supreme Court has distinguished them. In *Clark v. Williard*,⁸⁷ a statutory successor⁸⁸ to an Iowa Corporation had been appointed in that state under a statute giving him title to the property of the corporation. The corporation owned property located in Montana. The Supreme Court held that under the full faith and credit clause, the State of Montana must give effect to the title of the statutory successor.⁸⁹ However, since the Montana courts had jurisdiction and control over assets located within

85. A Tennessee statute permitted foreign corporations to do business in Tennessee on condition that they give resident creditors priority over non-resident creditors in the distribution of corporate assets in the event of insolvency. This statute was held unconstitutional in *Blake v. McClung*, 172 U. S. 239 (1898) and 176 U. S. 59 (1900). If resident creditors are privileged to attach assigned property when non-resident creditors are not, this is equally offensive to the Fourteenth Amendment of the Federal Constitution. See Note (1939) 87 U. OF PA. L. REV. 328.

86. The sharp question of constitutionality would be raised where assigned property was attached by a resident creditor and by a non-resident creditor. If there was any discrimination based on residence, the *decision* would be a direct violation of the equal privileges and immunities clause. But the usual case involves a contest between an attaching creditor and an assignee. Inasmuch as the assignee might not represent creditors, the constitution would not be violated by the *decision*, whether it upheld or vacated the attachment. The violation would be indirect, based on the *rule* of public policy which would produce different results depending upon the citizenship or residence of the attacking creditor. See Note (1939) 87 U. OF PA. L. REV. 328, 329-330.

87. 292 U. S. 112 (1934), *rev'g*, *Mieyr v. Federal Surety Co.*, 94 Mont. 508, 23 P. (2d) 959 (1933), and 294 U. S. 211 (1935), *aff'g*, *Mieyr v. Federal Surety Co.*, 97 Mont. 503, 34 P. (2d) 982 (1934).

88. In accordance with an Iowa statute an Iowa surety Company was dissolved and Clark was appointed liquidating officer and successor to titles held by the surety company at the time of its dissolution. The Montana Supreme Court said: "Even though it be conceded that the appointment of the receiver in the state of Iowa operated to transfer the property of the defunct surety company to him, such involuntary assignment in aid of a statutory judicial proceeding will not be recognized outside of the jurisdiction of the appointment, where the rights of domestic creditors are involved, if the receiver has not obtained possession of the property and where the creditors have obtained rights or liens upon the property even after the appointment in the foreign jurisdiction." *Mieyr v. Federal Surety Company*, 94 Mont. 508, 524, 23 P. (2d) 959, 964 (1933). The statutory successor would seem to be comparable to an assignee appointed under an involuntary statutory proceeding. But *cf. infra* note 89.

89. "We think the Supreme Court of Montana denied full faith and credit to the statutes and judicial proceedings of Iowa, in holding, as it did, that the petitioner was a receiver deriving title through a judicial proceeding, and not through the charter of its being and the succession there prescribed." *Clark v. Williard*, 292 U. S. 112, 121 (1934). "The position of a claimant who has the standing of a statutory successor is more closely analogous to that of a trustee under a voluntary general assignment for the benefit of creditors [citations omitted] than to one deriving title under a decree in insolvency proceedings [citation omitted]. . . ." *Id.* at 122-123. "Whether there is in Montana a local policy, expressed in statute or decision, whereby judgments and attachments have a preference over the title of a charter liquidator is a question as to which the Supreme Court of that state will speak with ultimate authority. It has not spoken yet." *Id.* at 123.

the state,⁹⁰ they were permitted to control the distribution thereof under a Montana policy of protecting local creditors.⁹¹ This latter phrase is misleading. If it means that Montana might favor local creditors to the exclusion of all others, it violates the privileges and immunities clause.⁹² Since, however, no foreign creditors were claiming a share in the Montana assets, the issue was not squarely raised. The Supreme Court of Montana, nevertheless, recognized that the assets, under the rule of *Blake v. McClung*, could be attached by non-resident, as well as resident, creditors.⁹³ It seems highly improbable that the Supreme Court intended to ignore its earlier decision in *Blake v. McClung*.⁹⁴

This recognition of the superiority of the local policy, under the majority rule relating to the extra-territorial effect of statutory assignments, renders impossible a unified administration. The difficulties are comparable to those arising under extra-territorial problems of receiver-ships.⁹⁵ The unfortunate results seem firmly imbedded in our federal

90. "Full faith and credit must be given to the decree of the Iowa court and the statutes of that state in this respect, that Clark was entitled to the property, not as an ordinary receiver, but as a quasi-assignee of the dissolved corporation by force of statute entitled of right to defend or sue in its stead in this state [citation omitted]. But the laws of the state of Iowa do not have extraterritorial force. Rights and remedies of property are governed by the laws of the state in which it is situated. The statutory assignment can only be given force in other states on the ground of comity; not by constitutional mandate [citations omitted]." *Mieyr v. Federal Surety Co.* 97 Mont. 503, 512, 34 P. (2d) 982, 987 (1934).

But cf. *supra* note 74. It would seem that extra-territorial effect to the statutory assignee's title is based not on comity, but on the constitutional mandate of full faith and credit. However, such recognition is subject to the local policy of permitting the foreign jurisdiction to administer the assets. See *supra* note 84.

91. Attaching creditors in Montana were preferred over the Iowa statutory successor according to the local policy of Montana. This policy was partly determined by reciprocity since Iowa would similarly subordinate a Montana statutory assignee. *Mieyr v. Federal Surety Co.*, 97 Mont. 503, 515, 34 P. (2d) 982, 988 (1934).

92. See *supra* note 85.

93. To satisfy an objection argued on the basis of *Blake v. McClung*, 172 U. S. 239 (1898), and 176 U. S. 59 (1900), the Montana Supreme Court said: "Here, any creditor, whether resident or not, was free at the time the levy of the execution was made to secure an attachment against the property of the Federal Surety Company. There is no denial of any privilege accorded to a Montana creditor to any nonresident creditor." *Mieyr v. Federal Surety Co.*, 97 Mont. 503, 516, 34 P. (2d) 982, 988 (1934).

94. The United States Supreme Court opinion does not refer to the problems of *Blake v. McClung*. Cardozo, J., said: "If title had been conveyed to an assignee for the benefit of creditors by a common law assignment or by insolvency proceedings, claimants in Montana might pursue their suits and remedies in derogation of the assignment when the law or policy of the locality ordained that this result should follow." *Clark v. Williard*, 294 U. S. 211, 214 (1935). The local policy may pertain to the formalities of transfer or attachment and execution, but the policy itself must be constitutional. It must not discriminate among creditors on the basis of residence or citizenship. See Note (1939) 87 U. OF PA. L. REV. 328.

The view of Mr. Justice Cardozo in respect to the extraterritorial effect of a common-law assignment is the minority view. See *supra* note 71. The "unimpeachable authority" which is cited for the proposition quoted above consists of nine cases involving two receiverships, four bankruptcy or insolvency statutes, and one assignment statute. *Ockerman v. Cross*, 54 N. Y. 29 (1873), the only case involving a common-law assignment upholds the right of the assignee who had taken possession.

95. See *Booth v. Clark*, 17 How. 322 (U. S. 1854). The policy of protecting local creditors by administering local assets causes delay, expense, and confusion because of

system.⁹⁶ The advantages derived from a recognition of the local policy rule seem small compared to those resulting from permitting a completely unified administration.⁹⁷ Small harm would be done if the courts applied to statutory assignments the rule they had developed regarding common-law assignments. The majority rule makes a statutory assignment a satisfactory device only where it is purely intrastate in scope.

DISCHARGES UNDER STATUTORY ASSIGNMENTS

Under a common-law general assignment, combined with a common-law composition, a debtor could obtain a discharge from his obligations owed to assenting creditors under the rule of *Brashear v. West*.⁹⁸ Further difficulties arose when he attempted to do likewise by the use of a statutory assignment.

State statutes frequently provide that creditors accepting dividends under a statutory assignment automatically consent to release the debtor from further liability.⁹⁹ Since creditors are privileged to refuse to accept dividends thereunder, and to retain their claims *in toto*, for what they might be worth, such statutes were probably not in violation of the Constitution as impairing the obligation of contract.¹⁰⁰ Creditors accepting dividends, having given their assent to a discharge, were not privileged to object on this ground.¹⁰¹

The difficulties of effecting discharges under assignment statutes become more serious when the Federal Bankruptcy Act intervenes.

the requirement of ancillary appointments. See First, *Extraterritorial Powers of Receivers* (1932) 27 ILL. L. REV. 271; Laughlin, *The Extraterritorial Powers of Receivers* (1932) 45 HARV. L. REV. 429; Sabel, *Suits by Foreign Receivers* (1934) 19 CORN. L. Q. 442.

96. The *Clark v. Williard* Cases, 292 U. S. 112 (1934), and 294 U. S. 211 (1935), are firm foundations for the unfortunate local interference with the unified administration of the assigned estate.

97. A completely unified administration would immunize the assigned assets from attachment, no matter where located. The statutory assignee could collect all the assets, liquidate them, and distribute dividends to all creditors *pro rata*. Local policy may be asserted, unfortunately, in three ways: (1) the jurisdiction in which the property is located may prevent the statutory assignee from removing any assets unless the creditors who file claims therein are paid their *pro rata* share; (2) the jurisdiction in which the property is located may prevent the assignee from removing any assets until all creditors who file claims locally are paid in full; (3) the jurisdiction in which the property is located may permit the property to be subjected to attachments notwithstanding the prior foreign statutory assignment until it is all consumed or until all claims are satisfied, the assignee taking the residue.

98. See "Common-law General Assignments with Discharge", *supra* p. 771.

99. See *supra* note 55.

100. The alteration of the contract obligation results from the assent of the creditor to the debtor's proposal, not from the statutory provisions. See *supra* pp. 773, 775.

101. *Haijek & Simecek v. Luck*, 96 Tex. 517, 74 S. W. 305 (1903); *First State Bank v. Allen*, 151 Va. 93, 144 S. E. 474 (1928); *Fugate v. Allen*, 153 Va. 143, 149 S. E. 501 (1929); cf. *National Bank of La Crosse v. Funke*, 215 Wis. 541, 255 N. W. 147 (1934). See *supra* note 100.

That law supersedes all state legislation inconsistent therewith.¹⁰² It invalidates all state bankruptcy and insolvency acts.¹⁰³ Proceedings under the latter are a nullity, and leave the assets of a debtor subject to immediate attachment.¹⁰⁴ This is true even though bankruptcy proceedings have not been instituted.¹⁰⁵ In *International Shoe Company v. Pinkus*,¹⁰⁶ the Supreme Court upheld the right of a creditor to attach assets of a debtor which the latter was attempting to liquidate through a state insolvency statute. The Arkansas Act, though labeled an "Insolvency Law", provided for a discharge of the claims of assenting creditors.¹⁰⁷ It did not, therefore, impair the obligation of contract.¹⁰⁸ The Supreme Court held that the State Act was superseded by the Federal Bankruptcy Law.¹⁰⁹ Curiously enough, the Arkansas Court had held that the proceedings were equivalent to a voluntary general assignment.¹¹⁰ The Supreme Court's opinion is therefore subject to the charge that the result depends upon the title appended to the statute by the state legislature.¹¹¹

Clearly, state assignment statutes not containing provisions for discharge are not superseded by the Bankruptcy Act.¹¹² Whether

102. *International Shoe Co. v. Pinkus*, 278 U. S. 261 (1929); *Sturgis v. Crowninshield*, 4 Wheat. 122 (U. S. 1819); *Ogden v. Saunders*, 12 Wheat. 213 (U. S. 1827); *In re Tarnowski*, 191 Wis. 279, 210 N. W. 836, 49 A. L. R. 686 (1926). See Notes (1938) WIS. L. REV. 302; (1933) 42 YALE L. J. 1140.

103. See *supra* note 102. The state statutes seem to be superseded only where inconsistent with the Federal Bankruptcy Act. As to persons not eligible for bankruptcy, they remain in effect under a majority of decisions. For example, since farmers and wage-earners are not subject to involuntary bankruptcy, as to them the state laws remain in effect. See Williston, *The Effect of a National Bankruptcy Law upon State Laws* (1909) 22 HARV. L. REV. 547; Notes (1916) 15 MICH. L. REV. 68, (1931) 15 MINN. L. REV. 582, (1938) WIS. L. REV. 302, 306-314.

104. When there is no federal bankruptcy law, a state insolvency statute is at least operative locally. A state insolvency statute, superseded by a federal bankruptcy act, cannot work a transfer by operation of law even on local property. *International Shoe Co. v. Pinkus*, 278 U. S. 261 (1929).

105. See *supra* note 104.

106. 278 U. S. 261 (1929). See Notes (1929) 29 COL. L. REV. 519, (1929) 27 MICH. L. REV. 696. See also (1929) 42 HARV. L. REV. 823, (1932) 8 WIS. L. REV. 282.

107. ARK. DIG. STAT. (Crawford & Moses, 1919) c. 93, §§ 5885-5893.

108. See *supra* notes 100, 101.

109. ". . . Congress did not intend to give insolvent debtors seeking discharge, or their creditors seeking to collect claims, choice between the relief provided by the Bankruptcy Act and that specified in state insolvency laws. States may not pass and enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations. [Citations omitted.] It is clear that the provisions of the Arkansas law governing the distribution of property of insolvents for the payment of their debts and providing for their discharge, or that otherwise relate to the subject of bankruptcies, are within the field entered by Congress when it passed the Bankruptcy Act, and therefore such provisions must be held to have been superseded." *International Shoe Co. v. Pinkus*, 278 U. S. 261, 265-266 (1929).

110. *International Shoe Co. v. Pinkus*, 173 Ark. 316, 319, 292 S. W. 996 (1927). But Arkansas at that time also had an assignment statute which was purely regulatory. ARK. DIG. STAT. (Crawford & Moses, 1921) c. 9, §§ 486-493.

111. The "insolvency statute", however, provided only for voluntary proceedings so that the only real difference between the two statutes was the discharge provision. ARK. DIG. STAT. (Crawford & Moses, 1921) c. 93, §§ 5885-5893.

112. In *Re Tarnowski*, 191 Wis. 279, 210 N. W. 836, 49 A. L. R. 686 (1926), a creditor who had accepted dividends in a proceeding under a state assignment statute

similar statutes with discharge provisions are superseded remains in considerable doubt. Upon their validity hinges the future of statutory general assignments. The doubt involved becomes apparent upon a brief survey of the pertinent decisions. In *Re Tarnowski*¹¹³ the Wisconsin Supreme Court held that a state assignment statute, in respect to its discharge provisions, was superseded by the Bankruptcy Act.¹¹⁴ The assignment statute itself, without the discharge provisions, was upheld.¹¹⁵ Shortly thereafter, the United States Supreme Court held likewise in *Pobreslo v. Joseph M. Boyd Company*, stating that it accepted the State court's construction of its statutes.¹¹⁶ No question of the validity of the discharge provisions was involved. The *Pobreslo* case means that a state assignment statute, not containing discharge provisions, is not superseded by the Bankruptcy Act.

Some inkling of light, as well as more than an inkling of doubt, as to the present status of an assignment statute with provisions for discharge, was revealed in *Johnson v. Star*.¹¹⁷ The debtor made a general assignment under a Texas statute providing for an automatic discharge by all creditors accepting dividends.¹¹⁸ A dissenting creditor attempted to attach the property in the hands of the assignee, alleging that the

moved to have a discharge granted thereunder set aside. The court held that the assignment statute itself remained valid, but the discharge provisions were superseded by the Bankruptcy Act. This interpretation was followed in *Pobreslo v. Joseph M. Boyd Co.*, 287 U. S. 518 (1933). Discharge provisions of the Pennsylvania statute were likewise held invalid in *Fidelity Trust Co. v. Union Nat. Bank*, 313 Pa. 467, 169 Atl. 209 (1933), *cert. denied*, 291 U. S. 680 (1934); *cf. In re McElwain*, 296 Fed. 112 (C. C. A. 3d, 1924).

113. 191 Wis. 279, 210 N. W. 836, 49 A. L. R. 686 (1926). Note (1927) 11 MARQ. L. REV. 101.

114. See *supra* note 112.

115. "... there can be no doubt that legislation prescribing regulations for the administration of voluntary assignments constitutes one subject of legislation, while the discharge of bankrupts constitutes quite another. A voluntary assignment for the benefit of creditors is a personal right inherent in the ownership of property. Such a right existed at common law independent of statute. The statutes do not confer the right, but statutes in this country have been enacted for the purpose of regulating the administration of the estate for the benefit of creditors. The discharge of the bankrupt from his debts constitutes the very essence of a bankruptcy law. While the administration of the estate of the bankrupt and the distribution of the proceeds thereof *pro rata* among his creditors is a usual, if not a necessary, incident of a bankruptcy law, the discharge of the debtor from his debts is no part of an assignment law. The winding up and a fair distribution of the estate of insolvent debtors may arise in various ways, but where such a proceeding does not result in the discharge of the insolvent debtor, statutes regulating such a proceeding do not conflict in any manner with the bankruptcy law, and it has been squarely held by the Supreme Court of the United States that such laws are not superseded by the national Bankruptcy Act. [Citations omitted.] It follows, therefore, that the features of our voluntary assignment act are separate and distinct from the discharge features first enacted as ch. 385, Laws of 1889. The discharge features of the Law of 1889 are superseded by the federal Bankruptcy Act and are still in force." *In re Tarnowski*, 191 Wis. 279, 285-286, 210 N. W. 836, 49 A. L. R. 686 (1926).

116. 287 U. S. 518 (1933). See *supra* note 115, and *Pobreslo v. Joseph M. Boyd Co.*, 210 Wis. 20, 242 N. W. 725 (1932).

117. 287 U. S. 527 (1933). See Notes (1933) 32 MICH. L. REV. 93, (1932) 11 TEX. L. REV. 381, (1933) 8 WASH. L. REV. 189, (1933) 42 YALE L. J. 1140.

118. TEX. REV. CIV. STAT. (Vernon, 1925) tit. 12, a. 263.

state statute was superseded by the Bankruptcy Act. The Supreme Court, following its ruling in the companion *Pobreslo* case, adopted the State Court's interpretation of the statute, and upheld the validity of the assignment.¹¹⁹

Johnson v. Star is subject to at least two interpretations. The issue of the validity of the discharge provisions of the statute was not precisely involved. The real problem was whether the assignment under the statute was invalidated by the Bankruptcy Act, rendering the assets subject to attachment by creditors.¹²⁰ The Supreme Court held that it was not. The language of the opinion, however, easily lends itself to a far broader interpretation. It sets out provisions of the statute *verbatim*, including the provisions relating to discharge.¹²¹ It accepts the state court's interpretation of its statute as being not an "Insolvency Act", but rather as regulating common-law assignments with discharge, which are admittedly valid under state law. The Texas court had upheld discharges given pursuant to statutory assignments, insofar as no bankruptcy proceedings had intervened to displace the assignments.¹²² At most, it may be said that *Johnson v. Star* contains dictum to the effect that the Supreme Court will uphold the validity of discharge provisions in a "state assignment statute" if the local court has already done likewise.¹²³

In content the insolvency statute involved in *International Shoe Company v. Pinkus* was substantially the same as the assignment statute involved in *Johnson v. Star*.¹²⁴ The issues were the same in both cases. Mr. Justice Butler wrote both opinions, with different results. The cases seem indistinguishable upon any substantial ground. In the *Pinkus* case he seemed to indicate that the discharge provisions of the "Insolvency Act" rendered the entire statute bad.¹²⁵ In the *Johnson* case he felt otherwise. In the latter case he followed the state court's interpretation of the statute, while in the *Pinkus* case he disregarded the

119. After discussing the Texas cases, the court said, "Accepting as we do that court's construction of the provisions in question, we are of opinion that they are not repugnant to the Bankruptcy Act. This case is ruled by our decision in *Pobreslo v. Joseph M. Boyd Company*." *Johnson v. Star*, 287 U. S. 527, 530 (1933).

120. This much litigated assignment was attacked in two different appellate courts of Texas. One court followed the *Pinkus* case and upheld the attachment. *Johnson v. Chapman Milling Co.*, 37 S. W. (2d) 776 (Tex. Civ. App. 1931). The other court vacated the attachment upon the ground that the assignment was valid although it admitted that the discharge provisions would be inoperative. *Star v. Johnson*, 44 S. W. (2d) 429 (Tex. Civ. App. 1931). The Texas Supreme Court resolved the conflict in favor of the latter ruling. *Johnson v. Star*, 47 S. W. (2d) 608 (Tex. 1932).

121. *Johnson v. Star*, 287 U. S. 527, 528 (1933).

122. *Haijek & Simecek v. Luck*, 96 Tex. 517, 74 S. W. 305 (1903).

123. Two state courts have held that their assignment statutes are superseded by the Bankruptcy Act. *Harbaugh v. Costello*, 184 Ill. 110, 56 N. E. 363 (1900); *Rowe v. Page*, 56 N. H. 190 (1867). See Note (1933) 20 VA. L. REV. 222, 223.

124. See *supra* notes 107, 118.

125. See *supra* note 109.

fact that the Arkansas court had treated a proceeding under the "insolvency statute" just as though the debtor had made a voluntary general assignment.¹²⁶ The only other possible ground for distinction lies in the fact that the Arkansas law was labeled an "Insolvency Act", while the Texas statute was labeled an "assignment enactment". It is difficult to see why such substantial differences in result should depend upon the name appended to a statute by the legislature.¹²⁷

Until the Supreme Court is called upon to determine squarely whether discharge provisions in a state assignment statute are superseded by the Bankruptcy Act, debtors will proceed thereunder subject to the risk that the Court will disregard its dictum in *Johnson v. Star*. If the dictum be approved, one may expect that the general assignment will continue as an efficacious device for the administration of insolvent estates, subject only to the aforementioned difficulties of extra-territorial administration.

The Court will probably be confronted with the precise issue in only one situation, which arises most infrequently. If an assignment has been carried through, a creditor has accepted a dividend, and the state court has thereupon granted a discharge, any assenting creditor may thereafter attack the validity of the discharge by suing for the balance of his claim. In such manner was the question raised in *Haijek & Simecek v. Luck*.¹²⁸ The Texas court avoided passing upon the validity of the automatic discharge provision of the statute. Instead, it held that since the creditor had given a release, and since such releases were valid at common law, the creditor was bound regardless of whether the discharge provisions of the statute were suspended by the Bankruptcy Act. This case was cited with approval by the Supreme Court in *Johnson v. Star*.¹²⁹

This analysis of *Johnson v. Star* gives rise to a hope which may be more than sheer speculation. Apparently a common-law assignment with a composition providing for releases by consenting creditors is not superseded by the Bankruptcy Act.¹³⁰ So, if a particular state follows *Brashear v. West*,¹³¹ and if that state will say that a discharge under its statute is granted just as at common law, the statute may not be super-

126. Mr. Justice Butler recognized the Arkansas court's interpretation of the statute, but refused to follow it. *International Shoe Co. v. Pinkus*, 278 U. S. 261, 266 (1929).

127. One writer has suggested in effect that under the *Pinkus* case the transfer of the assets was dependent upon the decree of the court which acquired jurisdiction by virtue of the statute, while under an assignment statute title is acquired by virtue of the debtor's act. See Note (1938) Wis. L. Rev. 302, 303. See also Note (1933) 42 YALE L. J. 1140, 1141-1142.

128. 96 Tex. 517, 74 S. W. 305 (1903).

129. See *supra* note 119.

130. See *Haijek & Simecek v. Luck*, 96 Tex. 517, 74 S. W. 305 (1903).

131. 7 Pet. 608 (U. S. 1833). See *supra* p. 771.

seded. In other words, the *Haijek* case may be a means of upholding a state assignment statute with discharge provisions. On the other hand, there is an obstacle in the way of achieving such a result. Many state assignment statutes provide for an automatic release by all creditors accepting dividends.¹³² State courts may thus reason that the statute replaces common-law assignments, that the discharge is granted not from the creditor's assent, but rather from the statute, and that this is repugnant to the Bankruptcy Act.¹³³ From this interpretation there seems to be no hope.¹³⁴ But the Texas statute so provided, and the court in the *Haijek* case chose to treat it as a mere codification of the common law, with the discharges granted voluntarily by the creditors.

This last interpretation is more desirable. The statute does merely codify what the debtor could have validly done at common law.¹³⁵ Nonetheless, the cautious debtor will bring himself within the rule of the *Haijek* case by securing a voluntary release from each creditor who accepts a dividend. It is worthy of note that such seems to be the practice, if not the rule, in Wisconsin, despite the decision in *Re Tarnowski*, invalidating the discharge provisions of the state assignment statute. Thereafter, in *National Bank of La Crosse v. Funke*,¹³⁶ a debtor-corporation made a general assignment for the benefit of its creditors who therein granted releases. Assenting creditors then sued corporate officers who were accommodation indorsers of corporate notes.¹³⁷ In holding against the creditors the court necessarily held that the discharge granted to the corporation under the assignment was valid.¹³⁸

ARRANGEMENTS UNDER THE CHANDLER ACT

The Chandler Act,¹³⁹ passed in 1938, effects wholesale changes in the Bankruptcy Act of 1898. Chapter XI,¹⁴⁰ entitled "Arrangements",

132. See *supra* note 55.

133. See *supra* note 102.

134. See GLENN, LIQUIDATION (1935) § 124.

135. For a discussion of this point of view, see *id.* § 125, pointing out that the general assignment with provision for discharge as to assenting creditors has survived the Bankruptcy Law in England.

136. 215 Wis. 541, 255 N. W. 147 (1934).

137. Under Section 120 of the Uniform Negotiable Instruments Law, a party secondarily liable is discharged by release of a party primarily liable. See BRANNON, NEGOTIABLE INSTRUMENTS LAW (6th ed. by Beutel, 1938) § 120.

138. See *supra* note 137. Apparently the issue of the validity of the discharge of the corporation under the assignment was not even litigated. The Virginia Assignment Statute permits the debtor to insert a discharge provision as to assenting creditors. VA. CODE ANN. (Michie, 1936) § 5278d. The Virginia courts have in effect upheld the validity of discharges granted in that manner by holding that a surety of the debtor is thereby released. *First Nat. Bank v. Allen*, 151 Va. 93, 144 S. E. 474 (1928); *Frugate v. Allen*, 153 Va. 143, 149 S. E. 501 (1929). See GLENN, LIQUIDATION (1935) § 125; Note (1933) 20 VA. L. REV. 222, 224.

139. BANKRUPTCY ACT OF 1938, 52 STAT. 840-940, 11 U. S. C. A. (Supp. 1938).

140. BANKRUPTCY ACT OF 1938, §§ 301-359, 52 STAT. 905-916, 11 U. S. C. A. §§ 701-799 (Supp. 1938). Chapter XII provides for the readjustment of debts secured by the real property and chattels real of individuals and partnerships. BANKRUPTCY ACT OF

providing for simplified bankruptcy compositions, may displace, to a very great extent, extra-bankruptcy assignments.

Since 1898, Section 12¹⁴¹ of the Bankruptcy Act provided for compositions thereunder. In theory that section possessed many advantages over a common-law composition. Since the debtor's assets were in custody of the bankruptcy court, they were immune from attachment. The most desirable feature, however, lay in the fact that the composition became binding on all creditors when a majority in number and amount had assented to the composition proposal, and the court had confirmed it.¹⁴² The debtor thereby obtained a discharge from his provable debts,¹⁴³ which was difficult under the common-law proceeding.

Nevertheless, common-law compositions continued to flourish, and Section 12 was practically a dead letter.¹⁴⁴ The reasons for this were not difficult of discovery. In the first place, the debtor made his composition offer only after he was before the court as a bankrupt.¹⁴⁵ Consequently, he was usually so hopelessly insolvent that the composition offered few advantages over straight bankruptcy liquidation.¹⁴⁶ Secondly, the proceeding was so cumbersome and costly that dividends were correspondingly reduced.¹⁴⁷

1938, §§ 401-526, 52 STAT. 916-929, 11 U. S. C. A. 801-926 (Supp. 1938). Chapter XIII provides for the readjustment of debts of wage earners. BANKRUPTCY ACT OF 1938, §§ 601-686, 52 STAT. 930-938, 11 U. S. C. A. §§ 1001-1086 (Supp. 1938).

141. BANKRUPTCY ACT OF 1898, § 12, 30 STAT. 549 (1898), 11 U. S. C. A. § 30 (1927).

142. "If the judge was satisfied that the composition was for the best interests of the creditors, that the bankrupt had not been guilty of any act or failed to perform any duty which would bar his discharge, and that the offer and its acceptance were in good faith and had not been made or procured by any means, promises or acts forbidden by the Bankruptcy Act, the judge could confirm the composition, provided it was accepted in writing by a majority in number and amount of all creditors whose claims had been allowed and the amount necessary to pay priority claims and costs had been deposited." J. B. Weinstein, *supra* note 3, at 14. See also *In re Spiller*, 230 Fed. 490 (D. Mass. 1916).

143. Section 14c of the Act of 1898 specifically provided that the confirmation of a composition should discharge the bankrupt from his provable debts. BANKRUPTCY ACT OF 1898, § 14c, 30 STAT. 550 (1898), 11 U. S. C. A. § 32c (1927).

144. Proceedings under § 12 were few in number.

145. Section 12a read: "A bankrupt may offer, either before or after adjudication, terms of composition to his creditors after, but not before, he has been examined in open court, or at a meeting of his creditors, and has filed in court the schedule of his property and list of his creditors required to be filed by bankrupts." BANKRUPTCY ACT OF 1898, § 12a, 30 STAT. 549 (1898), 11 U. S. C. A. § 30 (1927). This delay was not conducive to rehabilitation of a debtor.

146. Though it seems that a solvent debtor may file a voluntary petition in bankruptcy, he would seldom do so. *In re Foster Paint & Varnish Co.*, 210 Fed. 652 (E. D. Pa. 1914).

147. For example, the referee had only the powers of a special master. As a result, disputed matters were shuttled back and forth between referee and judge, with great delay and expense. Nor could the debtor make use of acceptances obtained from creditors in a previously attempted common-law composition. For a penetrating fact study of the cumbersome, expensive procedure under § 12, see DONOVAN, A REPORT ON THE ADMINISTRATION OF BANKRUPT ESTATES (1930) 24, 25, 114-120. See also J. I. WEINSTEIN, *op. cit. supra* note 3, § 12; J. B. Weinstein, *supra* note 3, at 14.

In 1933, Section 74 was added in an attempt to popularize bankruptcy compositions.¹⁴⁸ Some overlapping and confusion resulted from the fact that Section 12 was not repealed.¹⁴⁹ Although Section 74 simplified the procedure to some extent,¹⁵⁰ it was not widely used because of the attempt to affect secured claims, and for various other reasons.¹⁵¹

Under the Chandler Act both Sections 12 and 74 are expressly repealed. In their place is Chapter XI, entitled "Arrangements".¹⁵² The aim of the draftsmen is to make this chapter a desirable means of effectuating a bankruptcy composition. The attempt is to simplify and speed up the procedure, and to lessen administrative expenses.¹⁵³ A minute analysis of the provisions is beyond the scope of this article. A skeleton survey of appropriate provisions, however, may shed some light upon the question of whether the Arrangement Chapter will render obsolete extra-bankruptcy assignments.

Under Chapter XI a debtor may file his petition as soon as he is unable to meet his obligations as they mature, even though, in the bankruptcy sense, he may be solvent.¹⁵⁴ At this earlier period dividends to creditors should be larger, and there is greater hope of rehabilitation to the debtor.¹⁵⁵ During the proceedings the debtor may be kept in possession and operation of his business, keeping alive its going-concern

148. 47 STAT. 1467 (1933), as amended, 48 STAT. 922, 923 (1934), as amended, 49 STAT. 246 (1935).

149. Under § 12, a corporation was eligible to attempt a composition, while corporations were excluded from § 74. Individuals could come under either.

150. The debtor under § 74 could file an original petition, whereas under § 12, he must have been first before the court in a pending bankruptcy proceeding. See *supra* note 145. Section 74 also enlarged the powers of a referee. Cf. *supra* note 147.

151. The attempt was to affect secured creditors as to extension proposals only. For examples of difficulties arising thereunder, see *In re Sterba*, 74 F. (2d) 413 (C. C. A. 7th, 1935); J. I. WEINSTEIN, *op. cit. supra* note 3, at 259-261; J. B. Weinstein, *supra* note 3, at 15-16.

152. See *supra* note 140.

153. For example, the debtor presents his plan of arrangement and a statement of his affairs with his petition, §§ 323, 324, and the referee is given extended powers, § 331. Other attempts at simplification and speeding up of the procedure become apparent in the text of this article. See generally J. I. WEINSTEIN, *op. cit. supra* note 3, c. XI. Speeding up the procedure should result in economy, as should the fact that the debtor is privileged to negotiate with his creditors prior to filing a petition. See *infra* p. 789.

154. Section 323 says, "A petition filed under this chapter shall state that the debtor is insolvent or unable to pay his debts as they mature. . . ." BANKRUPTCY ACT OF 1938, § 323, 52 STAT. 907, 11 U. S. C. A. § 723 (Supp. 1938). That is, the debtor may be insolvent in either the equity or the bankruptcy sense. Insolvency in the bankruptcy sense as defined in § 1 (19) of the Chandler Act means that the aggregate of the debtor's property ". . . shall not at a fair valuation be sufficient in amount to pay his debts". BANKRUPTCY ACT OF 1938, § 1 (19), 52 STAT. 841, 11 U. S. C. A. § 1 (19) (Supp. 1938). Insolvency in the equity sense means mere inability to pay debts as they mature, although the debtor's assets may be in excess of his liabilities.

155. Since his assets may exceed his liabilities, there is more property available to creditors. The debtor may work out an extension with his creditors under Chapter XI, §§ 306 (1), 357 (3), 52 STAT. 906, 910, 11 U. S. C. A. §§ 706 (1), 757 (3) (Supp. 1938). By thus stalling off his creditors, he may be placed once more on a sound financial basis. See also J. B. Weinstein, *supra* note 3, at 17.

value and aiding him to earn dividends for his creditors.¹⁵⁶ But as soon as he files his petition, his property, wherever located, is in *custodia legis*, and therefore free from the claims of creditors.¹⁵⁷ Thus, difficulties of extra-territorial administration, characteristic of statutory assignments, are eliminated in proceedings under Chapter XI. To that extent, then, the arrangement provisions of the Chandler Act offer a distinct advantage over assignment statutes.¹⁵⁸

The debtor files his plan of composition with his petition.¹⁵⁹ As soon as it has been approved by a majority in number and amount of creditors, and has been confirmed by the court, the plan becomes binding upon all creditors, the debtor then receiving a bankruptcy discharge.¹⁶⁰

Such, in brief, is the procedure to be followed under Chapter XI. Other provisions, however, offer additional flexibility. The debtor is permitted to secure acceptances from his creditors prior to the filing of his petition.¹⁶¹ Thus, he may attempt a common-law composition. If successful in securing the consent of all creditors, he files a petition under Chapter XI and secures a confirmation and discharge without formal application and hearing.¹⁶² Failing to secure unanimous consent, he may nonetheless file a petition and have the plan approved as soon as a majority in number and amount have assented.¹⁶³ It then becomes binding upon all creditors.¹⁶⁴ In the latter instance, however, a formal application for the court's approval is required.¹⁶⁵ Upon confirmation of the plan, the debtor receives a discharge from all of his creditors by virtue of the Act.¹⁶⁶ This control over dissenting creditors

156. The court may permit the debtor to remain in possession, or may appoint a receiver or trustee. §§ 342, 343, 52 STAT. 909, 11 U. S. C. A. §§ 742, 743 (Supp. 1938). The arrangement plan may also provide that the business be operated subject to the control of a creditors' committee. § 357 (5), 52 STAT. 911, 11 U. S. C. A. § 757 (5) (Supp. 1938).

157. §§ 311, 312, 52 STAT. 906, 11 U. S. C. A. §§ 711, 712 (Supp. 1938). And by virtue of § 314, the court may enjoin the commencement or continuation of proceedings to enforce liens upon the property of the debtor. 52 STAT. 907, 11 U. S. C. A. § 714 (Supp. 1938). See *infra* note 172.

158. Though the filing of a petition under Chapter XI immunizes the debtor's assets, wherever located, from attachment, the court wherein the proceedings are brought probably may not proceed extra-territorially to enforce claims held by the debtor against third parties. Cf. FINLETTER, PRINCIPLES OF CORPORATE REORGANIZATION (1937) 177-187.

159. See *supra* note 153. Since this gives creditors early knowledge of what the debtor seeks to accomplish, the hope is that the proceeding will thereupon be speeded up. A meeting of creditors is promptly called. A copy of the proposed arrangement accompanies the notice of meeting. §§ 334, 335, 52 STAT. 908, 11 U. S. C. A. §§ 734, 735 (Supp. 1938).

160. §§ 362, 366, 371, 52 STAT. 911, 912, 11 U. S. C. A. §§ 762, 766, 771 (Supp. 1938).

161. § 336 (4), 52 STAT. 908, 11 U. S. C. A. § 736 (4) (Supp. 1938). This was not permitted under § 12. See *supra* note 147.

162. § 361, 52 STAT. 911, 11 U. S. C. A. § 761 (Supp. 1938).

163. § 362, 52 STAT. 911, 11 U. S. C. A. § 762 (Supp. 1938).

164. § 367 (1), 52 STAT. 912, 11 U. S. C. A. § 767 (1) (Supp. 1938).

165. § 362, 52 STAT. 911, 11 U. S. C. A. § 762 (Supp. 1938).

166. § 371, 52 STAT. 912, 11 U. S. C. A. § 771 (Supp. 1938).

gives the debtor an advantage which could not have been acquired in extra-bankruptcy assignments.¹⁶⁷

This simple procedure, with its distinct advantages, suggests the demise of statutory assignments and common-law compositions. Those desirable attributes, however, may prove to be more apparent than real. There is reason to suspect that difficulties of interpretation and administration will arise which will give renewed life to extra-bankruptcy assignments and compositions.

In the first place, Chapter XI is pregnant with ambiguities. Creditors may be divided into classes, but no basis for classification is indicated.¹⁶⁸ If a plan attempts to treat loan creditors upon a more favorable basis than mercantile creditors, litigation and delay may result. Also, it is difficult to ascertain what claims are considered "provable".¹⁶⁹ And if a corporation attempts an arrangement, no specific provision is made for reorganization, or for the protection of stockholders.¹⁷⁰ These ambiguities suggest expense, complications, and delay, not economy, simplicity, and speed.

167. It is to be remembered that under statutory assignments, common-law assignments, and compositions, dissenting creditors were privileged to refuse to participate, retaining their claims *in toto*.

168. "For the purposes of the arrangement and its acceptance, the court may fix the division of creditors into classes and, in the event of controversy, the court shall after hearing upon notice summarily determine such controversy." § 351, 52 STAT. 909, 11 U. S. C. A. § 751 (Supp. 1938). While such classifications have apparently been common in "friendly adjustments", see *supra* note 1, the fact that no basis for classification is set out in the Act gives promise of controversy. Despite the summary process provided for in § 351, such disputes will be time consuming and expensive. Explaining this section, Mr. J. I. Weinstein (*op. cit. supra* note 3, at 276) writes, "Small claims, bank claims, service claims and merchandise claims may be grouped in separate classes, and, if fair and equitable, the terms of settlement with each class may be different. For example, claims under \$100 may be paid in full or ahead of other unsecured debts, or borrowed money claims may be deferred in payment to merchandise claims, or service claims not entitled to priority may be paid immediately and in full."

Section 362 provides that where creditors have been divided into classes, acceptances by a majority in number and amount of each class are required for confirmation of the arrangement plan. 52 STAT. 911, 11 U. S. C. A. § 762 (Supp. 1938).

169. "Creditors" shall include the holders of all unsecured debts, demands, or claims of whatever character against a debtor, whether or not provable as debts under Section 63 of this Act and whether liquidated or unliquidated, fixed or contingent. . . ." § 307 (1), 52 STAT. 906, 11 U. S. C. A. § 707 (1) (Supp. 1938). This definition applies to an extension agreement only. As to other arrangements, apparently claims are provable as in straight bankruptcy. See c. XI, § 302, 52 STAT. 905, 11 U. S. C. A. § 702 (Supp. 1938). Cf. c. X, § 106 (4), 52 STAT. 883, 11 U. S. C. A. § 506 (Supp. 1938), for the definition of "creditor" in corporate reorganization proceedings, and § 1 (11), 52 STAT. 841, 11 U. S. C. A. § 1 (11) (Supp. 1938), as to straight bankruptcy. Although corporations are eligible to proceed under Chapter XI, § 306 (3), 52 STAT. 906, 11 U. S. C. A. § 706 (3) (Supp. 1938), and § 146 (2), 52 STAT. 887, 11 U. S. C. A. § 546 (2) (Supp. 1938), stockholders probably do not have provable claims except under § 307 (1), 52 STAT. 906, 11 U. S. C. A. § 707 (1) (Supp. 1938).

170. It is not made clear whether the old corporation may remain in existence, or whether a new one may be organized. There is no provision for the issuance of new stock. Compare the detailed sections on these matters in Chapter X, dealing with corporate reorganizations. §§ 197, 203, 210, 211, 216 (8) (11) (12), 52 STAT. 893, 894, 895, 896, 897, 11 U. S. C. A. §§ 597, 603, 610, 611, 616 (8) (11) (12) (Supp. 1938). See also Heuston, *Corporate Reorganizations under the Chandler Act* (1938) 38 COL. L. REV. 1199.

In the second place, Chapter XI itself seems to encourage the use of extra-bankruptcy devices. A debtor may attempt a common-law composition.¹⁷¹ If a few creditors object, or threaten attachments, the debtor may thwart them by immediately filing a petition under Chapter XI.¹⁷² Hence, the threat of the use of this chapter may have the coercive power of repopularizing common-law compositions. The cheapness and simplicity of the latter gives added impetus. Of course, the debtor may utilize a common-law or statutory assignment, and employ the Chandler Act as a coercive force in the same manner. The desirability of this procedure, however, seems questionable.¹⁷³

The ambiguities of Chapter XI, plus the coercive power it gives a debtor, however, may together revivify general assignments. In other words, proceedings under Chapter XI may still be too cumbersome and expensive. In that event, it may expect the same fate as its predecessors, Sections 12 and 74.

CONCLUSIONS

From this survey of the evolution and development of compositions, assignments, and arrangements, the following conclusions may be drawn:

1. The common-law composition is simplest and most economical of all insolvency devices. Its defects are twofold: (a) the debtor may have difficulty securing releases from all of his creditors; (b) during the period in which he is seeking those releases, his assets remain subject to attachment. The coercive threat of the Chandler Act may give new life to common-law compositions.

2. The common-law assignment, as such, is a means of immunizing assets from attachment. It is rendered of little value since it offers no discharge from obligations to the debtor.

3. The common-law assignment with discharge from assenting creditors was a desirable and economical device. Its growth was retarded by statutory regulation and by the difficulty of securing releases from all creditors.

4. The development of the statutory assignment was in turn threatened by the enactment of federal bankruptcy legislation. It seems

171. It has already been noticed that a debtor may secure acceptances from his creditors before filing a petition. See *supra* note 161. Also, the proceeding is informal if he secures the assent of all creditors in advance. See *supra* note 162.

172. Section 67a, 52 STAT. 875, 11 U. S. C. A. § 107a (Supp. 1938), voiding liens by judicial proceedings within four months of bankruptcy, is made expressly applicable to proceedings under Chapter XI. See also § 302, 52 STAT. 905, 11 U. S. C. A. § 702 (Supp. 1938).

173. It would seem unwise to make a statutory assignment because of the expense involved. Fees of an assignee would only be added to administrative costs of a proceeding under Chapter XI, thus reducing the amount available for creditors.

possible, however, even today for a debtor to proceed under state statutes and to secure valid releases from assenting creditors. Extra-territorial difficulties make the statutory assignment chiefly valuable only for the administration of estates which are purely intrastate in nature.

5. Chapter XI of the Chandler Act purports to offer a simplified and economical means by which a debtor may effectuate an arrangement with his creditors. Its means of controlling dissenting creditors and its discharge provisions are most advantageous. If its ambiguities are ironed out and it fulfills the hope of its creators, the result of such a simple, feasible procedure may be that the statutory assignment will be rendered obsolete. On the other hand, if it fails of its purpose, as did Sections 12 and 74, one may anticipate rejuvenation of the statutory assignment. The developments in the near future under Chapter XI will tell the story.