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The Effect of the National Bankruptcy Act on Kentucky's General Assignment Law

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Whether he is convicted or not, the issues are brought more vividly before the public and the town becomes divided pro and con.

Another real objection is that prosecutions for group libels may depend largely on the affiliations of the district attorney and his staff or their susceptibility to political pressures of strong minority groups. If prosecutions are brought, whatever the result, the effect will probably be unsatisfactory. If the defendant wins, his position is merely strengthened and he becomes more arrogant. His followers are encouraged. If the defendant loses, the sentence will be short or the fine light. He becomes a martyr and his followers become more contemptible of democratic processes.66

Because of these factors and others, The Commission on the Freedom of the Press, whose seventeen members are unaffiliated with the press, radio, and motion picture industries, are unanimously opposed to the enactment of group libel statutes.67 On the other hand, the American Jewish Congress, an organization which represents a group which has felt the sting of unjustified and untruthful attacks, is one of the leading proponents of such legislation.68 Experiment under the Illinois statute may prove whether the fears of this type of legislation are well-founded, or whether such legislation can be of real value. But the rise of the Nazis in the face of more stringent legislation than America has ever seen, with the legislation often working to the advantage of those whom it sought to restrain, creates a presumption against the effectiveness of group libel laws.69

THOMAS P. LEWIS

THE EFFECT OF THE NATIONAL BANKRUPTCY ACT ON KENTUCKY'S GENERAL ASSIGNMENT LAW

It has long been held that state laws on insolvency are suspended while the national Bankruptcy Act remains in effect.1 Courts have disagreed, however, as to exactly what constitutes an insolvency law. Virtually all courts agree that a statute which merely regulates the

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66 CHAFEE, op cit. supra note 63 at 127.
67 CHAFEE, op cit. supra note 63 at 129.
68 TANENHAUS, op cit. supra note 62 at 296.
69 See Keisman, Democracy and Defamation: Fair Game and Fair Comment I, 42 Col. L. R. 1085, 1092-1110 (1942).
1 In re Macon Sash, Door and Lumber Co., 112 F 323 (D. C., D. Ga., 1901), rev'd on other grounds; In re John A. Ethridge Furniture Co., 92 F. 329 (D. C., D. Ky., 1899); (Proceedings under such state insolvency laws, as such, are now void whether proceedings in Bankruptcy follow or not.)
common law assignment for the benefit of creditors is not of itself an
insolvency statute, and is not suspended by that act. If, however,
the state general assignment law goes further and contains provisions
repugnant to the Bankruptcy Act, the conflicting provision may be
held invalid. This was the position taken by the Supreme Court of
the United States in a very early case, holding that state legislation
on bankruptcy or insolvency is suspended by the passage of the na-
tional Bankruptcy Act only insofar as it conflicts with the federal
statutes. But in 1929 the Supreme Court, dealing with an act held to
be an insololvency statute, decided that the entire state statute, not
merely the offending parts, were superseded by the National Bank-
ruptcy Act. The court, considering the federal bankruptcy power to
be unrestricted and paramount, said that he states may not put in
force laws to interfere with or complement the Bankruptcy Act, or to
provide additional or auxiliary regulations in the field encompassed
by bankruptcy.

Writers have taken different views as to which of various stated
tests or factors should be given the greatest emphasis in determining
whether a state statute which resembles the national law will be held
to conflict therewith. Professor Williston early took the position that
the historical content of state and national legislation was the im-
portant thing. For example, the probate court's jurisdiction over the
distribution of insolvent estates (with pro rata sharing and discharge)
is not superseded, although that is the normal object of a bankruptcy
law. Miller's view was, that if the main purpose of a state law is
"machinery for liquidation of the debtor's assets, protection of creditors
from preferences, and debtor's discharge, it is almost always held to
be in conflict with the Bankruptcy Act to the extent that both statutes
make similar provisions." Professor Glenn thought it incorrect to
say that discharge is the test, since a voluntary general assignment
providing for a release as a condition for preference substantially
effects a discharge as does bankruptcy; but the real test is rather volun-
tariness or involuntariness, whether it is wholly by agreement, the
statute merely regulating the general assignment or by purely judicial
proceedings. Professor Max Radin has suggested that the test is

2 Boese v. King, 108 U. S. 379 (1883). Proceedings under the general as-
signment laws of states, or under the common law deed of assignment, are not
void or voidable, In re Sivers, 91 F. 366 (D. C. Mo., 1899).
5 WILLISTON, The effect of the National Bankruptcy Act on State's Laws, 22
Harv. L. Rev. 547, 555 et seq. (1909).
6 29 Ill. L. Rev. 695, 700 (1935).
7 The Illinois Business Corporation Act and Bankruptcy Legislation, Glenn,
Liquidation 210 (1935).
neither voluntariness nor the discharge, but whether there is coercion of the creditors.⁸

It would seem that any discharge provision in a state general assignment law is suspended by the Bankruptcy Act, regardless of the manner in which such discharge is contemplated unless, of course, it is by agreement of the parties. A writer in a recent article in the Virginia Law Review⁹ observed: "Even though the two main objects of bankruptcy are: fair and equal distribution of the debtor's assets among his creditors, and the granting to the debtor a fresh start in life through discharge, the latter is controlling in classifying state statutes as insolvency laws or merely statutory regulations of general assignments." The Wisconsin Supreme Court in the case of In re Tarnowski,¹⁰ cited with approval by the United States Supreme Court in Pobreslo v. Joseph M. Boyd Co.,¹¹ held that the right to make a voluntary assignment for the benefit of creditors is a personal right inherent in the ownership of property, and existed at common law independent of statutes; that while the discharge of a bankrupt from his debts is the very essence of the Bankruptcy Law, the discharge of a debtor is not part of an assignment law. One may conclude from the foregoing statements that, although both the state general assignment laws and the Bankruptcy Act provide for a pro rata distribution of the debtor's assets among his creditors, the former will not be declared suspended unless they provide for a discharge of the debtor from liability to his creditor.¹²

What provisions in the Kentucky statutes might conceivably be held to conflict with the Bankruptcy Act? There is no insolvency law, so labelled, in Kentucky today. In a case decided shortly after the passage of the present Bankruptcy Act, a lower federal court, sitting in Kentucky, had under consideration the general assignment laws of Kentucky.¹³ The question was whether after a general assignment had

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⁸ 20 AM. BAR ASS'N J. 792 (1934).
⁹ 36 VA. L. REV. 813, 817 (1950).
¹⁰ 191 Wis. 279, 210 N.W. 836 (1926).
¹¹ 287 U. S. 518 (1933).
¹² This conclusion is supported by numerous state court decisions, e.g., Texas: "Insofar as the state law provides for a release by the creditors it is suspended, but nevertheless, the assignment itself was valid to convey the property to the assignee." Patty-Joiner & Eubank Co. v. Cummins, 93 Tex. 598, 57 S.W. 566 (1900). Wisconsin: "So long as the state Statutes regulate the trust created by the deed of assignment, they continue in force during the existence of the Federal Bankruptcy Act." In re Tarnowski, supra note 10. Cf. Hajeck and Simiek v. Luck, 96 Tex. 517, 74 S.W. 305 (1903).
¹³ Supra note 1. The same question has arisen as to statutes other than general assignment laws, such as the corporate dissolution and receivership laws. There seems to be no possibility that the Kentucky receivership law is in conflict with the Bankruptcy Act. The question has arisen with regard to receivership laws
been made and completed, the bankruptcy court should take jurisdic-
tion of a motion to appoint a receiver upon an involuntary petition in
bankruptcy. The court held that it should and went on to say that
while the insolvency laws of a state are suspended by the Bankruptcy
Act, Kentucky's general assignment law was not to be suspended.

The general assignment law of Kentucky is contained in Chapter
379 of the Kentucky Revised Statutes, with some provisions in Chapter
378. Section .010 of Chapter 379 provides that every voluntary assign-
ment made by a debtor in trust for his creditors shall be for the benefit
of all his creditors and enumerates certain debts which must be paid
before the general creditors take anything. Sections .020 to .040 define
the rights, duties and requirements of the assignee. Sections .050 and
.060 provide for the supervision of the assignment in the county court.
Section .070 provides that if, before making the assignment the debtor
has made a preferential or fraudulent transfer of any property, it shall
vest in the assignee, who shall institute proceedings for its recovery,
using any remedy which a creditor may exercise. Sections .080 and
.090 deal with exemptions, and power of sale of the assignee. Section
.100 provides for the receipt of claims by the assignee and also that
if any creditor fails to present his claim at the time specified or within
three months thereafter then he shall be deemed to have waived his
rights to any part of the assigned estate. Section .110 provides for the
sale or compromise of any debt due the estate. Sections .120 to .150
provide for the allowance or rejection of any claims by the assignee,
payment of claims, and discharge of the assignee. Section .160 gives
the right to appeal from the judgment of the county court and Section
.170 gives the circuit court jurisdiction of actions for the settlement of
the estate.

There is one other specific provision which has been brought into
question with regard to its conflict with the Bankruptcy Act. This
provision is found in the chapter of the statutes dealing with fraudulent
conveyances, providing that any transfer or conveyance by a debtor
in contemplation of insolvency with the intent to prefer certain
creditors shall operate as an assignment of all the debtor's property
for the benefit of his creditors. Ohio and Pennsylvania have very
similar forced assignment provisions. Professor Williston has taken

in other states, substantially the same as Kentucky's and has generally been
answered in favor of validity. Chicago Title and Trust Co. v. Wilcox Bldg. Corp.,
1945) noted in 30 Minn. L. Rev. 638 (1945).


(Purdon 1936).
the position that such provisions, including specifically the Kentucky provision are invalidated because of the Bankruptcy Act. His reason is that the "state law, as a punishment of the debtor or redress to his creditors ... enforces the very consequences which are provided for in the Bankruptcy Act; namely, the sequestration and distribution of the debtor's property." Williston's view finds support in a decision of the Pennsylvania court which held that a very similar preference provision there was suspended by the Bankruptcy Act.

The Kentucky cases are not in agreement. The above provisions, as well as Section .070 of Chapter 379 (on general assignments), were before the Court of Appeals in 1903. The court held that the provisions were not in conflict with nor invalidated by the Bankruptcy Act, saying:

"The Statute quoted above [Ky. Rev. Stat. 379.060] vests in the assignee not only the property conveyed to him by the assignor, but also all the property conveyed away by the assignor by a preferential or fraudulent transfer. ... If the state courts may enforce voluntary assignments for the benefit of creditors, they may certainly enforce a statute like this, merely regulating what property shall vest in the assignee under the deed of assignment. ... When the transaction in question took place the United States Bankruptcy Act was in effect. ... It is insisted ... that the state statute was superseded by the act of Congress. ... In support of this position we are referred to a number of decisions in other states to the effect that all state insolvency laws are suspended when the paramount jurisdiction of Congress has once been exercised. ... "This act is not a bankrupt law, nor an insolvent act. It has none of the characteristics of either, except that it provides for the appropriation of the property of the debtor to the payment pro tanto of all his creditors.""

Other Kentucky cases agree in general with this view.

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16 Supra note 5 at 560.

At least one state court has decided that its entire general assignment law was suspended by the Bankruptcy Act. Harborough v. Costello, 184 Ill. 110, 56 N.E. 363 (1900). The Illinois court based its conclusion on the ground that as they seek to accomplish the same purpose, to wit: the pro rata distribution of assets of the debtor among his creditors, they cannot be in force together without direct and positive collision; it necessarily follows that the federal act supersedes or suspends the state law. (Evidently the Illinois law contained no discharge provision as no mention was made of it.)

18 Downer v. Porter, 116 Ky. 422, 76 S.W. 135 (1903).
19 Linthicum v. Fenley, 74 Ky. 131 (1874); Ebersole and McCarthy v. Adams, 73 Ky. 85 (1873); Proctor's Trustee v. Wadesworth, 42 Ky. 401 (1843); Cf. Williston, supra note 16 at 6 on Ky. Rev. Stat. sec. 378.060 (1948).

At first blush it may seem that Section. 100 of Chapter 379 is in conflict with the Bankruptcy Act as it provides that if a creditor does not present his claim to the assignee on the day named or within three months thereafter he shall be deemed to have waived his right to any part of the assigned estate. However, this provision does not discharge the debtor from all liability to the creditor, who
The United States Supreme Court has also taken a position in agreement with the Kentucky court, holding that such provisions are consistent with the Bankruptcy Act. In *Stellwagen v. Clum*\(^{20}\) the Supreme Court had before it a provision similar to the Ohio general assignment laws which provided in effect that any transfer by a debtor to prefer creditors, or with intent to hinder, delay, or defraud them shall, if the transferee knew of such intent, be declared void at the suit of any creditor and a receiver appointed to administer the debtor's assets pro rata for the benefit of all creditors. The court held that such provisions were consistent with the Bankruptcy Act in that their purpose was the avoidance of fraudulent and preferential transfers, thus promoting equality of distribution. The court further observed: "Our decisions lay great stress upon this feature of the law (discharge of the debtor) . . . which is wholly wanting in the Ohio statutes under consideration."

Furthermore, the U. S. Supreme Court held that the general provisions of assignment statutes resembling those of Kentucky are to be held valid as against the contention that they were in conflict with the national act.\(^{21}\)

In conclusion, the Kentucky general assignment law merely regulates the trust created by the deed of assignment, providing for pro rata distribution of the debtor's assets, while not providing for his discharge and, therefore, is not in conflict with the National Act.

**William S. Tribell**

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**ARREST WITHOUT A WARRANT**

There are two basic types of arrest—those made under a warrant and those made without a warrant. Since those made with a warrant are generally lawful insofar as the act of arrest itself is concerned and the usual fault to be found with them is in the warrant rather than the arrest, the more complex situation of arrest without a warrant will be dealt with.

The law of arrest without a warrant may be neatly divided into two categories depending upon whether the crime for which the arrest