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The recent decision of the Colorado Supreme Court in the case of *McKelvey v. Striker*[1] has again given rise to a discussion of the validity of the Colorado Assignment Act. The court held that a common-law assignment made to a trustee for the benefit of creditors was void as to any objecting creditor. Although upholding the right to make a common-law assignment,[2] the court held that a judgment creditor, who had never accepted the offer of the debtor, had a right to pursue any remedy which he had against the debtor or his property, "just as though no assignment had been made."

The particular portion of the decision with which we are concerned in this dictum contained in the opinion:

> "Had the debtor proceeded under the statutory assignment act, the results might have been different."

It will be observed that the court does not definitely say that the results *would have been different*, but the implication is present.

While there is no Colorado Supreme Court decision on the exact point involved, it has been generally felt among lawyers that the statutory assignment act is inoperative, and for that reason the statute has not been generally invoked.[3] The particular statute now on the books[4] was adopted in Colorado in 1897, although it was not the first assignment act in this state. It provides generally for the assignment of debtor's property to an assignee, who liquidates the same and makes distribution of the proceeds to creditors. The procedure is somewhat detailed and is similar to that followed in the federal bankruptcy courts. Section 44 of the act provides that any person who makes such an assignment "may be *discharged* from his debts of every character" by compliance with the act. This order of discharge becomes binding upon all creditors residing

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[1]Case No. 14832, decided Aug. 25, 1941, and not yet officially reported.

[2]Damaskus v. McCarty-Johnson Heating Co., 88 Colo. 279, 295 Pac. 490 (1931). McMullin v. Keough-Doyle Meat Co., 96 Colo. 298, 42 P. (2d) 463 (1935).

[3]Denver District Court judges have declared the statute suspended. For opinions, see the cases of *In re* Paul H. Little, No. 90279; Weisen v. White, No. 93432; and *In re* H. W. Bullock, No. A29312.

[4]COLO. STAT. ANN. (1935) c. 12.

within the state and all outside creditors who have appeared and participated in the proceedings or who have received and accepted a dividend.

This section makes it a bankruptcy act. Our court stated in the case of *Clark v. Bright*:[5]

> "The assignment act *is, in effect, a bankruptcy act.* It was passed by our legislature a short time before the congressional act and its purpose is to enable an insolvent debtor by conveying his property to an assignee for the benefit of creditors, to be discharged from his debts. * * * The general scope and purpose of our law is to *discharge* a debtor from his debts upon complying with the law." (Italics ours.)

The Constitution of the United States[6] gives Congress the power to establish uniform laws on the subject of bankruptcies throughout the United States. Under this power, Congress has acted four times.[7] The law now in effect was enacted July 1, 1898, and with some amendments is the one now in force. This act, of course, provides for the discharge of the provable debts of the debtor.

We now have a situation in Colorado wherein there are two bankruptcy statutes in force, the federal and state. As already pointed out, the state statute has been declared by our court to be a bankruptcy act,[8] and has been in effect since 1897; the federal statute since 1898. It is generally held that when Congress has power to legislate upon a subject, but fails to do so, the individual states may so legislate. But when Congress has spoken, the question arises whether the state act thereby becomes void, or is suspended, or held in abeyance, or whether both may act concurrently on the same subject-matter.[9]

In the decisions and among the text-writers, a marked distinction is made between state statutes which are general insolvency statutes, which provide for the discharge of the debtor and are therefore, in effect, bankruptcy statutes, and those which merely permit and regulate general assignments for the benefit of creditors. Our statute is of the former type.

The earlier decisions held that the assignment of a debtor under the

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[5]30 Colo. 199, 69 Pac. 506 (1902).

[6]ART. IV, §8.

[7]The first act was passed April 4, 1800, and repealed Dec. 19, 1803. It made no provision for voluntary bankruptcy and was applicable only to merchants, traders and bankers. The second law was enacted Aug. 19, 1841, due to the panic of 1837, and was repealed March 3, 1843. This act provided for both voluntary and involuntary bankruptcy and was broader in its provisions than the act of 1800. The third act was passed March 2, 1867, and repealed Sept. 1, 1878. The law now in force was enacted July 1, 1898, and was amended in some particulars by several supplementary acts (1903, 1906, 1910, and 1938).

[8]Clark v. Bright, *supra*, note 5.

[9]See Routt County v. Denver & S. L. R. R. Co., 88 Colo. 14, 291 Pac. 1020 (1930).

state act was merely an act of bankruptcy which would give creditors a right to file an involuntary petition in bankruptcy. Other cases held that the state act was not suspended or superseded unless the federal statute was *invoked* either by a voluntary or involuntary petition in bankruptcy. Typical of such decisions is that of *Jensen-King-Bird Co. v. Williams,*[10] a Washington case, in which the state statute was likewise adopted prior to 1898. The court said:

> "So that it will be seen that the vital question to be determined in this case is whether or not the bankruptcy law which was passed by Congress * * * supersedes or suspends the state insolvency law which was in existence at the time of the passage of said bankruptcy act. There is some conflict of judicial decisions on this question, but it was decided by this court * * * that the enactment of the Federal Bankruptcy law of July 1, 1898, did not suspend the jurisdiction of state courts in insolvency cases, *where there had been no proceeding instituted respecting the matter in controversy.*" (Italics ours.)

In *Shaw v. Standard Piano Company,*[11] counsel argued that since both laws operate upon the same subject-matter, namely, the assets of the corporation, and the same persons, namely, the corporation and its creditors, and upon the same rights, namely, the pro-rata distribution of assets among its creditors, the effect is that the state insolvency laws are suspended. The court said that undoubtedly this would be true if it had appeared that the jurisdiction of the federal bankruptcy court had been *invoked,* but since it appears that it was not, the question argued is not presented for decision.

These earlier decisions are no longer being followed, and the courts now hold that the state insolvency statutes are superseded whether the federal bankruptcy statutes are invoked or not. In the Idaho case of *Capital Lumber Co. v. Saunders,*[12] the court points out the distinction between proceedings under a general insolvency statute and one that simply permits the assignment for the benefit of creditors. The decision cites that of *In re Seivers,*[13] in which the contention hinged upon the question as to whether the national bankruptcy law suspended the voluntary assignment statutes of the state, and on this point the court said:

> "Concerning these different contentions, it appears to me that there is a substantial difference between a proceeding under a general insolvency statute and one under a statute permitting general assignments. The one administers upon the estate of an insolvent as a proceeding in the Courts, derives its potency from the law,

[10] 35 Wash. 161, 76 Pac. 934 (1904).
[11] 87 N. J. Eq. 350, 100 Atl. 167 (1916).
[12] 26 Idaho 408, 143 Pac. 1178 (1914).
[13] 91 Fed. 366 (D. C. Mo. E. D. 1899).

winds up the estate judicially, and discharges the debtor. Such is essentially a proceeding in bankruptcy, and such is undoubtedly superseded by the act of Congress in question. * * * It results from these views that, *while proceedings under the insolvency laws, as such, are now void whether proceedings in bankruptcy follow or not, proceedings under the general assignment laws * * * or under the common law deed of assignment, are not void or voidable, unless proceedings in bankruptcy are subsequently instituted.*" (Italics ours.)

In the leading case of *In re Tarnowski*,[14] the discharge provisions of the act were held to be severable, and the entire act was not suspended. Tarnowski made a voluntary assignment under a state statute similar to the Colorado act for the benefit of creditors, and thereafter the estate was administered according to the act and distribution made. The International Shoe Company filed its claim and received and accepted pro-rata dividends. In due course, Tarnowski made application for a discharge and the shoe company objected on the ground that the provision relating to a discharge had been superseded by the National Bankruptcy Act. The attorneys for the debtor argued that the shoe company, having acquiesced in the proceedings, and having filed a claim and participated in the dividends, is not in a position to object to a discharge because they submitted to the jurisdiction of the court; that they may not enjoy the benefits and privileges of the law and then escape its burdens by attacking its validity. The court pointed out that the shoe company is not attacking any feature of the law under which the estate was administered, as up to this point the statute is merely a regulation of voluntary assignment; that anyone can assign his property to anyone else for any legitimate purpose, and that the statute merely points out how distribution and liquidation should be made. But the discharge of a debtor is quite another thing. *"The discharge of a bankrupt from his debts constitutes the very essence of a bankrupt law."* Since the discharge provision has been superseded by the Bankruptcy Act, it has no force, and the creditor may object to the discharge even though he filed his claim and accepted the dividend.

The United States Supreme Court had this question before it in 1929 in the case of *International Shoe Co. v. Pinkus*,[15] in which the question arose under the state act, although the federal bankruptcy act had not been invoked. The court held the state act void, saying:

"Congress did not intend to give insolvent debtors seeking discharge, or their creditors seeking to collect claims, choice between

[14] 191 Wis. 279, 210 N. W. 836, 49 A. L. R. 686 (1926).

[15] 278 U. S. 261, 49 S. Ct. 108, 73 L. ed. 318 (1929). See also Boese v. King, 108 U. S. 379, 2 S. Ct. 765, 27 L. ed. 760 (1883).

> the relief provided by the Bankruptcy Act and that specified in state insolvency laws. States may not pass or enforce laws *to interfere with or complement the bankruptcy act or to provide additional or auxiliary regulations.*" (Italics ours.)

In view of the above decision of the United States Supreme Court, the question has arisen whether the state statutes which do not provide for a discharge are likewise superseded. Such a case arose in 1932, *Hammond v. Lyon Realty Company.*[16] The court discusses at some length the decision in *International Shoe Co. v. Pinkus, supra,* and other cases, and then says:

> "It was not decided in either of these cases that there might not be a state insolvent law that would be superseded by the National Bankruptcy Act, although not providing for the discharge of the indebtedness. * * * Thus it was expressly said in *International Shoe Co. vs. Pinkus:* 'States may not pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations.' *It follows that not only those state laws which purport to cover the whole field* of insolvency administration *are superseded* by the national bankruptcy law, *but all other state laws* to the extent that they *hamper or restrict* its proper operation." (Italics ours.)

The evolution of the judicial process continued until it finally reached the point where all state statutes on the subject seem to be suspended whether or not they provide for the discharge of the debtor. This was decided in our own circuit by Judge Phillips in the case of *First National Bank of Albuquerque v. Robinson.*[17] The case arose under a New Mexico statute which simply provided for an assignment for benefit of creditors, but which did not provide for a discharge of the debtor. The court analyzed the state law and reached the conclusion that it is essentially an insolvency act and covers substantially the same field as the National Bankruptcy Act. While the New Mexico act does not make express provision for the discharge of the debtor, it does provide for the distribution of its assets and the dissolution of the corporation. * * * The court then makes a statement which clearly goes much further than any previous decision on the subject, when it said:

> *"An express provision for a discharge is not an essential element of an insolvency law."* (Italics ours.)

The court then lays down this rule, which seems to go the limit in so far as state statutes are concerned:

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[16] 59 F. (2d) 592 (C. C. A. 4th, 1932).
[17] 107 F. (2d) 50 (C. C. A. 10th, 1939).

> "By virtue of the constitutional authority of Congress to enact a uniform system of bankruptcy, the national bankruptcy act is *paramount and superior* to all state laws upon the subject, and all state insolvency laws are suspended in so far as they relate to the same subject-matter and affect the same persons as the National Bankruptcy Act." (Italics ours.)

This same principle has been applied and invoked on subjects other than bankruptcy.[18] In 1939, Pennsylvania passed an Alien Registration Act requiring all aliens to register each year, carry their cards with them at all times and so on and provided a penalty for failure to comply with the act. In 1940, Congress passed a Federal Registration Act for aliens. A test case was brought to determine the validity of the state act. In a well reasoned and well written opinion by Justice Hugo Black, the court pointed out that the basic subject of the state and federal laws is identical —registration of aliens as a distinct group; and that "the only question is whether the state act is in abeyance or whether the state and federal government have concurrent jurisdiction to register aliens * * *."

The court holds, first, that the Constitution of the United States is the supreme law of the land; that the Constitution gives Congress the power to regulate foreign affairs, and that the responsibility of a government toward an alien is part of that duty and power. "Consequently," said the court, "the regulation of aliens is so intimately blended and intertwined with responsibilities of national government that where it acts, and the state also acts on the same subject, 'the act of Congress * * * is supreme; and the law of the state, *though enacted in the exercise of powers not controverted,* must yield to it.'" (Italics ours.) The court then lays down the following rule:

> "And where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations."

The decision of *International Shoe Co. v. Pinkus, supra,* is cited in support of this statement.

It would appear that if the words "administration of the estates of bankrupts" were substituted in the above quotation for the words "registration of aliens," we would thereby have what is probably the present law upon the subject in this country.

There are some courts which cannot understand why the state laws

[18]Hines v. Davidowitz, 61 S. Ct. 399 (decided Jan. 20, 1941).

cannot be enforced or proceeded under so long as the federal bankruptcy law is not invoked. The answer is that Congress has the power to legislate upon the subject matter of bankruptcies. It has not always done so.[19] During such periods, when no federal act was in force, state acts upon the subject were perfectly valid. It is not the right of Congress to establish these laws, but their actual establishment, which causes the state statutes to become inoperative.[20] The proposition, therefore, that the state act is suspended or held in abeyance by the federal act is as clear upon authority as it is upon logic.

In the *McKelvy case*[21] the Colorado Assignment Act itself was not involved, much less its validity, since that case involved only a common law assignment. Therefore the language of the court that "the results might have been different" if the debtor had proceeded under the statutory assignment was pure dictum and cannot be taken as indicating in any way that in a case directly involving the validity of the state act, our Supreme Court would not follow the general line of authorities.

Hamlet J. Barry, Jr., Writes of

Current Events of Bench and Bar

Greater Number of Government Vehicles Boosts Tort Claims

Since the defense effort has been under way there has been a twenty per cent increase in tort claims involving government-owned vehicles. Because of all these claims it is predicted that the pending tort claim bill will be speedily passed. This bill provides that claims for $7,500 or less will be adjudicated in the federal courts. Claims of a greater amount will still have to be considered by the congressional claims committees.

Lawyers Are Urged to Learn Latin-American Laws

Roy Vallance, secretary general of the Inter-American Bar Association, in a recent address recommended that lawyers and law students familiarize themselves with the legal institutions of the Pan-American countries. Mr. Vallance also suggested that attempts should be made to harmonize and unify the commercial law of the Americas, and that unless the lawyers make this effort the increasing trade with South America will be hampered in its growth.

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[19] *Supra*, note 7.
[20] Sturges v. Crowninshield, 4 Wheat. 122, 4 L. ed. 529 (1819).
[21] *Supra*, note 1.