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ASSIGNMENTS FOR THE BENEFIT OF CREDITORS AND COMPETITIVE SYSTEMS FOR LIQUIDATION OF INSOLVENT ESTATES†

*Benjamin Weintraub, Harris Levin
and Eugene Sosnoff**

Credit men observing their debtors cease operations with the intent of liquidating their assets for the benefit of creditors, are often perplexed by the methods of liquidation available.¹ Although the Bankruptcy Act offers a uniform system of liquidation throughout the United States and its territories, competing local systems are in existence in practically every state and territory. Their lack of uniformity shows no indigenous commercial need of a particular locality, but rather a haphazard growth. Thus, some states, like New York, have several statutes which have been either designed or invoked for the liquidation of insolvent estates:

1. The Debtor and Creditor Law provides for "General Assignments for the Benefit of Creditors"² and in addition contains complementary provisions for the liquidation of claims of "Secured Creditors."³

2. Section 105 of the Stock Corporation Law⁴ provides for the liquidation of corporations without judicial supervision and has been interpreted by the courts to include insolvent corporations.⁵

3. The Bulk Sales Act,⁶ not designed in the statutes as an insolvency proceeding, but which usage has developed into a hybrid liquidating system. This procedure has been justly criticized for the misapplication of a statute to an un contemplated purpose.⁷

4. Non-statutory proceedings which are also prevalent in many jurisdictions, such as the "Sale by Order of the Owner"⁸ and the common law assignment or deed of trust or its equivalent.⁹ The purpose of the former

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* See Contributors' section, Masthead, p. 99, for biographical data.

¹ See New York Credit Men's Adjustment Bureau, Inc. v. Weiss and Amsterdam, 305 N.Y. 1, 110 N.E.2d 397 (1953) where the court discusses the proceedings available to an insolvent.

² L., 1909, c. 17; N.Y. Debtor and Creditor Law art. 2.

³ L., 1942, c. 876; N.Y. Debtor and Creditor Law art. 2A.

⁴ L. 1924, c. 441, § 16 and amendments; N.Y. Stock Corp. Law § 105 et seq.

⁵ In re Flexlite Corp., 180 Misc. 718, 43 N.Y.S.2d 948 (Sup. Ct. N.Y. County 1943).

⁶ See Weintraub and Levin, "Bulk Sales Law and Adequate Protection of Creditors," 65 Harv. L. Rev. 418 (1952) for a full discussion as to the relative merits of such a proceeding.

⁷ Id. at 438.

⁸ Id. at 421.

⁹ Brainard v. Fitzgerald, 3 Cal. 2d 157, 44 P.2d 336 (1935).

proceeding is generally to sell the assets through an auctioneer under the supervision of the debtor without notice to creditors and then to distribute the leavings to creditors.¹⁰ This procedure has been criticized for constituting a circumvention of bulk sales laws in jurisdictions which do not have the Pennsylvania type statute, which requires auctioneers to comply with bulk sales laws.¹¹ These two procedures and that under Section 105 of the Stock Corporation Law are out-of-court proceedings in contradistinction to a statutory assignment for the benefit of creditors which provides for judicial supervision.

This conflict between in-court and out-of-court procedures is further accentuated by the Bankruptcy Act which makes available an additional means of liquidation of an insolvent's estate. Since it is axiomatic that an insolvent's estate belongs to his creditors, it follows that any disposition of his property for the purpose of liquidation and distribution should be in accordance with a design and practice best suited to give creditors the highest return not only in dollars, but as the facts of each case warrant, in thorough examination and administration.¹²

The general weakness of the out-of-court proceeding, however, is its susceptibility to abuse. And the fact that there may at times be creditor supervision does not lessen the possibility that the proceedings are not designed to protect creditors' interests on every occasion.

It follows therefore, that without creditor supervision the rights of creditors can only be preserved in proceedings which safeguard a debtor's assets, not only those assets which are in *custodia legis*, but those which are technically so, having been transferred somewhere in the twilight zone of insolvency, the four month period. Preservation of assets is the first requisite of an insolvency statute. Equally important is an equitable distribution without preference among general creditors. Interwoven with these principles are simplicity of procedure and economy of operation. The conflict is the extent to which out-of-court and in-court procedures measure up to these standards, not only in their respective categories, but also within each category. A knowledge of this conflict may aid in understanding the relative merits of each insolvency proceeding.

THE ASSIGNMENT IN BUSINESS ECONOMY

Business failures in the United States in 1952 totalled 7,666.¹³ No breakdown as to the type of liquidation seems to be available as to the

¹⁰ See *New York Credit Men's Adjustment Bureau, Inc. v. Weiss and Amsterdam*, 305 N.Y. 1, 110 N.E.2d 397 (1953).

¹¹ For a full discussion of proceedings and significance of Pennsylvania type statute, see Weintraub and Levin, *supra* note 6, at 421.

¹² See discussion "The Cheaper Proceeding" *infra*, p. 35.

¹³ See *New York Times*, Jan. 5, 1953, p. 64, col. 1, citing figures released by Dun & Bradstreet.

nation as a whole, but the New York Credit and Financial Management Association has furnished statistics for cases handled by it.¹⁴ These statistics indicate that the association handled twice as many statutory assignments in New York City as straight bankruptcy cases.¹⁵ Interestingly enough, out-of-court settlements and extensions handled were more than twice as many as assignments, although it does not appear which of the settlements were ultimate liquidations. For present purposes, the statistics are significant in showing the wide extent to which assignments are utilized by this association of credit executives for the liquidation of insolvent estates.¹⁶

The extensive use of statutory assignments in New York State leads to the conclusion that debtors and creditors have found that they constitute an important factor in competitive insolvency liquidations. The exploration of the reasons would seem to indicate first and foremost, their ease of execution. The statutory assignment like the common law assignment or deed of trust,¹⁷ is a transfer of the insolvent's property to a trustee or assignee to liquidate for the benefit of the insolvent's creditors. This ease of execution of an assignment by an insolvent debtor, a simple two page printed document, requiring no initial effort or real expense has been one of the reasons why it has found favor among debtors. Without such a simple procedure an insolvent might very well ponder the giving of preferences or making fraudulent conveyances, particularly if his alternative is bankruptcy, as many a debtor has a horror of the so-called bankruptcy stigma.¹⁸

Most statutes have no prohibition against the choice of the debtor's representative as assignee¹⁹ and this latitude is very often another reason for the execution of an assignment. Although it would be wise in the first instance to execute the assignment to bona fide creditors' associations or

¹⁴ *Ibid.*

¹⁵ Despite these statistics, informal inquiries with the docket clerks of state and federal courts in New York County indicate that there were more bankruptcy than assignment proceedings instituted for the same area in 1952.

¹⁶ See note 13 *supra*. Of the "173 cases of financial embarrassment . . . 39 cases were liquidated through assignments for the benefit of creditors in the state court . . . 13 companies invoked Chapter XI . . . out-of-court settlements either by extension or compromise numbered 105 . . . 16 cases were liquidated through the bankruptcy courts. . . ."

¹⁷ See p. 6 *infra*.

¹⁸ See Harris, "The Bulk Sales As a Vehicle for Effecting Out-of-Court Settlement with Creditors," 55 *Com. L.J.* 317 (1950):

He is motivated by the desire . . . to escape the stigma of being designated a bankrupt. . . .

¹⁹ Cf. Ark. Stat. Ann. § 36-201 et seq. (1947) which provides for the appointment of a receiver; Cal. Civ. Code § 3449 et seq. (Deering 1949) which provides for the assignment by an insolvent in trust to the sheriff who calls a meeting of creditors for the purpose of electing an assignee from their own number.

representatives, nevertheless, the absence of such restrictions has the salutary result of quick immunization of the assets as against attaching creditors or dissipation. Creditors are not remediless in such situations, as they can petition for a substitution of assignee, if the facts warrant a finding of misconduct or incompetency; or creditors can file an involuntary petition in bankruptcy.²⁰ Statutory assignments therefore, form a useful purpose in preserving assets for the benefit of creditors. Once these assets have been brought under the custody of the court, the choice then is with the creditors as to whether bankruptcy or the assignment proceedings will furnish the best results.

The assignment also serves a useful purpose in common law settlements²¹ or extensions as an escrow document, i.e., the debtor will agree with his creditors to pay their obligations over an extended period of time: The collateral to be deposited in the event of a default in meeting payments, is an assignment for the benefit of creditors. The agreement between the debtor and his creditors will provide that in the event the debtor defaults, the creditors can file the assignment and liquidate the assets under it. This assures creditors immediate control over their debtor's estate.²² Frequently when a debtor first approaches his creditors with his problems and no solution can be immediately arrived at, the creditors will insist that the debtor execute an assignment for the benefit of creditors to be held in escrow until a plan can be formulated.

These uses give assignments a facility and flexibility of operation not possessed by other proceedings. But of course, an insolvency statute has other fundamental purposes²³ and the question arises as to what extent the assignment competes with other statutory insolvency proceedings such as the Bankruptcy Act or state dissolution proceedings for corporations.

THE COMMON LAW ASSIGNMENT OR DEED OF TRUST

The forerunner of the statutory assignment was the common law assignment or deed of trust. A century ago almost all assignments for the benefit of creditors were common law assignments. This was so simply because there were few state statutes regulating assignment proceedings. Debtors were proclaimed to have an "inherent common law right"²⁴ to

²⁰ See Bankruptcy Act § 3a, subd. 4, 52 Stat. 844 (1938), 11 U.S.C. § 21a, subd. 4 (1946), as amended, 66 Stat. 421 (1952), 11 U.S.C.A. § 21a, subd. 4 (Supp. 1953).

²¹ For a discussion of common law assignments, see Weintraub, "Some Practical Aspects of Debtor and Creditor Adjustments for the General Practitioner," lecture published in two parts, 126 N.Y.L.J. 702, col. 1 (Oct. 2, 1951); 126 id. 714, col. 1 (Oct. 3, 1951).

²² *Ibid.*

²³ See p. 4 *supra*.

²⁴ *Brashear v. West*, 7 Pet. 608 (U.S. 1833).

make general assignments; or, stated slightly differently, a general assignment "creates an express trust, no legislation is needed to give it validity."²⁵ Absent fraud, the common law assignment was invulnerable to attack by objecting creditors.²⁶

While most statutes today permit a debtor to do little more than choose an assignee, at common law the debtor had wide range in fixing the terms and conditions of the trust. He could execute a partial assignment; prefer one creditor over another and thereby frequently deprive non-preferred creditors of any share in his assets; and demand releases from consenting creditors. And finally, he could endow the assignee with broad discretionary powers in the administration of the trust.²⁷ The entire proceeding has been appropriately described as:

a private transaction between the debtor and the assignee, with little of the notoriety which its avowed object would seem to require, and its effect has, not inaptly, been characterized as 'a bankrupt law made by the debtor for himself.'²⁸

Creditors' control over the "inherent common law right" of debtors to make general assignments seldom came about, and when it did, it was only in a negative fashion upon the discovery of fraud. At such times, an ambitious creditor might sue under statutes outlawing fraudulent conveyances or invoke the equity powers of the courts. Needless to say, such costly and somewhat undefined remedies were rarely pressed.²⁹

In the later years of the nineteenth century many of the aspects of common law assignments were recognized as abusive: The debtor was too much in command of the parceling out of his assets; there were no anticipatory safeguards against fraud; investigation was not easy; and preferred treatment of friendly creditors was unseemly. Methods were sought which would afford creditors some authority and equal participation in the proceeding and would insure the integrity of the assignee. The outcome was the enactment in state after state of statutes regulating assignments for the benefit of creditors.

A few of these statutes, like those of Maryland³⁰ and Massachusetts³¹ were very brief. They left regulation to case law, and as a result assignments continued as private arrangements. Most statutes, however, were comprehensive and specified in detail the steps to be followed in assignu-

²⁵ Glenn on Liquidation 204 (1935).

²⁶ *Id.* at 174.

²⁷ Burrill on Assignments 23-24, 171 (6th ed. 1894).

²⁸ *Id.* at 24.

²⁹ *Id.* at 23.

³⁰ Md. Code Ann. art. 47 et seq. (1951).

³¹ Mass. Ann. Laws c. 203, §§ 40-42 (1933).

ment proceedings. Some of these elaborate statutes contained express provisions that they were to be regarded as exclusive,³² and thereby completely replaced common law assignments. Other statutes in the comprehensive class, however, were silent or ambiguous on the question of exclusiveness.³³ The problem of what to do with non-conforming assignments was left to the courts.

This problem has many phases. It arises when non-consenting creditors attempt to attack the assignment by levying upon the assets in the assignee's possession. When confronted with such suits, courts render decisions based on the usual considerations: facts, equities, estimates of legislative intent and policy. Concern with whether the irregularities in the assignments are deliberate or inadvertent is rarely displayed, and with exceptions to be noted, most of this litigation is treated as representative of isolated occurrences, that is to say, the courts do not frequently regard the issues at hand as reflecting a general practice throughout the state.

In a suit to upset an assignment, one of three decisions is available to the court: It can declare the non-complying assignment void and permit the attacker to recover in full; it can direct compliance with the statute; or it can hold the assignment valid despite the deviation from the statute. The third result is generally justified on the rationale that the assignment, valid at common law, is not invalidated by the statute.

To illustrate the foregoing: When an assignor swore to his schedule of assets as "just and true" and the statute required the oath to read "full and complete,"³⁴ the Georgia Supreme Court declared the assignment void and refused a request for permission to amend the affidavit.

Many courts look upon the complete disqualification of an assignment as unwise because the attacking creditor recovers in full and thereby deprives other creditors of an equitable share in the proceeds of the estate.³⁵ A sounder approach was adopted by a New York court faced with a suit by a judgment creditor against an assignee who failed to record the deed

³² The assignment law of New Jersey provides:

All assignments for the benefit of creditors not made in accordance with the provisions of this chapter shall be null and void. 2A N.J. Stat. Ann. § 2A:19-6 (1952).

³³ See note 2 *supra*.

³⁴ *Fort v. Martin Tobacco Co.* 77 Ga. 111, 1 S.E. 223 (1886). For other cases where the assignments were discarded see *Younghiogheny & Ohio Coal Co. v. Anderson*, 186 Mich. 349, 152 N.W. 1025 (1915); *Havehill Shoe Novelty Co. v. Leader Shoe Co.*, 87 N.H. 366, 180 A. 242 (1935); *Lupinsky v. Hoffman*, 158 Misc. 261, 284 N.Y. Supp. 549 (Sup. Ct. Bronx County 1934) (discussed p. 12 et seq. *infra*).

³⁵ Significantly, subsequent to *Fort v. Martin*, *supra* note 34, the Georgia assignment law was amended to provide that

. . . no creditor shall obtain any priority or preference of payment out of the assets assigned, on any judgment rendered after the filing of a petition to set aside the assignment, in case the same is set aside and deemed to be void. Ga. Code Ann. § 28-301 et seq. (1933).

of assignment and obtain a bond.³⁶ The court ruled that the failure of the assignee to file the assignment and a bond could be cured by a simple order directing compliance with the statute.

The last two cases concerned apparently honest assignments. Where the defection from the statute has been fraudulent, some courts have appropriately appointed a receiver to take charge of the estate and distribute it ratably among claimants.³⁷

An instance where an assignment, irregular under the statute, was upheld as valid at common law, is found in *Damaskus v. McCarthy-Johnson Heating & Engineering Co.*³⁸ The creditor there attempted to garnishee property in the hands of the purchaser from the assignee. Striving to avoid the inequities that would accrue upon plaintiff's success, the Colorado court resorted to the oft heard reasoning that the statute was directory rather than mandatory, and therefore common law assignments were still legal. Assignees in Colorado, however, are best advised to comply with the statute. For ten years later, the same court ruled that while common law assignments were recognized and legal, creditors of the assignor who did not consent to the assignment could levy on the assets in the hands of the assignee "just as though such assignment had not been made."³⁹ In the light of this later decision, one wonders whether the plaintiff in the *Damaskus* case, *supra*, might not have been turned back on some more realistic principle than that the assignment was valid at common law.

A similar thought arises in connection with *Utah Ass'n of Credit Men v. McDonnell*⁴⁰ where a suit by an assignee to collect damages from a defendant who reneged on a contract of sale was upheld despite the latter's defense that the assignment was at variance with statutory requirements. In a carefully worded opinion the court ruled the assignment valid at common law, and then qualified its view by saying that while in some instances creditors might complain of a failure to comply with the statute, the position occupied by this defendant did not permit him to object.⁴¹

³⁶ See, e.g., *In re Berman*, 173 App. Div. 689, 160 N.Y. Supp. 79, 80 (1st Dep't 1916) *Accord*, *Bertenshaw v. Klag*, 117 Kan. 176, 231 P. 73 (1924). This view has been embodied in Wisconsin's assignment statute which forbids the courts to void assignments, but allows any creditor upon petition to compel the assignee to comply with the law. Wis. Stat. § 128.02 (1951).

³⁷ See, e.g., *Murray Bros. v. Mackinac Circuit Judge*, 241 Mich. 312, 216 N.W. 914 (1925).

³⁸ 88 Col. 279, 295 Pac. 490 (1931).

³⁹ 108 Col. 320, 116 P.2d 921 (1941).

⁴⁰ 50 Utah 531, 167 Pac. 817 (1917).

⁴¹ In discussing the assignment, the court held:

In our opinion it was just as legal, binding and effective, under the circumstances, upon all

When in the odd case a court seeks to preserve an honest although non-conforming assignment, without promoting the general practice of avoiding the statute, it would appear unnecessary to introduce the vague and misleading concept that the conveyance was and still is valid at common law. A more forthright approach would be simply to direct compliance with the statute; or, if that were not feasible, order some practical adjustment to insure adherence to statutory purposes and to provide adequate substitutes for statutory safeguards.

A far more serious problem is posed in those jurisdictions where in order to avoid the alleged inconvenience and expense of court supervision that would result from statutory requirements, assignments are consistently and deliberately made outside the statutes. When such dodging of legislative enactments receives court sanction, two classes of assignments equally valid are found to exist side by side in a given jurisdiction: the first, statutory and the other, non-statutory or common law. This condition prevails in many states. One commentator, on the basis of correspondence, has stated that "only in a handful of jurisdictions" is any attempt made to comply with the statutes.⁴² Another has observed that in California "common law assignment is generally preferred to statutory assignment."⁴³

A leading case upholding the methods of common law assignment is *Brainard v. Fitzgerald*.⁴⁴ Involved was an assignment to the secretary of the board of trade of San Francisco "on a printed form used generally by boards of trade." The assignment was for the benefit of creditors generally, but it was conceded by the assignee that it did not comply with the statute as to form or recordation. The court ruled that a valid common law transfer had taken place and held it impervious to an attacking creditor. The court then concluded:

In the absence of any conflict with or violation of our statutory law, we are not inclined to interfere with the practice developed by local boards of trade of procuring assignments, executed in good faith for the benefit of creditors generally.⁴⁵

As already indicated, the result of the decision in the *Brainard* case,

parties to it, as if the statute in question had been complied with in every particular as to formalities, execution and procedures under it. It is not our purpose nor do we wish to be understood as here deciding that in a proper case under the Utah statute creditors may not complain of the failure to comply with statutory formalities and procedure. . . ."

50 Utah 513 at 542, 167 Pac. 817 at 819 (1917).

⁴² Comment, 47 Yale L.J. 944, 946 (1938).

⁴³ Comment, 36 Calif. L. Rev. 586, 587 (1948).

⁴⁴ 3 Cal. 2d.157, 44 P.2d 336 (1935).

⁴⁵ Id. at 163. 44 P.2d at 339.

supra, was to establish for California alternative systems for the execution and administration of general assignments. The first is a free-style, undefined liquidation to be worked out by private arrangement between the debtor and his assignee. Whatever is devised the court will uphold, provided there is no "conflict" with California's statutory law.

The second type of general assignment provided for in California is the statutory one. California has a comprehensive assignment law.⁴⁶ This law provides, among other things, for the filing of assignments, inventories and assignees' bonds; it sets conditions for the examination of assignors; recites methods for the conduct of sales; directs accounting by assignees and fixes their fees. This law also states that certain assignments are void, e.g., assignments which contain preferences or demand releases; and finally, the law provides for priority payment to certain classes of tax⁴⁷ and wage claimants.⁴⁸ Altogether the California statute is designed to insure the orderly administration of insolvent estates and to shut off the likelihood of any preferential or fraudulent drain of assets. In the light of the existence of this statute, the action of the California court in the *Brainard* case, supra, in establishing an alternative out-of-court insolvency procedure is unsound. The assignment in *Brainard*, supra, was described as varying from the statute in form and recordation. Presumably this meant that the deed was irregular on its face and was not filed. It is also likely that the assignee made no attempt to account or take many other steps required by the written law. The court found that these omissions were not violative of the California code. The question that immediately presents itself is—what acts would violate the code? Would the code be violated if the assignor preferred a creditor? If he stipulated for releases? If he assigned only a part of his property? The answers to these questions can be determined only in future litigation. *Brainard v. Fitzgerald*, supra, stands for no more than that a non-conforming assignment cannot be uprooted in California if the non-conformity is simply in form or recordation. When the non-conformity is present in some other aspect of the assignment, it is impossible at this point to predict whether the California courts will protect the conveyance. In short, pending the test case, the legality of many of the features of common law assignments in California, as in other jurisdictions, is uncertain.

The effect of the *Brainard* case, supra, is that creditor organizations in California have not used the statutory assignment for at least the last

⁴⁶ Calif. Civ. Code § 3449 et seq. (Deering 1949).

⁴⁷ Calif. Rev. and Tax Code § 6756 (Deering 1953).

⁴⁸ Calif. Code of Civ. Proc. § 1204 (Deering 1950).

thirty years (1948).⁴⁹ If the common law system did not have abuses, what was the necessity of the statutory assignment? In the hands of non-creditor groups, the common law assignment will bring the entire process into disrepute. The evils of secret sales, sales on insufficient notice, irresponsible assignees, padding of claims, delay in distribution and unlimited commissions and fees, are only a few of the possible devices by which the integrity of the assignment proceeding would be undermined.⁵⁰

Insolvency proceedings hardly lend themselves to uncertainty. Debtors and creditors alike ought to know precisely what course should be followed in the liquidation and distribution of insolvent estates. When the pattern is fixed, administration can proceed quickly and efficiently to the final accounting, with judicial supervision insuring the integrity of the proceeding. When assurance as to the validity of the methods employed is absent, all parties concerned must be on tenterhooks lest a discontented creditor attempt to upset the entire transaction. In such circumstances, the non-statutory assignee may be reluctant to press demands for return of property or objections to dubious claims. Furthermore, while the statutory assignee is frequently endowed by law with the authority to avoid faulty security devices and preferential and fraudulent conveyances, the non-statutory assignee can rarely invoke these strong-arm powers.

The unfeasibility of permitting dual assignment systems to exist side by side in the same state was recognized by a New York court in *Lupinsky v. Hoffman*.⁵¹ In that case the assignor attempted at the outset to proceed in accordance with New York's Debtor and Creditor Law. However, he failed to acknowledge his assignment as required by Section 3 of that law. When the defect was realized, he tried to amend the instrument of assignment to make a common law deed of trust out of it. Upon a creditor's suit, the court declared the document void. The decision can be criticized for permitting the attacking creditor to recover in full to the exclusion of other creditors. However, the reasons offered by the court for its refusal to honor the makeshift proceeding are persuasive. Speaking of the Debtor and Creditor Law, the court said:

⁴⁹ See 36 Calif. L. Rev. 587 n. 6 (1948).

⁵⁰ See, e.g., 65 Harv. L. Rev. 3, 438 (1952):

Admitting that the machinery for liquidating a debtor's business requires additional expense such as the employment of attorneys, accountants and appraisers, and that there is an attendant delay in the ultimate payment of liquidation dividends, we must still bear in mind that the most comprehensive procedures for the liquidation of an insolvent debtor or for the reorganization of his business are the statutory provisions.

See also, Burill, *Voluntary Assignments for the Benefit of Creditors* 23 (6th ed 1894), who remarks that "the common law assignment" has been characterized as a "bankrupt law made by the debtor for himself."

⁵¹ 158 Misc. 261, 284 N.Y. Supp. 549 (Sup. Ct. Bronx County), aff'd, 246 App. Div. 803, 285 N.Y. Supp. 1074 (1st Dep't 1936).

The only manner in which the property of a debtor may be assigned and distributed for the benefit of creditors is in accordance with the provisions of the Debtor and Creditor law; otherwise this law would just be a fancy collection of words to be observed or not observed according to the whims and fancies of the debtor and his select group of creditors. . . . The debtor and creditor law contains minute specifications of each step in an assignment for the benefit of creditors. The Appellate Division of this department has simplified the statute law by a code of rules which must be observed in the handling of debtors' estates.⁵²

The rationale of the *Lupinsky* case, *supra*, is incontrovertible. When the state legislature has provided elaborate and comprehensive procedures for conducting general assignments, these procedures should be followed. Any shortcomings in the law can be cured by amendment. An insolvency proceeding, no matter how apparently honest and simple, is a complex affair permeated with possibilities of fraud. It should not be left to private arrangement.

Thus it is easy to understand why the common law assignment has been rejected in New York. Other cases are in accord with *Lupinsky v. Hoffman*, *supra*. In *In re Berman*,⁵³ an assignment for the benefit of creditors had been executed and thereafter a judgment creditor obtained the appointment of a receiver in supplementary proceedings. No objection was made to the form or validity of the assignment but it had not been filed as required by statute nor had any other steps been taken to bring the assignment into conformity with the statute. A motion was thereupon made to direct the assignee to turn over all the assets collected by him to the receiver. The lower court granted the motion.

The Appellate Division, however, held that the order directing the turn-over to the receiver was erroneous: Title to the assets had passed to the assignee, and the failure to fulfill the requirements of the statute did not render the assignment void. But the court did find that the failure to record and to give a bond might be grounds for the general removal of the assignee and the appointment of a new assignee. However, it held that this question had become academic since an involuntary petition in bankruptcy had been filed against the assignor.

In *Colonial Carpet Corp. v. Rosen*,⁵⁴ the court again considered the

⁵² *Id.* at 262, 284 N.Y. Supp. at 580. Again at 263, 284 N.Y. Supp. at 550 the court stated: There is nothing effective about a common-law deed of trust unless all of the creditors, including loan and merchandise creditors, join therein. Otherwise, such a common-law deed of trust is void. The debtor and creditor law and the rules of the Appellate Division provide for rigid supervision over the estates of insolvent debtors. Parties must not be allowed to deal with insolvents' property at their own smart will. The law has been written into the debtor and creditor law and its provisions must be followed and obeyed.

⁵³ 173 App. Div. 689, 160 N.Y. Supp. 79 (1st Dep't 1916).

⁵⁴ 143 Misc. 418, 255 N.Y. Supp. 815 (N.Y. City Ct. 1931).

conflict between common law assignees and judgment creditors: A deed of trust had been executed and a motion thereafter made by a judgment creditor to require the trustee to turn over sufficient moneys to satisfy his judgment. The motion was made on the ground that the assignment did not conform to the provisions of the Debtor and Creditor Law and was, therefore, void. The court distinguished the *Berman* case, *supra*, pointing out that not only were the directory provisions of the law not complied with in that the assignment was not recorded and no bond filed, but a sale was held without court order and counsel fees and other expenses were paid, also without court approval. The court stated at page 816:

If the provisions of the debtor and creditor law mean anything, they must mean that in a proceeding in which the parties never intended to comply with its terms, the assignment is invalid against the dissenting creditor.

The court granted the turnover and the judgment creditor was paid in full to the exclusion of the other creditors. This is another decision by a New York court which can be criticized⁵⁵ for permitting one creditor to recover in full at the expense of the remainder of the creditors. However the principle of the case that common-law assignments cannot exist side by side with statutory assignments is sound, and points the way to an effective resolution of the ambiguity in assignment statutes which do not explicitly state that the statutory methods are to be exclusive.

ASSIGNMENTS IN THE VARIOUS STATES AND TERRITORIES

An analysis of the assignment statutes existing in the 48 states, the District of Columbia and the four territories, shows the existence of such an amorphous group as almost to defy classification.⁵⁶ The range is from

⁵⁵ See p. 12 *supra*.

⁵⁶ The following table is designed for a ready reference as to significant sections of the assignment statutes in all states, the District of Columbia, Alaska, Hawaii, Porto Rico and The Virgin Islands:

State	Statute		Allows Preference	Grants Discharge (D) Permits Release (R)
	Comprehensive (C) Non-Comprehensive (NC)			
ALABAMA	NC			
ALASKA	NO STATUTE			
ARIZONA	C			R
ARKANSAS	C		X	R
CALIFORNIA	C			
COLORADO	C			D
CONNECTICUT	NO STATUTE			
DELAWARE	NC		X	
FLORIDA	C			
GEORGIA	NC		X	

the simplest type such as exists in Idaho to that of New York. The Idaho statute is an example of oversimplification.⁵⁷ Its sole provision is a mandate that no assignment for the benefit of creditors is valid unless the

State	Statute		Allows Preference	Grants Discharge (D) Permits Release (R)
	Comprehensive (C) Non-Comprehensive (NC)			
HAWAII	NO STATUTE			
*IDAHO	NC			
ILLINOIS	NO STATUTE			
INDIANA	C			
IOWA	C			
KANSAS	C			
KENTUCKY	C			
LOUISIANA	C			
MAINE	NO STATUTE			
*MARYLAND	NC			
*MASSACHUSETTS	NC			
MICHIGAN	C			
MINNESOTA	NC			
MISSISSIPPI	NC		X	
MISSOURI	C			
MONTANA	C		X	
NEBRASKA	C			
NEVADA	NO STATUTE			
NEW HAMPSHIRE	C			D
NEW JERSEY	C			
NEW MEXICO	C			
NEW YORK	C			
NORTH CAROLINA	C			
NORTH DAKOTA	NC		X	
OHIO	C			
OKLAHOMA	C			
OREGON	NO STATUTE			
PENNSYLVANIA	C			
PUERTO RICO	NO STATUTE			
RHODE ISLAND	C			
SOUTH CAROLINA	C		X	R
SOUTH DAKOTA	C			
TENNESSEE	C			
TEXAS	C			D
UTAH	C			
VERMONT	NC			
VIRGINIA	NC			R
WASHINGTON	C			D
WEST VIRGINIA	C			
WISCONSIN	C			
DIST. OF. COL.	C			
VIRGIN ISLANDS	C			D

* These three states do not really have assignment statutes—they simply have statutes that in very brief provisions recognize the practice of general assignments.

⁵⁷ Idaho Code Ann. tit. 68, § 68-201 (1949).

assignee is a bona fide resident of the state. Such problems as the duties, powers, rights and remedies of an assignee are ostensibly left to judicial legislation.

At the other extreme of the statutory horizon is the New York statute which is the most comprehensive of all assignment statutes.⁵⁸ Recently amended,⁵⁹ its trend is to keep abreast of the parallel sections of the Bankruptcy Act, in an effort to give greater rights to the assignee to support the recovery of assets for creditors.

The credit man checking accounts in 53 jurisdictions will want to know whether all or any of these statutes not only provide for an equitable distribution of the assets available for creditors, but whether the statutes have at least the minimal provisions for the recovery of preferences and fraudulent conveyances; and finally whether participation in the assignment proceeding releases his concern's claim against the debtor.

A classification based on the credit man's viewpoint is possible:

(1) The New York type⁶⁰ statute, which contains provisions providing for an assignment of all the assignor's property, and prohibits preferences to general creditors and does not allow for the debtor's discharge.

(2) The Texas and Virginia type⁶¹ statute, which makes it a condition precedent to sharing in any distribution that the creditor release the assignor.

(3) The Georgia type⁶² statute which permits an assignment of part of the assignor's property and which may be to a preferred group of his creditors.

(4) The Connecticut "type" where no statute is in existence and common law assignment may be available.

(5) The Idaho type⁶³ statute with no substantial provisions.

Since an assignment for the benefit of creditors constitutes an act of bankruptcy,⁶⁴ the credit man will be immediately confronted with the

⁵⁸ See N.Y. Debtor and Creditor Law art. 2.

⁵⁹ L. 1950, c. 758. See also, Weintraub and Levin, "General Assignments for the Benefit of Creditors: Recent Amendments to the Law," 123 N.Y.L.J. 1786, col. 1 (May 19, 1950), 123 *id.* 1806, col. 1 (May 22, 1950).

⁶⁰ See, e.g., N.Y. Debtor and Creditor Law art. 2 and chart note 56 *supra*, and column thereunder of "Comprehensive statutes."

⁶¹ See, e.g., Tex. Civ. Stat. § 261 (Vernon 1948) and Va. Code Ann. §§55-156 *et seq.* (1950). Reference throughout this article to the New York, Georgia, California, Idaho and Connecticut type statutes, connotes only the principle differences between them as set forth in subsds. (1) to (5) inclusive.

⁶² Ga. Code Ann. c. 28-3 (1953).

⁶³ See, e.g., note 57, *supra* and chart note 56 *supra*, and column thereunder of "Noncomprehensive Statutes."

⁶⁴ Bankruptcy Act § 3(a), Subdv. 4, 52 Stat. 844 (1938), 11 U.S.C. § 21 (a), Subdv. 4

problem as to whether to allow the debtor's estate to be liquidated under the assignment proceeding or whether to file an involuntary petition in bankruptcy. In arriving at a decision, he must of necessity consider his rights and remedies under the particular type of assignment statute.

THE NEW YORK TYPE

New York offers a comprehensive legal procedure for the liquidation of insolvent estates under court supervision with adequate protection for creditors. Jurisdiction of the proceedings is in the Supreme or County Court.⁶⁵ Provision is made for the form of assignment, filing and acknowledgement.⁶⁶ Although the act does not clearly indicate that the assignment must include all the debtor's property and must be for the benefit of all creditors, the decisional law is to that effect.⁶⁷

Within 20 days after the assignment the debtor is required to file schedules of his assets and liabilities in detail.⁶⁸ To encourage effective compliance with this requirement, the debtor's attorney is allowed compensation for his services in this connection.⁶⁹ This is somewhat similar to compensation allowable in bankruptcy proceedings to the bankrupt's attorney.⁷⁰ However, the failure to file schedules does not delay effective administration for, if the debtor fails to file schedules, the assignee prepares and files them instead.

The duties of an assignor are somewhat analogous to those of a bankrupt: He must comply with all lawful orders of the court, examine the correctness of all claims, deliver to the assignee his books, and if ordered by the court, submit to examination under oath.⁷¹

The duties of the assignee likewise run parallel to those of a trustee in bankruptcy. He must sell the property at public auction unless good cause is shown for a private sale.⁷² He is authorized to advertise for creditors to present claims, and the form of claim is prescribed. Before selling any property, the assignee must file a bond in an amount to be fixed by the court, generally in a sum at least equal to the value of the assets. He must collect and reduce the property in the estate to cash, report to the

(1946), as amended, 66 Stat. 42 (1952), U.S.C.A. § 21(a) Subd. 4 (Supp. 1953). Further reference to the Bankruptcy Act will be indicated by sections of the Act and not the Code.

⁶⁵ N.Y. Debtor and Creditor Law § 2.

⁶⁶ Id. § 3.

⁶⁷ See, *In re General Assignment for Benefit of Creditors of Forty Wall St. Corp.*, 258 App. Div. 108, 15 N.Y.S.2d 554 (1st Dep't 1939).

⁶⁸ N.Y. Debtor and Creditor Law § 4.

⁶⁹ Id. § 4.

⁷⁰ Cf. Bankruptcy Act § 62a (1).

⁷¹ N.Y. Debtor and Creditor Law § 4.

⁷² Id. § 14. Cf. Bankruptcy Act § 47a, "Duties of Trustee."

court the disallowance of claims, furnish information regarding the estate to interested parties as requested, keep regular accounts and, finally, close the estate as expeditiously as possible.⁷³ Failure of the assignee to perform his duties subjects him to removal on motion of a creditor.⁷⁴

The part creditors play in the administration of the estate is clearly indicated by a provision requiring them to receive ten days' notice⁷⁵ of all proposed sales of property, the payment of dividends, the final accounting and the compromise of any controversy. Provision is made for the provability and allowance of claims, including damage for breach of a lease; and the principle of set-off is recognized.⁷⁶

The court is given broad power to supervise the proceeding; to allow claims; to authorize the continuance of the business; and to determine the exemptions of assignors. It can also authorize the assignee to bring an action against persons who have received property in fraud of creditors and which transfer might have been avoided by creditors; and the court can authorize the institution of a suit to recover a voluntary preference. The court has additional power to allow the claims of secured creditors in such sums as may be owing above the securities; and to permit the assignee to examine parties and witnesses under oath and to compel their attendance and the production of books.⁷⁸

The court may also require the filing of interim and final reports and must pass upon them, and if proper, may discharge the assignee and his surety. Additional power is given to the court to approve a composition settlement between the assignor and his creditors, to punish contempt resulting from any disobedience or any violation of any order and to restrain by arrest a party or witness from leaving the jurisdiction. And finally, the court is given such power as a surrogate may exercise in reference to an account by an executor or administrator.⁷⁹

The most singular authority vested in the court, however, is authority to set aside invalid claims.⁸⁰ All claims which for want of record or otherwise would not be valid against the claims of creditors of the assignor

⁷³ N.Y. Debtor and Creditor Law § 27.

⁷⁴ *Id.* § 8.

⁷⁵ *Id.* § 12.

⁷⁶ *Id.* § 3. Cf. Bankruptcy Act § 68.

⁷⁷ N.Y. Debtor and Creditor Law § 13.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.* This anomalous provision stems historically from the jurisdiction of probate courts over the distribution of insolvent estates. See Williston, "The Effect of the National Bankruptcy Act on State's Laws," 22 *Harv. L. Rev.* 547 (1909).

⁸⁰ N.Y. Debtor and Creditor Law § 17, reads as follows:

Claims which for want of record or for other reasons would not have been valid as against the claims of creditors of the assignor shall not be liens against his estate.

will not be considered liens against the estate. Thus, a chattel mortgage filed an unreasonable time after delivery of the mortgage has been held to be invalid against an assignee, although good against the assignor.⁸¹ And thereby the concept that the assignee's title is no better than that of the assignor, has been abandoned.⁸²

Preferences are prohibited other than for wages which are limited to a sum not to exceed \$600 earned by each employee within three months prior to the assignment.⁸³ Priorities for taxes are not contained in the assignment statute but have been made applicable by other laws.⁸⁴ The uniform act governing liquidation of secured claims in insolvency proceedings has likewise been made applicable.⁸⁵ Rules promulgated by New York courts implement and regulate these provisions.⁸⁶

It is a unilateral proceeding commenced at the volition of the assignor alone and has no provision for forced assignments, i.e., preferential or fraudulent transfers by the debtor in contemplation of insolvency shall operate as an assignment of all of the debtor's property for the benefit of all of his creditors.⁸⁷ Forced assignments detract from the voluntary nature of assignment proceedings; their necessity is not clearly apparent. However, they may be extremely useful in those jurisdictions which do not have effective statutes for the recovery of preferential and fraudulent conveyances.

It is a sound liquidating statute insofar as the sale of property is concerned, the notice afforded creditors and the distribution of the proceeds. The definite weaknesses in the New York statute are considered below.⁸⁸

THE TEXAS AND VIRGINIA TYPE STATUTE AND THE DISCHARGE QUESTION

One of the most perplexing problems of assignment statutes is the question of the availability of a discharge to a debtor. The Texas and Virginia statutes are examples of those purporting to grant a debtor a discharge.

⁸¹ See *Stich v. Pirkel*, 100 Misc. 594, 166 N.Y. Supp. 440 (Sup. Ct. Kings County 1917).

⁸² See *In re Brown Bomber Baking Co.*, 293 N.Y. 141, 56 N.E.2d 85 (1944).

⁸³ N.Y. Debtor and Creditor Law § 22. Cf. Bankruptcy Act § 64a (1).

⁸⁴ The order of priority: First, Director of Internal Revenue, 31 U.S.C. 191 (1946); second, wages, N.Y. Debtor and Creditor Law § 22; third, New York State franchise and unemployment insurance contributions and New York City sales and business tax on a parity, *In re Torpedo Dress Co.* 259 App. Div. 1076, 22 N.Y.S.2d 121 (1st Dep't 1940), and N.Y. Labor Law § 574; and fourth, premiums for workmen's compensation insurance policies, N.Y. Workmen's Compensation Law § 130. Cf. Bankruptcy Act § 64.

⁸⁵ N.Y. Debtor and Creditor Law § 30.

⁸⁶ Each department has its own rules. Uniformity would aid administration. Cf. Bankruptcy rules for Southern and Eastern Districts of New York (1952).

⁸⁷ Ky. Rev. Stat. § 378.060 (1953), Ohio Gen. Code Ann. § 1104 (Page 1938); Pa. Stat. Ann. tit. 39, § 152 (1930). See Note, 41 Ky. L. J. 450 (1953).

⁸⁸ See p. 28 et seq. *infra*.

The Texas statute⁸⁹ provides for the discharge of the debtor from the claims of those creditors who have received dividends of at least 33⅓%. The Virginia statute⁹⁰ provides that the assignment may contain a provision that accepting creditors are deemed to have discharged the assignor. To what extent are these and similar statutes valid?

Commenting on the Virginia statute a recent writer⁹¹ took the position that the discharge of debts is a unique feature of federal bankruptcy legislation and should not be permitted by state statutes or even by private arrangement outside of state statutes. He therefore concluded that the Virginia statute, if tested by the courts, would be held unconstitutional.

The Supreme Court has been clear that a state assignment statute which grants a discharge is void at least as far as the discharge provision of the statute is concerned.⁹² Further, the general remarks of the court would lead to the conclusion that a state statute which provides no more than that an assignor *may* include a stipulation for release in his deed of assignment, would likewise be invalid.

However, the question of whether under state law (non-statutory) an assignor can validly insist upon a release is uncertain. The Supreme Court has virtually sanctioned such procedure in at least one case.⁹³

The first important statement of the Supreme Court appears in *Boese v. King*.⁹⁴ In this case, a New Jersey assignment was attacked by a judgment creditor who sought to levy on assets in the hands of the assignee. The New Jersey law under which the assignment was executed granted a discharge to creditors who filed claims. The attacking creditor claimed that the presence of the discharge provision meant that the law was suspended.

In dictum, the Supreme Court remarked that the statute was "inoperative," at least as far as the discharge section was concerned. The court, however, had no intention of allowing one creditor to satisfy his claim in full by striking down the assignment. The court noted that if this creditor had really been dissatisfied with the state assignment proceeding he could have superseded it by filing an involuntary bankruptcy petition.

The court turned back the attack by holding that no matter what the status of New Jersey law, the assignment was adequate to pass title from the assignor to the assignee, and this passage of title immunized the property. The court did not actually describe the assignment as a so-called

⁸⁹ Tex. Civ. Stat. art. 261 et seq. (1948).

⁹⁰ Va. Code Ann. § 55-156 et seq. (1950).

⁹¹ 36 Va. L. Rev. 813 (1950). Cf. Glenn on Liquidation 210 (1935).

⁹² *Boese v. King*, 108 U.S. 379 (1883).

⁹³ *Johnson v. Star*, 287 U.S. 527 (1933).

⁹⁴ 108 U.S. 379 (1883).

common law assignment, but some such thought appears to have been behind its words. The court was impressed by the fact that the assignment covered all of the debtor's property and was for the equal benefit of all "accepting" creditors. The court did not consider the perplexing question: What if the common law of New Jersey permitted an assignor to demand a release and such release were demanded?

The second significant occasion for an expression of the viewpoint of the Supreme Court on discharges in state assignment proceedings was *International Shoe Co. v. Pinkus*.⁹⁵ Involved was Arkansas' Insolvency Act.⁹⁶ If the trimmings are snipped away, the Arkansas Act is seen to be nothing more than an assignment statute with a few added twists. Under it the debtor petitions the court to be adjudged an insolvent and to have a receiver appointed to take custody of his assets. Thereafter administration proceeds as in any assignment. The vulnerable feature of the Arkansas Act was its discharge clause and its title, "Insolvency Act."

International Shoe Co. recovered a judgment against Pinkus, and on the same day, Pinkus petitioned to be adjudged insolvent. International refused to participate in the state proceeding and levied on property in the hands of the receiver. The Arkansas court upheld the statutory proceeding on the ground that even if the statute were invalid, the Chancery court in Arkansas could have conducted such a proceeding without statutory authorization.

The Supreme Court noted that the Arkansas law was an insolvency act, that Pinkus did not file a petition in bankruptcy because he had already been in bankruptcy within the past six years,⁹⁷ and, that if the Arkansas law were allowed to stay on the books "intolerable inconsistencies and confusion would result."⁹⁸

Boese v. King, supra, was distinguished on the ground, among others, that the creditor there could have instituted a bankruptcy proceeding, while here the creditor did not have a large enough claim to file an involuntary petition. In the course of its opinion the Supreme Court stated that the high court of Arkansas had wrongly interpreted the power of the Arkansas Chancery Court.

The result was that the Supreme Court held the Arkansas statute invalid, and International Shoe was paid in full. If the logic in the *Boese* case had been followed, it would not have been necessary to hold the entire

⁹⁵ 278 U.S. 261 (1929).

⁹⁶ Crawford and Moses Digest § 5885 et seq. (1921). Now found in Ark. Stat. Ann. § 36-201 et seq. (1947).

⁹⁷ Cf. Bankruptcy Act § 14c(5).

⁹⁸ See *International Shoe Co. v. Pinkus*, 278 U.S. 261 (1929).

Arkansas statute invalid and sanction a preference for International; it would have been enough simply to have barred the discharge privilege. Again, the court did not deal with the question of whether, without the aid of statute, Arkansas courts could grant discharges.

Four years later in *Probeslo v. Boyd*,⁹⁹ the Supreme Court again had the discharge problem to consider. Wisconsin had a fairly comprehensive assignment statute which, among other features, permitted a discharge and contained a clause which stated that no creditor, once an assignment was made, could obtain a preference over another, even if the assignment were declared void. A creditor garnisheed an assignee alleging that the Wisconsin statute conflicted with the Bankruptcy Act. The Supreme Court denied the creditor's contention: The court pointed out that the Wisconsin courts had themselves invalidated the discharge provision; that otherwise the Wisconsin law simply regulated assignments or "administered trusts;"¹⁰⁰ the law did not, like the Arkansas statute, "impose conditions which trammelled and made against equal distribution of property"¹⁰¹ or provide "a judicial winding up of the debtor's estate."¹⁰² However one may cavil at the court's distinction between the Arkansas and Wisconsin statutes, its holding was sound: An assignment for the benefit of creditors or state insolvency proceedings exclusive of the discharge features was valid.

On the same day that *Probeslo*, supra, was decided, the Supreme Court decided *Johnson v. Star*.¹⁰³ Involved was the Texas assignment statute.¹⁰⁴ *Johnson v. Star* cannot be understood from the court's opinion alone. It is necessary first to look into two earlier Texas cases and the opinion of the Texas court in *Star v. Johnson*.

The first Texas case was *Patty-Joiner v. Cummins*.¹⁰⁵ This case involved an attack on an assignment under the Texas statute. *Boese v. King* had already been decided by the United States Supreme Court. The Texas statute contained a provision that the assignor would be released from claims of all creditors who received a 33⅓ per cent dividend.

The Texas court held that the provision for a release in the Texas statute was suspended by the Bankruptcy Act, but otherwise, the Texas law was in force, and in any event, the assignment could not be attacked because it was good at common law; title passed to the assignee; and any

⁹⁹ 287 U.S. 518 (1933).

¹⁰⁰ Id. at 526.

¹⁰¹ Id. at 525.

¹⁰² Id. at 526.

¹⁰³ 287 U.S. 527 (1933).

¹⁰⁴ Tex. Civ. Stat. art 261 et seq. (1948)

¹⁰⁵ 93 Tex. 598, 57 S.W. 566 (1900).

creditor who wished, could accept under the assignment. The court further said that it favored releases but did not explicitly say that an assignor in Texas could demand a release outside of the statute, since such a holding was unnecessary to the disposition of the case.

After *Patty-Joiner*, supra, came *Haijek v. Luck*.¹⁰⁶ The *Haijek* case meets the problem squarely. For here a creditor who received a 33 $\frac{1}{3}$ per cent dividend in a Texas assignment subsequently sued the assignor for the balance of his claim. The Texas Supreme Court correctly analyzed *Patty-Joiner* as not being decisive of the issue at bar. Mindful of *Boese v. King*, however, the court held that although the release provision in the Texas assignment statute was suspended, an assignor in Texas could still stipulate for releases at common law. Therefore, as long as the assignment was not superseded by an involuntary petition in bankruptcy, it could be enforced by the Texas court as a valid common law assignment, release and all. Neither *Patty-Joiner* nor *Haijek* was appealed to the United States Supreme Court.

The Texas case that was appealed was *Johnson v. Star*.¹⁰⁷ A judgment creditor garnisheed a Texas assignee claiming that the assignment law was suspended. The Texas court said that only insolvency statutes are suspended, not assignment laws; and that the Texas statute was in force, since it only administered assignments. The court based its opinion on *Patty-Joiner* rather than *Haijek*. Without much discussion of the problem of common law assignments, it held that the discharge provision in the law was suspended but the remainder of the law was in force.

Now in *Johnson v. Star*, supra, debts amounted to \$11,000 and the assignee only held some \$500 in liquid assets. Under Texas law the assignor was not entitled to a discharge. An interesting question not raised by any law reviewer, is whether this assignor could still stipulate for a discharge under the Texas common law. The Texas court did not raise this question, it simply said, as had Texas courts before it, that a non-consenting creditor could not defeat an assignment by attachment. *Patty-Joiner* was declared controlling.

The case was then appealed to the Supreme Court¹⁰⁸ which affirmed the state court holding. As already remarked the *Probeslo* case¹⁰⁹ was decided the same day. Both opinions were written by Mr. Justice Butler. In *Johnson v. Star*, Mr. Justice Butler reasoned for the Supreme Court as follows: The question is whether the Texas statute as construed by its

¹⁰⁶ 96 Tex. 517, 74 S.W. 305 (1903).

¹⁰⁷ 44 S.W.2d 429 (Tex. Civ. App. 1931).

¹⁰⁸ 287 U.S. 527 (1933).

¹⁰⁹ 287 U.S. 518 (1933).

highest court is repugnant to the Bankruptcy Act. In *Patty-Joiner* and *Haijek* the state court ruled that the statute governed assignments and the discharge provision was suspended, therefore the statute was not repugnant to the Bankruptcy Act.

Since the *Probeslo*¹¹⁰ and the *Johnson*¹¹¹ cases were decided on the same day, the law on discharges in assignment seems to be:

- (a) Discharges of a debtor may not be authorized by statute.
- (b) But discharges may be authorized by state common law, *i.e.*, assignors can stipulate for releases and make them a ground for receipt of dividends in those jurisdictions recognizing common law assignments.

In short, state legislatures under no circumstances can afford assignors the privilege of a discharge. But state courts may or may not afford the privilege as they wish.

THE GEORGIA TYPE

Georgia's statute¹¹² allows the assignor to prefer one creditor over another but excludes corporations. Seven states¹¹³ in all still allow preferences of one sort or another. This does not include the Idaho type statute, which may or may not allow preferences depending upon decisional law.¹¹⁴ All such enactments have a basic weakness in not providing for equal distribution.

THE CONNECTICUT TYPE

Under Connecticut law statutory insolvency proceedings have been suspended¹¹⁵ during the existence of the Bankruptcy Act; and even the common law assignment seems to be void unless all creditors assent thereto.¹¹⁶ Eight jurisdictions have no statute at all.¹¹⁷ If the common law assignment is held to be void, then there is no insolvency liquidation of the individual or partnership possible in these jurisdictions. But Connecticut does have a statute for the dissolution of corporations¹¹⁸ which statute is similar in design to that of New York.¹¹⁹

¹¹⁰ *Ibid.*

¹¹¹ 287 U.S. 527 (1933).

¹¹² Ga. Code Ann. § 28-301 et seq. (1933).

¹¹³ Arizona, Delaware, Georgia, Mississippi, Montana, North Dakota and South Carolina.

¹¹⁴ See Note, 47 Yale L. J. 944 (1938), describing the statutes of the following states as inoperative: Indiana, Louisiana, Maryland, Massachusetts, North Dakota, New Hampshire and Washington.

¹¹⁵ Conn. Rev. Gen. Stat. §§ 6914 to 6949 (1949).

¹¹⁶ *Ibid.*

¹¹⁷ Connecticut, Illinois, Maine, Nevada, Oregon, Alaska, Hawaii and Porto Rico. See chart, note 56 *supra*.

¹¹⁸ Conn. Rev. Gen. Stat. § 5226 et seq. (1949).

¹¹⁹ See p. 36 *infra*.

THE IDAHO TYPE

Provisions for executing and administering assignments are sketchy. Twelve states¹²⁰ have statutes of this nature. The weakness of these statutes is generally that they furnish no guide for the assignee, and procedures, rights and remedies are made to depend upon the uncertainty of decisional law.

OTHER COMPETITIVE SYSTEMS OF INSOLVENCY
LIQUIDATION*The Bankruptcy Act*

The New York type assignment, although following the Bankruptcy Act in many details,¹²¹ is essentially geared for liquidations free of intricate preferences.¹²² In this field, the rights of the trustee and the powers of the bankruptcy court are preeminent. One useful function of the assignment, as has been discussed,¹²³ is to hold the assets intact and to create an act of bankruptcy so that creditors can adopt a choice of procedures depending upon the facts.¹²⁴ Assignments at present can compete with bankruptcies in simple liquidations but not beyond that sphere. Nor is there any competition as to the dischargeability of debts, for discharge provisions in state assignment statutes appear to be unconstitutional.¹²⁵

Other fields of competition need only be mentioned briefly. Thus, the New York statute has a gimmick which provides for a composition settlement between the debtor and his creditors.¹²⁶ It is archaic and fraught with grave doubt as to its legal soundness. This provision cannot compete with the carefully planned and experienced reorganization and arrangement proceedings of the Bankruptcy Act. And where the purpose of a debtor is to remain in business and adjust or extend his obligations with creditors, the arrangement or reorganization sections of the Bankruptcy Act offer the best procedure.¹²⁷

¹²⁰ Alabama, Delaware, Florida, Georgia, Idaho, Maryland, Massachusetts, Minnesota, Mississippi, North Dakota, Vermont and Virginia. See chart, note 56 supra.

¹²¹ See Weintraub and Levin, "General Assignments for the Benefit of Creditors: Recent Amendments to the Law," 123 N.Y.L.J. 1786, col. 1 (May 19, 1950); 123 id. 1806, col. 1 (May 22, 1950). These amendments (L. 1950 c. 758) tend to utilize some of the valuable experience learned through bankruptcy practice and to harmonize as closely as possible assignment proceedings with bankruptcy practice.

¹²² See Bankruptcy Act §§ 60, 67, 70.

¹²³ See p. 6 supra.

¹²⁴ See H.R. 79, 83rd Cong., 1st Sess. (1953), proposed legislation for making an assignment an act of bankruptcy only if coupled with another act which militates against this procedure.

¹²⁵ See p. 19 et seq. supra.

¹²⁶ See N.Y. Debtor and Creditor Law § 15, subd. 14.

¹²⁷ See Weintraub and Levin, "Chapter XI Approaches Its 'Teens,'" 35 Cornell L. Q. 4

Moreover, a great degree of certainty in the law is afforded by the cases which interpret the Bankruptcy Act. The dearth of decisional law in assignment proceedings has made statutory interpretation by analogy or parallel with the Bankruptcy Act a necessity. New York decisions are in point: In *Pavone Textile Corp. v. Bloom*¹²⁸ an assignment for the benefit of creditors had been filed. In the course of the proceeding, there was presented the issue as to whether interest on tax claims ceased with the filing of the assignment or continued until the date of payment. The court concluded that interest was not payable after the date of the assignment.

In arriving at its conclusion as to the claim of the State of New York, the New York Court of Appeals indicated that there was a close parallel between related provisions of the assignment statute and the Bankruptcy Act.¹²⁹ Thus, under the Bankruptcy Act, after the payment of the expenses of administration and wages, taxes are given equal priority, before the payment of general claims,¹³⁰ and in assignment proceedings, the State of New York has a similar priority, but after the claim of the United States and wage claims¹³¹ have been paid. A further similarity exists also in the nature of provable debts.¹³² The court held that since the Supreme Court had ruled in the *City of New York v. Saper*,¹³³ that interest ceased on the filing of the bankruptcy petition, therefore by analogy, interest should cease upon the filing of the assignment. The final comment of the court is:

The rationale of the authorities hereinbefore cited is sound . . . they harmonize the rules in bankruptcy and assignment proceedings.¹³⁴

Recent amendments to the New York statute carry out the design to model it in the light of the bankruptcy provisions.¹³⁵ Power has been granted the assignee to institute with court permission an action to set aside a sale in violation of the Bulk Sales Act;¹³⁶ voluntary preferences have been made recoverable under much the same circumstances as in bankruptcy;¹³⁷ the bankruptcy definition of insolvency has been adopted by the statute;¹³⁸ claims for anticipatory breaches of contract, including

(1950); *Id.*, "Third Year of Arrangements Under the Bankruptcy Act: Crossroads and Signposts," 18 N.Y.U.L.Q. Rev. 375 (1941).

¹²⁸ 302 N.Y. 206, 97 N.E.2d 755 (1951), *aff'd sub nom. U.S. v. Bloom*, 342 U.S. 912 (1952).

¹²⁹ *Id.* at 212.

¹³⁰ Bankruptcy Act § 64(a).

¹³¹ See note 84 *supra*.

¹³² Cf. Bankruptcy Act § 57(a) and N.Y. Debtor and Creditor Law § 13.

¹³³ 336 U.S. 328 (1949).

¹³⁴ 302 N.Y. 206 at 213, 97 N.E.2d 755 at 756 (1951).

¹³⁵ Laws 1950 c. 758, N.Y. Debtor and Creditor Law art. 2A.

¹³⁶ *Id.* § 15(6).

¹³⁷ *Id.* § 15(6a). Cf. Bankruptcy Act §§ 60(a), (b).

¹³⁸ N.Y. Debtor and Creditor Law § 13. Cf. Bankruptcy Act § 1(19).

unexpired leases on property have been made provable, limiting the claim of a landlord for damages resulting from the rejection of an unexpired lease on real estate to a period not to exceed one year, plus an amount equal to the unpaid accrued rent;¹³⁹ priority has been granted to wage earners in a sum not exceeding \$600;¹⁴⁰ provision has been made for compensation to the attorney for the assignor for services rendered in filing schedules and finally fees paid by the assignor to an attorney prior to and in connection with an assignment have been made subject to reexamination and excessive payments are recoverable.¹⁴¹

Amendments to assignment statutes which engraft in whole or in part specific provisions of the Bankruptcy Act, as does the New York statute, will also have the effect of making available to the assignment proceeding a host of bankruptcy cases which will serve as a guide in specific interpretations of the statute. Uniformity among state statutes may result from the incorporation into various state assignment statutes of similar provisions of the Bankruptcy Act. Of course, this is haphazard growth and is a far cry from the formulation of a uniform statute.

Such interpretation by analogy is always made difficult by the differences in rights and powers of a trustee in bankruptcy as compared to an assignee. Ample provision may appear in the Bankruptcy Act, but lack of such provision in the state law may raise a serious doubt as to the applicability of a bankruptcy provision to an assignment provision. Thus, in a recent assignment proceeding¹⁴² the problem was presented as to whether a membership corporation could make an assignment for the benefit of creditors. The question was raised by the title company which excepted from its policy the right of the assignor to make such an assignment contending that there was no provision in the New York statute authorizing a membership corporation to assign for the benefit of creditors. The New York Debtor and Creditor Law authorizes the filing of an assignment "by a corporation."¹⁴³ No restriction is made as to the type of corporation included and ostensibly the term is broad enough to include a membership corporation. But the Bankruptcy Act leaves no doubt by providing that "any person . . . shall be entitled to the benefits of this act as a voluntary bankrupt."¹⁴⁴ "Person" is defined in the Act so as to include corporations.¹⁴⁵ Thus, by convincing the title company that New

¹³⁹ N.Y. Debtor and Creditor Law § 13. Cf. Bankruptcy Act § 63(9).

¹⁴⁰ N.Y. Debtor and Creditor Law § 22. Cf. Bankruptcy Act § 64(2).

¹⁴¹ N.Y. Debtor and Creditor Law § 4(5). Cf. Bankruptcy Act § 60(d).

¹⁴² *In re Drew Seminary, Inc.*, Putnam County Court File No. 209 (1952) unreported.

¹⁴³ N.Y. Debtor and Creditor Law § 2.

¹⁴⁴ Bankruptcy Act § 4(a). See also an interpretation of the section by the bankruptcy court in *In the Matter of Elmsford Country Club*, 50 F.2d 238 (S.D.N.Y. 1931).

¹⁴⁵ Bankruptcy Act § 1(19).

York assignment law would follow the Bankruptcy Act, the company was persuaded to withdraw its objection. The necessity for going outside the state statute to the Bankruptcy Act and its decisional law, again exhibits the weakness of state assignment laws. In such instances the cure lies in amending the latter.

But even the New York statute, which follows the Bankruptcy Act closely, cannot compete in many substantial respects:

- (1) The statute is unable to corral involuntary preferences into its orbit of liquidation.
- (2) Swift administration of estates under the state statute has been impeded by the failure of New York courts to follow statutory law.
- (3) Summary jurisdiction in allowance of claims is lacking.
- (4) No highly skilled judicial officer (referee in bankruptcy) is made available for constant and complete control of all proceedings.
- (5) No provision can constitutionally be made for the discharge of the debtor.
- (6) When interstate problems arise the statutes lack of uniformity with other state statutes leads to difficult problems in conflict of laws.

Despite prevailing opinion,¹⁴⁶ as respects economy of operation the assignment proceeding does not appear to be more economical than a bankruptcy proceeding notwithstanding the more comprehensive and highly specialized administration which prevails in the latter.

The Involuntary Preference

From a liquidation statute with common law vestiges allowing preferential treatment of creditors, the New York statute has grown to one designed for equal distribution of assets to general creditors. The statute originally authorized preferences to general creditors although limited to one-third of the estate. This preference was lawful if contained in the document assigning the debtor's property. This preferential treatment was abolished on recommendation of New York's Law Revision Commission whose purpose was to:

. . . remove variations between the law as to general assignments and the comparable provisions of the Bankruptcy Act which hinder successful use of the general assignment as an alternative to bankruptcy.¹⁴⁸

Thereafter and in 1950 an effective provision was inserted in the statute authorizing the assignee to institute an action to recover a voluntary preference received within four months of the assignment under much the same circumstances as a trustee could recover such a preference under

¹⁴⁶ See p. 35 *infra*.

¹⁴⁷ N.Y. Debtor and Creditor Law § 8, formerly old § 22.

¹⁴⁸ See Report of the N.Y. Law Rev. Comm. 295, 296 (1950) which first appeared as (1950) Leg. Doc. 65(1) at 11 and 12.

Sections 60(a) and 60(b) of the Bankruptcy Act.¹⁴⁹ At the same time the definition of insolvency contained in the Bankruptcy Act was inserted into the state law.¹⁵⁰ But this provision still leaves an involuntary preference, such as an attachment or lien of judgment obtained prior to the assignment, beyond the assignee's powers to set aside.¹⁵¹

Statutes of several of the states provide for the setting aside of such a lien if obtained within periods not exceeding four months prior to the execution of the assignment.¹⁵² Equality of distribution among general creditors necessitates such provisions. The status of the assignee as an ordinary creditor deprives him of rights which a trustee in bankruptcy enjoys by virtue of the Bankruptcy Act.¹⁵³ An anomalous condition exists under the Uniform Trust Receipts Act wherein the assignee is made a judgment creditor with a lien outstanding on the property in his possession.¹⁵⁴ Since New York State has adopted the Uniform Trust Receipts Act the provision referred to places the assignee in the same position as a trustee in bankruptcy, although, as noted, the New York Debtor and Creditor law gives the assignee no such powers as possessed by a trustee in bankruptcy. Clearly effective administration requires that the assignee have the rights, remedies and powers of a trustee. There exists no sound reason to differentiate between voluntary and involuntary preferences.

This principle is recognized in the Uniform Commercial Code¹⁵⁵ in its provisions dealing with the rights of third parties against unperfected security interests.¹⁵⁶ An unperfected security interest is held to be subordinate to the claim of a lien creditor without knowledge of the security interest.¹⁵⁷ The definition of "lien creditor" is one who has obtained a lien on property by "attachment, levy or the like and includes an assignee for the benefit of creditors . . . and a trustee in bankruptcy . . . or a receiver in equity. . . ." ¹⁵⁸

The Code's inclusion in the aforementioned grouping of an assignee as a creditors' representative entitled to the same remedies as a trustee is sound. The primary idea in any statutory liquidation is to bring about

¹⁴⁹ N.Y. Debtor and Creditor Law § 15 subd. 6(a).

¹⁵⁰ *Id.* § 13.

¹⁵¹ *Matter of Feldman and Co.*, 237 App. Div. 720, 262 N.Y. Supp. 681 (1st Dep't 1933).

¹⁵² Ark. 10 days; N.H. 3 mos.; R.I. 4 mos.; Wis. 30 days for attachments; 1 mo. for preferences.

¹⁵³ *Cf.* Bankruptcy Act §§ 67, 70.

¹⁵⁴ N.Y. Pers. Prop. Law § 58.

¹⁵⁵ § 9-301.

¹⁵⁶ *Id.* subd. 3.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

the turning over of all assets to the liquidator, without preference to any creditor, for equal distribution to all creditors of the same class.

Summary Jurisdiction and the Secured Creditor

The bankruptcy court has jurisdiction summarily to determine all issues in relation to property of the bankrupt actually or constructively in *the trustee's possession*.¹⁵⁹ This power makes for speedy administration particularly in dealing with secured creditors. The position of the assignee, on the other hand, as against a secured creditor, appears at least in New York, to have resulted in confusing decisions.

Liquidation of the property held as security for the payment of obligations and the provability of the excess over the value of the property is provided in simple language by the Bankruptcy Act.¹⁶⁰ The purpose of the section is to realize for the estate the equity in the property belonging to the bankrupt, for the benefit of the estate. If the property is in the possession of the creditor and his agreement provides for a liquidation which is designed to bring full value for the property, the creditor will generally be permitted to sell.¹⁶¹ If the property is in the possession of the bankrupt, the receiver or trustee will be allowed to sell at an upset price set above the secured creditor's indebtedness, if he can show an equity accruing to the estate above the creditor's lien. The determination as to the manner and method of sale is properly within the discretion of the bankruptcy court.¹⁶²

The secured creditor's right to his property and the provability of his claim was a late arrival in the Debtor and Creditor Law of New York, although it was derived from the Uniform Act.¹⁶³ The assignment statute has no special provision as to secured creditors, but a separate statute was enacted in 1942 known as Article 2-A. Its juxtaposition to Article 2 of "General Assignments for the Benefit of Creditors" shows the legislators' intention to consider it principally a part of the assignment statute. The statute in effect follows the bankruptcy rule both as to liquidation of property and provability of secured claims.

This thought is emphasized in a federal case, *Florence Trading Corp. v. Rosenberg*:¹⁶⁴ Kitchen Products Corp. executed an assignment for the benefit of creditors in December 1941. In the previous October it had

¹⁵⁹ See Bankruptcy Act § 23(a).

¹⁶⁰ *Id.* § 57(h).

¹⁶¹ See 4 Collier On Bankruptcy (14th ed. 1940) §§ 70.97, 70.98.

¹⁶² *Ibid.*

¹⁶³ L. 1942 c. 876, § 1, constitutes, except for minor differences in text, adoption of the "Uniform Act Fixing Basis of Participation by Secured Creditors in Insolvent Estates."

¹⁶⁴ 128 F. 2d 557 (2d Cir. 1942).

executed for a present consideration, a chattel mortgage on its fixtures. At the time of the assignment, Kitchen delivered to its assignee possession of the chattels. By the terms of the mortgage such assignment constituted a default and the next day the mortgagee instituted an action in replevin and issued its writ to the sheriff. The sheriff seized the chattels from the assignee and turned them over to the mortgagee. Later that same day an involuntary petition in bankruptcy was filed against Kitchen and it was adjudicated a bankrupt. The trustee thereafter instituted a proceeding to have Kitchen turn over the fixtures to him and to allow him to sell them free and clear of the mortgagee's lien, said lien to attach to the proceeds of the sale.

The question was therefore squarely before the court as to whether under New York law the institution of an action of replevin ousts the assignee of title and possession of property he received from the assignor. In ruling that the replevin did not oust the assignee of title the court cited the holding of *Isaacs v. Hobbs Tie & Lumber Co.*,¹⁶⁵ namely, that it was a "well recognized rule" that once a court of competent jurisdiction had taken control of property, its possession may not be disturbed by another court of concurrent jurisdiction. And as a corollary the court held that the court of original jurisdiction is "competent to hear and determine all questions respecting title, possession and control of property."¹⁶⁶

Judge Clark then posed the question as to whether this "well recognized rule" applies to assignments for the benefit of creditors and he held it did.¹⁶⁷ The assignee, therefore, has full power over the property in his possession which could not be disturbed by a replevying creditor. The court arrived at this conclusion independently of Article 2-A which had been enacted at about the time of the decision.

The rationale of the *Isaacs* and *Florence* cases, supra, is to support creditors' representatives in powers, right and remedies which will allow the trust res in its widest sense to be undiminished. The Bankruptcy Act and decisional law gives the trustee broad powers to deal with secured interests; the assignee's powers in those jurisdictions where the Uniform

¹⁶⁵ 282 U.S. 734 (1931).

¹⁶⁶ *Florence Trading Corp. v. Rosenberg*, 128 F.2d 557 at 561 (2d Cir. 1942).

¹⁶⁷ The question here is whether or not that 'well recognized rule' applies under the New York law dealing with assignments for the benefit of creditors. This law has been the subject of extensive revisions; the final one, made in 1909 and amended in 1914, resulted in a complete code for the adjudication of the rights and duties of the debtor and his creditors, implemented by extensive powers to the assignment court to allow and disallow claims and to pass all necessary orders for the settlement of the insolvent's estate as a court of 'general jurisdiction' . . .

The decisions have construed this law as giving the court full power over the estate, which is said to be in custodia legis and anyone involved in the administration thereof on behalf of the court is subject to its summary jurisdiction. . . .

Id. at 560, 561.

Act Fixing Basis of Participation by Secured Creditors in Insolvent Estates, has been adopted is equally extensive, except for decisional law. But it would seem realistic where not inconsistent with the provisions of a particular statute that the courts in endeavoring to determine powers of assignees for the benefit of creditors, should as far as possible follow bankruptcy precedent. This will have the double effect of providing a body of decisional law now absent from most statutes, and ultimate uniformity in the statutes.

Such guidance for the New York court would have eliminated the erroneous result of *In re Geoghan*.¹⁶⁸ In that case, the assignor was a dealer in household appliances. At the time of the assignment for the benefit of creditors he had some appliances in his possession which were secured by trust receipts to a bank. The assignee petitioned Special Term to sell the appliances free and clear of the trust receipts, the lien, if any, to attach to the proceeds, on the ground that there was an equity in the property for the assignee. The proceeding was under Article 2-A of the New York Debtor and Creditor Law and the assignee stipulated that he would sell at an upset price which would protect the bank. Instead of following the *Florence* case,¹⁶⁹ supra, or section 35 allowing alternative determinations of value, Special Term held that the assignee was not a secured creditor within the meaning of section 30.¹⁷⁰

The case illustrates several fallacies: First, a failure to interpret properly Article 2-A in a case of first impression: and second, a failure to follow bankruptcy precedent. It is quite obvious that under section 30 the liquidator is the assignee, and the secured creditor, the bank. Under section 35, upon petition by either the liquidator (assignee) or the secured creditor (bank) the court may order the security liquidated. Among the methods provided is one "by liquidator's sale of the assets, which when completed and approved by the court, shall pass to the purchaser a good title, free and clear of all liens of the secured creditor, such liens to be transferred to the proceeds of the sale. . . ." ¹⁷¹ Unless Article 2-A is properly interpreted and the assignee's sale of secured property follows bankruptcy procedure, his administration of the estate will be severely hampered.

¹⁶⁸ 200 Misc. 945, 107 N.Y.S.2d 593 (Sup. Ct. Bronx County 1952).

¹⁶⁹ See note 164 supra.

¹⁷⁰ See N.Y. Debtor and Creditor Law §§ 30, 35.

¹⁷¹ See *Matter of Iroquois Beverage Co. Inc.*, 118 Misc. 552, 195 N.Y. Supp. 236 (Erie County Ct. 1922), where the court held that in considering questions arising under assignments for the benefit of creditors, the court must be guided to some extent by the law and practice in the bankruptcy court. The reasoning of the court was based on L. 1914 c. 360, a radical revision of statute in order to make it conform to Bankruptcy Act.

Summary Jurisdiction and Allowance of Claims

Summary jurisdiction is necessary for speedy relief in disallowing claims of creditors who have received preferences, unless they surrender such preferences.¹⁷² No provision comparable to section 57(g) of the Bankruptcy Act was inserted in the 1950 amendments to New York's assignment law. But in interpreting the 1914 amendments, Judge Clark noted in the *Florence* case,¹⁷³ supra, that the rights of the assignee had been

. . . implemented by extensive powers to allow and disallow claims and to pass all necessary orders for the settlement of the insolvent's estate as a court of general jurisdiction. Further it was provided that the court shall have full jurisdiction to do all and every act relating to the assigned estate, the assignees, assignors and creditors, and jurisdiction shall be presumed in support of the orders and decrees therein unless the contrary be shown.¹⁷⁴

It would seem that the general equity powers of the court and the *Florence* case, supra, are substantial authority for summary jurisdiction to recover property and to disallow claims of creditors receiving preferences unless the preference is returned. As yet no New York reported case appears on the former of these phases of summary jurisdiction; a reported case, however, denies the assignee the power to disallow summarily a claim where the creditor had received a preference and relegates the assignee to a plenary suit.¹⁷⁵ No reference was made in the court's opinion to bankruptcy decisional law. If the assignee is to be required to liquidate the estate and administer it with all due dispatch, he must be given these essential tools which are necessary for sound workmanship.

The Referee in Bankruptcy

No insolvency system offers sounder administration than the supervision provided by the Bankruptcy Act in creating the office of referee in bankruptcy.¹⁷⁶ Here we have a highly skilled judicial officer whose daily business is bankruptcy and its problems. The skill of such a court becomes specialized. Furthermore, the referee maintains his jurisdiction over a proceeding and its many facets from beginning to end. His supervision encompasses liquidation of the assets, problems of summary jurisdiction and provability of claims; and he passes on application for allowances

¹⁷² Cf. Bankruptcy Act § 57(g).

¹⁷³ See *Florence Trading Corp. v. Rosenberg*, 128 F.2d 557 (2d Cir. 1942).

¹⁷⁴ *Id.* at 561.

¹⁷⁵ In *Matter of Winn Television Corp. Assignor* (New York Credit Men's Adjustment Bureau Assignee) 129 N.Y.L.J. 1067, col. 3 (2d Dep't March 31, 1953).

¹⁷⁶ See Bankruptcy Act § 34.

to the various parties. When the final report of the trustee is filed, the referee is completely familiar with the case.¹⁷⁷

In assignment proceedings no direct supervision is exercised by the state court. In the Supreme Courts of the State of New York, Counties of New York and Kings, various phases of the proceedings are brought on for hearing at Special Terms of the courts. In these courts several judges pass upon different phases of the proceeding with none having complete supervision of the whole, because of the rotation of presiding justices.

The Discharge

Granting an insolvent a discharge by state statute or decisional law is unsound. Discharge or release features in state statutes are repugnant to the provisions of the constitution which had a manifest purpose of uniformity. As now formulated, a discharge under the Bankruptcy Act is granted not as a matter of right, but as a privilege. A bankrupt or debtor is entitled to a discharge only if he has not committed one of the seven acts barring such discharge under section 14 of the Bankruptcy Act. To grant discharges haphazardly or indifferently to all insolvents, as permitted by some state statutes or decisions, is to remove all premium on honest dealing and even to encourage dishonest activities, for in either event, an insolvent will be able to obtain a discharge.¹⁷⁸

Furthermore, even under the Bankruptcy Act, not all debts are dischargeable. As a matter of public policy, the bankrupt should not escape every one of his obligations.

A state statute or court decision may, therefore, allow a discharge wider in scope than the Bankruptcy Act, or without any of the considerations enunciated by the Bankruptcy Act, as requisite to a discharge. The answer is not in the advice to creditors to file an involuntary petition which necessitates the assistance of two other creditors, and puts the burden on the creditor instead of the debtor, but in maintaining the empirically sound procedure adopted by the Bankruptcy Act.

Lack of Uniformity

Lack of uniformity in state statutes creates difficulties in administration. When an assignment is filed in one jurisdiction and property is located in another the problem presented is whether the assignee's title

¹⁷⁷ See Bankruptcy Act § 38.

¹⁷⁸ See Gamer, "On Comparing 'Friendly Adjustment' and Bankruptcy," 16 Cornell L.Q. 35, 66 (1930):

The Bankruptcy Act, on the other hand, defines and sets up a standard for which a refusal of a discharge may be made. Its legal interpretation may be different, but it is necessary. The importance of a legal discharge granted to a deserving, i.e., 'honest' in the legal sense—insolvent debtor is not measured in dollars and cents.

is superior to claims of local creditors. The rule generally is that an assignment which is valid where made will pass title to the personal property of the assignor wherever located, provided the assignment would not have been vulnerable to attacking creditors if made at the situs of the property.¹⁷⁹ As a matter of practice however, the variations among statutes with regard to release provisions, preferences and recordation, are so numerous as to render many assignments vulnerable to attack by local creditors. Therefore, to insure equal distribution it may be necessary for other than local creditors to institute bankruptcy proceedings.¹⁸⁰

The Cheaper Proceeding

Much speculation often appears as to which liquidation procedure is cheaper. Statistical comparison is difficult because each individual case has its own variables, such as types of assets sold, market conditions, depreciation and others. Furthermore, how measure worthy but costly and unfruitful efforts to uncover fraudulent and preferential transfers; and the cost of investigating and possibly opposing a debtor's application for a discharge?

A careful and painstaking analysis was made in an article appearing in the *Quarterly*,¹⁸¹ the purpose of which, among others, was to examine "some of the claims of superiority of the 'friendly adjustment' system over the bankruptcy system in the matter of liquidating insolvent estates."¹⁸² Although the author's inquiry was essentially a comparison between bankruptcy and out-of-court settlements, the rationale is applicable to competitive statutory proceedings. Generally speaking the cases with substantial assets lend themselves to out-of-court settlements; to a lesser degree those with some assets are the subject of assignments for the benefit of creditors; the no asset cases terminate in bankruptcy.

In *New York Credit v. Weiss et al.*,¹⁸³ the argument was made that a

¹⁷⁹ Goodrich on Conflict of Laws 489 (3rd ed.).

¹⁸⁰ Cf. Montgomery, "Senator Langer Sponsors Bankruptcy Act Amendments Threatens Repeal Bill if Proposals Lose Out," 46 Credit Executive No. 9, p. 29 (published by N.Y. Credit & Fin. Management Ass'n Inc):

In conclusion, he (Sen. Langer) reiterates that if these (§§ 2560-2563) or other amendments to the federal bankruptcy system do not succeed in putting an end to the complaints he has been receiving, then "I will seek to abolish the entire federal bankruptcy system and will return the administration of such matters to the 48 states under their separate laws. I am sure that as a last resort we can handle these problems successfully in the states.

¹⁸¹ See Gamer, *supra* note 178, at 35. A footnote to the article states that it was prepared by the author "while engaged in the Yale School of Law study and investigation of Bankruptcy in New Jersey, under the direction of Professor William O. Douglas," now a Justice of the Supreme Court.

¹⁸² *Id.* at 35. The "friendly adjustment" system is another name for any out-of-court settlement.

¹⁸³ *New York Credit Men's Adjustment Bureau v. Weiss and Amsterdam*, 305 N.Y. 1, 110 N.E.2d 397 (1953).

sale by an auctioneer was a less expensive administration in the liquidation of assets and would bring greater returns to creditors than a bankruptcy or assignment. Plaintiffs countered that certain values would necessarily be sacrificed: an independent trustee, an examination of witnesses, a possible recovery of preferences. Similarly in bankruptcy (assuming for the sake of argument that the costs are slightly higher) the creditor obtains the advantage of a dignified examination of the bankrupt and witnesses before a judicial officer and a thorough examination into the bankrupt's history.¹⁸⁴

From the bankrupt's viewpoint, it must be remembered that the bankruptcy system also provides for a discharge, allows exemptions and provides a fee to his attorney.¹⁸⁵ The New York statute recently provided for the payment of a limited fee to an attorney representing the assignor.¹⁸⁶ Most statutes have no such provision. The determination, therefore, as to which procedure is less expensive will depend in the final analysis on which procedure best satisfies the needs of a particular case.

CORPORATE DISSOLUTION PROCEEDING

New York in common with many states has proceedings for dissolution of a corporation and eventual liquidation of the corporate assets and their distribution.¹⁸⁷ Article 10 of the Stock Corporation Law of the State of New York contains three sections, 105, 106 and 107, and Section 105 bears the title "Dissolution Without Judicial Proceedings." Article 2, section 5 et seq., of the Stock Corporation Law provides for the birth of a business corporation, its formation and life. It is a logical conclusion that a corporation having lived from sections 5 to 104 may some day arrive at section 105 and terminate its existence. Section 105 provides for this dissolution without legal proceedings.

The procedure is quite simple if comparison is made with more complex methods of dissolution such as bankruptcy or assignments for the benefit of creditors. The New York statute provides for the preparation of a petition setting forth fundamental facts about the corporation's existence and alleging that the corporation elects to dissolve. Approval of all stockholders, or two thirds at a duly constituted meeting is necessary.

Consent of the State Tax Commission is essential. And this consent is not forthcoming unless all franchise taxes have been paid. The consent

¹⁸⁴ See *Gamer*, supra note 178, at 66, where ". . . it is submitted that bankruptcy gives much more for its increased costs. . . . In the bankruptcy system creditors' rights are protected throughout. . . ."

¹⁸⁵ *Id.* at 67.

¹⁸⁶ See N.Y. Debtor and Creditor Law § 4(5).

¹⁸⁷ Cf. Conn. Rev. Gen. Stat. §§ 5229-5237 (1949).

and petition are then filed with the Secretary of State who issues a certificate dissolving the corporation. Upon issuance of the certificate, the corporation ceases to carry on business except for the purpose of ultimate liquidation. Notice is given to the public by publication of the certificate at least once a week for two successive weeks.

After such publication the corporation continues for the purpose of liquidating its assets, winding up its affairs and paying its existing obligations. At any time after three years from the filing of a certificate of dissolution, the directors may give notice of the filing of claims against the corporation and claimants failing to file within the time limit set forth in the notice, are then barred from participating in the distribution of the assets.

The final act contemplated by section 105 is the termination of the corporation's existence as distinguished from its dissolution, which may be characterized as the beginning of the end. After the expiration of the time to file claims, the directors provide for its termination by filing in the county clerk's office a certificate of termination. Consent of the State Tax Commission and publication as aforementioned are again required. The corporation then ceases to exist—except that all claims heretofore filed or suits pending can be prosecuted, judgments continue to be binding upon the assets and the directors are given power to defend suits, to administer and liquidate the remaining assets "for the purpose of finally winding up its affairs."

Thus far the one word absent from the context of section 105 has been "creditor." Is this merely a lapse or intentional omission? A reading of the section would seem to indicate it was never meant for the liquidation of insolvent corporations. In fact one early case¹⁸⁸ so interprets the section, but later cases of higher authority hold that notwithstanding the language of the section, it applies to insolvent corporations.¹⁸⁹

This result poses several problems germane to the liquidation of an insolvent estate under section 105:

1. Does the filing of a petition by an insolvent corporation under section 105 constitute an act of bankruptcy or is its use an immunity against creditors desiring to file an involuntary petition in bankruptcy?
2. Does section 105 compete as an insolvency proceeding with assignments for the benefit of creditors or is there a line of demarcation for their respective use?

¹⁸⁸ *Willy v. Diepress Co.*, 156 Misc. 762, 281 N.Y. Supp. 907 (Sup. Ct. Madison County 1935).

¹⁸⁹ See *New York Credit Men's Adjustment Bureau v. Weiss and Amsterdam*, 305 N.Y. 1, 110 N.E.2d 397 (1953).

¹⁹⁰ See Bankruptcy Act § 3a (5).

An Act of Bankruptcy

Under the provisions of the Bankruptcy Act, an act of bankruptcy is committed if the bankrupt "suffers the appointment of trustees of its estate. . . ."¹⁹⁰ The filing of the petition under section 105 of the Stock Corporation Law of the State of New York does not technically provide for the appointment of trustees as in bankruptcy, i.e., a court official who has title to property and whose every act is performed in his own name. Obviously, a proceeding out-of-court, cannot have an official of the court. But even though the corporation continues to sue and be sued in its own name, nevertheless legal title to its property has been held to vest in its directors,¹⁹¹ and to be immune from attachment or levy by creditors. This in effect makes the directors trustees.¹⁹²

Thus the filing of a petition under section 105 is suffering the appointment of the directors as trustees and constitutes an act of bankruptcy. This conclusion is supported by the recent case of *In re Bonnie Classics, Inc.*,¹⁹³ in which the bankruptcy court held directors of an insolvent corporation to be trustees of the corporate res for the benefit of creditors.

In the *Bonnie Classics* case, *supra*, the debtor filed a petition for dissolution under section 105 of the Stock Corporation law and proceeded to liquidate without prior consultation of its creditors. Creditors subsequently held a meeting and sharply criticized the procedure invoked by Bonnie Classics, as a unilateral attempt by an insolvent debtor to control its own liquidation.¹⁹⁴

A Competitive System

It is apparent that section 105 is free from many restraints which generally prevail in court controlled liquidation proceedings. Directors are authorized to sell the corporate property at a private or public sale or to continue the business for the purpose of liquidation. These wide powers make for a flexibility in liquidation proceedings not present in court proceedings where the sale of property is subject to court and creditor approval.

In addition to this flexibility certain safeguards are present to protect creditors' interests. Directors selling assets are subject to the Bulk Sales Act like other merchants.¹⁹⁵ Any transfer in bulk of merchandise and

¹⁹¹ *Steinhardt Import Corporation v. Levy*, 174 Misc. 184, 20 N.Y.S.2d 360 (Sup. Ct. N.Y. County 1940).

¹⁹² *Ibid.*

¹⁹³ Opinion by Referee Herbert Lowenthal, C.C.H. (Bank. R.) No. 57920 (S.D.N.Y. 1953), order affirmed on review by Judge Edward A. Weinfeld, unreported.

¹⁹⁴ See Daily News Record, p. 28, col. 5 (N.Y. Ap. 30, 1953).

¹⁹⁵ See Unif. Comm. Code Art. 6 (1951), and particularly § 6-103 (5), excepting from its provision:

Sales made in the course of proceedings for the dissolution of a corporation and of which

fixtures not in the ordinary course of business without notice to creditors would be a violation of the Bulk Sales Act.¹⁹⁶ Furthermore, any director who acted in a way inimical to the interests of stockholders and creditors, could be held accountable to them for his acts. Certainly causes of action existing under section 60 of the General Corporation Law against directors for waste and mismanagement continue against directors in dissolution. And for speedy action, relief is given under section 106 to compel directors to file their accounts and to hold them accountable for their administration,¹⁹⁷ and even to appoint a receiver to supersede them.¹⁹⁸

Whether an insolvent corporation belongs in a section 105 proceeding, or whether an assignment for the benefit of creditors will best serve its purpose, is a difficult decision and should be made only after consultation with creditors, since an insolvent's estate belongs to its creditors.¹⁹⁹

Assuming, therefore, creditor cooperation or control, the particular advantages of a section 105 proceeding can be summarized as follows:

- (1) A concern has heavy inventories which have been frozen or a large quantity of raw materials, which can be sold in the regular course of business at prices which can avoid sacrifice values. Continued operation is possible, even though on a cost basis of the merchandise some loss is sustained. In the long run, the ultimate realization to creditors is higher.
- (2) No stigma of an assignment or bankruptcy proceeding is attached to the dissolution and directors of an insolvent concern look upon this method with general approval. The personal factor of the director assisting in the dissolution makes for a greater liquidation efficiency.
- (3) Responsibility is upon the directors in dissolution. Stock and resignations can be held in escrow to be used at the will of a creditors' committee to insure proper performance by the directors.
- (4) Interim dividends can be declared upon the suggestion of the creditors' committee, which in essence controls the directors by limiting salaries, providing for countersignature of checks and retention of its own accountant and attorneys.

the creditors of the corporation receive advance notice substantially equivalent to that provided in this Article. . . .

See Section 44 of the Personal Property Law of New York which does not exclude from its provisions sales in dissolution proceedings. Cf. Unif. Comm. Code Art. 6.

¹⁹⁶ See Note, 28 N.Y.U.L. Rev. 1176 (1953) where the writer, in discussing Section 105 of the N.Y. Stock Corp. Law, ignores the applicability of the notice requirements of the Bulk Sales Act to a dissolution proceeding.

¹⁹⁷ See Application of Bittner, 265 App. Div. 490, 39 N.Y.S.2d 658 (1st Dep't 1943) where Supreme Court under its general equity powers and those conferred by section 106 could order directors to account.

¹⁹⁸ See, *Lathers v. Hamlin*, 102 Misc. 563, 564, 170 N.Y. Supp. 98, 99 (Sup. Ct. N.Y. County 1918) where the court held:

The power to appoint a common-law receiver is a prerogative of a court of equity in aid of its jurisdiction and by means of which the res is retained in custodia legis until in the orderly course of procedure the rights of the parties can be determined. . . .

See also, *O'Mahoney v. Belmont*, 62 N.Y. 133 (1875).

¹⁹⁹ See Weintraub and Levin, *supra* note 6.

(5) The elimination of court orders providing for the operation of the business, reports, and authority for procedural steps result in a flexibility of liquidation.

The disadvantages can be summarized as follows:

(1) The proceeding is only desirable in those cases where there are no complex problems of administration. If the corporation has given preferences voidable under an assignment or bankruptcy, a section 105 proceeding is not feasible for their recovery.

(2) Serious problems affecting leaseholds and executory contracts may exist. For example, if a corporation has a long term lease the landlord can claim damages for the entire period and he will be entitled to payment on a long term basis instead of the one year limitation under the Debtor and Creditor Law or Bankruptcy Act.²⁰⁰

(3) No discharge is provided for directors for the acts of their administration under section 105, although it is provided for under section 106. Similarly, the estate must be kept open for three years for the filing of claims, and a partial declaration of dividends before that time may in some cases be hazardous.

In conclusion the pros and cons of a dissolution proceeding as against an assignment proceeding are as follows: Section 105 is advantageous in a liquidation by continued operation to preserve inventory values, particularly where the liabilities are not far from the realizable value of the assets, and no problems of the enforcement of creditors' rights is presented. Excluding these gilt-edge cases, in the great majority of insolvencies, the assignment for the benefit of creditors or the Bankruptcy Act offers the better relief.

CONCLUSION

The New York type of assignment for the benefit of creditors at times competes favorably with the Bankruptcy Act and is superior in many respects to corporate dissolution proceedings. It offers a simple method of liquidation of assets and the recovery of voluntary preferences. It immunizes assets in those instances where debtors would not in the first instance seek bankruptcy. And it has found favor in the commercial world²⁰¹ with credit men in those instances where the debtor assigns to a creditor's representative. It gives creditors the opportunity to administer their debtor's estate from the inception to determine the manner of liquidation, to examine the books and records, to ascertain the existence of fraud and preferences, and finally, to satisfy themselves as to the debtor's

²⁰⁰ Cf. N.Y. Debtor and Creditor Law § 13 and Bankruptcy Act § 63a (9).

²⁰¹ See Daily News Record p. 1 cols. 1 and 2 (N.Y. May 22, 1953) reporting the national convention of the New York Credit and Financial Management Association as follows:

Opposition to a proposal to eliminate general assignments for the benefit of creditors as an act of bankruptcy was sounded as the credit congress closed today. Opposition was voiced in a set of resolutions adopted as the 57th convention became history.

honesty or to proceed, if need be, with involuntary bankruptcy proceedings.

Expanding the New York type statute to invest the assignee with powers, duties and remedies of a trustee in bankruptcy, and the court with summary jurisdiction over property and claims, will go a long way towards keeping the liquidation in one proceeding instead of being superseded by bankruptcy. But whatever competitive standing the New York type statute has with the Bankruptcy Act, it is quite obvious that statutes of the Idaho type (no guiding provisions), Texas and Virginia types (release instituting provisions), Georgia type (preference granting provisions) and the California system (common law releases) definitely fail to compete as liquidation proceedings and constitute sound reasons for filing an involuntary petition and superseding the assignment proceeding.

There has been pending a bill²⁰² in the House of Representatives to provide that an assignment for the benefit of creditors shall not be considered an act of bankruptcy unless coupled with other acts. The enactment of this bill would disregard the many distinctions existing in the various state laws, and would invite unscrupulous debtors to exploit the inadequacies in the assignment statutes in many states. Creditors should have the right in the first instance to determine whether they desire state court procedures or the Bankruptcy Act. And their choice will be in a large measure determined by the powers, rights and duties granted the assignee in each particular jurisdiction. Furthermore, the burden should not be put upon the creditors to ferret out an act of bankruptcy, when the debtor has publicly declared his insolvency and authorized the liquidation of his assets for the benefit of creditors by executing the assignment.

Assignments also are valuable as escrow documents, as is the stock in a corporate dissolution proceeding. As a general rule, however, an assignment is a far more advantageous liquidation proceeding than corporate dissolution.

Recommendations for improvement of the assignment laws are as follows:

1. Promulgation of a uniform statute modelled on the New York type providing for filing in foreign jurisdictions, giving the assignee superior title as against judgment and attaching creditors, and following New York decisional law outlawing common law assignments.
2. Amendment of the New York type assignment to grant an assignee powers comparable to those of a trustee at least as far as concerns the recovery of involuntary preferences and in the allowance of claims.

²⁰² See note 124 *supra*.

3. Authorization to the courts, where not inconsistent with provisions of assignment statute, to resolve assignment problems by resorting to precedent established by bankruptcy law.

4. Extension of the provision for payment of counsel fees to the attorney for assignor to include in addition to compensation for filing schedules, attendance at hearings and general advice in representing the assignor.

Insolvency statutes must have a practical significance, and relation to the economic and commercial problems of the debtor and his creditor. And as they present a common sense²⁰³ application to their problems and seek to minister to their every day needs, simply, equitably and uniformly, they accomplish a sound and beneficial result.

²⁰³ See Conant, *Science and Common Sense* 219 (1951):

. . . The scientist himself may well nail his flag to the mast with the equivalent of the motto 'art for art's sake,' but so too can the big game hunter, the mountain climber, and the stamp collector. If we are going to consider pure science as something other than a private pastime we must face up to all who question its significance.