Michigan Law Review

Volume 16 | Issue 7

1918

Note and Comment

Ralph W. Aigler
University of Michigan Law School

Edson R. Sunderland
University of Michigan Law School

Evans Holbrook
University of Michigan Law School

Abraham Jacob Levin
University of Michigan Law School

Recommended Citation
Ralph W. Aigler, Edson R. Sunderland, Evans Holbrook & Abraham J. Levin, *Note and Comment*, 16 MICH. L. REV. 533 (1918).
Available at: https://repository.law.umich.edu/mlr/vol16/iss7/5

MICHIGAN LAW REVIEW

PUBLISHED MONTHLY DURING THE ACADEMIC YEAR, EXCLUSIVE OF OCTOBER, BY THE
LAW SCHOOL OF THE UNIVERSITY OF MICHIGAN

SUBSCRIPTION PRICE $2.50 PER YEAR. 35 CENTS PER NUMBER

NOTE AND COMMENT

A CALL TO LAWYERS.—The following letter, which explains itself, has been received from the secretary of the special committee for war service of the American Bar Association.

"EDITOR, MICHIGAN LAW REVIEW,
Law School, University of Michigan,
Ann Arbor, Michigan.

DEAR SIR:

The American Bar Association has appointed a Special Committee for War Service, whose function is to supply the right lawyers to any Department of the Government in need of men with legal training. This activity has the sanction and cordial approval of President Wilson and his Cabinet, who have suggested that it be carried on in cooperation with the U. S. Public Service Reserve of the Department of Labor.

The Special Committee consisting of John Lowell, Chairman, and Lawrence G. Brooks, Secretary, is now established in Washington at 1712 Eye Street, where it is engaged in making a survey of the several Government Departments and Bureaus to ascertain the kind of work at present being done by lawyers, the number of additional lawyers now needed, and the extent of the probable future demand for members of the legal profession. The Committee, on the other hand, is canvassing the situation through the many channels open to the American Bar Association, to discover what lawyers of ability are available for the Government.

The survey so far made shows that lawyers are wanted by the Government in a variety of capacities, both legal and executive, volunteer and compensated, to work in Washington and elsewhere,—that the Association, in short, has a splendid opportunity for National Service. The Special Committee is now preparing as rapidly as possible to perform this service, and expects soon to be in a position promptly and capably to answer the call of any Department for men with legal experience.

The Committee asks that all lawyers willing and able to serve the Government at this time send their names to the American Bar Association at 1712 Eye Street, Washington, D. C., with a brief statement of their training and qualifications and the conditions under which they are able to serve.

Very truly yours,
LAWRENCE G. BROOKS,
Secretary Special Committee for War Service."

EFFECT OF CHANGE OF LAW UPON OBLIGATION TO PAY RENT.—In *McCullough Realty Co.* v. *Laemmle Film Service,* (Nov. 16, 1917), 165 N. W. 33, the supreme court of Iowa had occasion to pass upon a question which has become increasingly frequent with the spread of prohibition laws, namely, the effect upon the obligation of a tenant to pay rent, of a subsequent law that makes it unlawful for him to use the premises for the purpose for which he leased them. The case before the Iowa court was not one arising out of a lease of premises for saloon purposes, but the question involved was precisely the same, and the saloon cases were relied upon for the decision. The action was for rent upon a written lease containing the following clause: "Said premises are leased for Film Exchange and film and theatre supplies purposes only and are not to be used for any unlawful or offensive purposes whatever." The defendant contended that by reason of a city ordinance, passed after the demise, providing that it should be unlawful to store, handle, etc. any inflammable motion picture films in buildings which are not fireproof, it had become impossible to use the premises for the purposes for which they were leased. The lessee had vacated the premises. It appeared that the handling of films was 99 per-cent of the business of a film exchange, and that it was wholly impracticable to keep the films at one place and have the office at another. Being of opinion that "the entire beneficial use of the leased premises was prevented by the ordinance", the court held the defendant freed of the obligation to pay rent.

Where a lease contains a clause *permitting* the premises to be used for saloon purposes and the premises are in fact so used, a subsequent change in the law making it unlawful to operate a saloon does not affect the tenant's rent liability. *Hayton* v. *Seattle Brewing and Malting Co.,* (1911), 66 Wash. 248, 37 L. R. A. (N. S.) 432; *Hyatt* v. *Grand Rapids Brewing Co.,* (1912), 168 Mich. 360. But where the lease restricted the use of the premises to such purpose, such subsequent change in the law was held to release the tenant. *The Stratford Inc.* v. *Seattle Brewing & Malting Co.*, (1916), 94 Wash. 125, L. R. A. 1917 C 931. So also in *Heart* v. *East Tennessee Brewing Co.*, (1908), 121 Tenn. 69, 19 L. R. A. (N. S.) 964; *Greil Bros. Co.* v. *Mabson*, (1912), 179 Ala. 444, 43 L. R. A. (N. S.) 664; *Kahn* v. *Wilhelm*, (1915), 118 Ark. 239. On the other hand, it has been held that even when the use of the leased premises is restricted to the business later made unlawful, there is no release from rent liability. *Lawrence* v. *White*, (1909), 131 Ga. 840, 19 L. R. A. (N. S.) 966 *dictum; Goodrum Tobacco Co.* v. *Potts-Thompson Liquor Co.*, (1910), 133 Ga. 776, 26 L. R. A. (N. S.) 498; *Hecht* v. *Acme Coal Co.*, (1911), 19 Wyo. 18, 34 L. R. A. (N. S.) 773 *semble.*

If the subsequent change in law does not prevent *entirely* the beneficial use of the demised premises, the tenant may be held liable despite the fact that he is prevented from carrying on the principal business for which the premises were taken. *Standard Brewing Co.* v. *Weil*, (1916), 129 Md. 487. So where a "saloon" is considered as not necessarily a place where intoxicating liquors are sold, the tenant must pay, for he may dispense soft drinks, etc. *O'Byrne* v. *Henley*, (1909), 161 Ala. 620, 23 L. R. A. (N. S.) 496; *Hecht* v. *Acme Coal Co., supra; In re Bradley*, (1915), 225 Fed. 307.

That a "saloon" is not necessarily a place where intoxicants are sold, see also *Kitson* v. *Ann Arbor*, 26 Mich. 325. Such liberal meaning of the word, however, has been denied. *The Stratford, Inc.* v. *Seattle Brewing & Malting Co., supra.* But where the lease restricts the use of the premises to purposes of a "bar" or "bar-room", it is considered that intoxicating liquors are to be sold. *Greil Bros. Co.* v. *Mabson, supra,* and in *The Stratford, Inc.* v. *Seattle Brewing & Malting Co., supra,* the tenant was deemed discharged despite the fact that by a modification of the lease permission had been given to operate on the premises a bootblacking stand and a restaurant and to sell tobacco, the court going on the ground that the running of a saloon was the real purpose for which the premises had been leased; it was that which fixed the rental. The principal case thus accords with the case just cited. See also *Kahn* v. *Wilhelm, supra.*

The decisions that the lessee is relieved from his obligation to pay rent are not agreed as to the reason for such result. In the *Heart* case the court went on the ground that the purpose for which the lease was made having become unlawful the whole lease "became and is void and unenforceable at the instance of either party." In the *Greil Bros. Co.* case the court speaks of subsequent impossibility of performance by reason of change in law and also of destruction of a thing the continued existence of which is assumed as a basis of the agreement. *Kahn* v. *Wilhelm* went on the ground that the performance having become unlawful the contract was void. And in *The Stratford* case the court treated the problem as covered by the general rule that performance of a contract is excused when by subsequent change in law the acts called for are rendered unlawful.

Where premises are leased and it is stipulated that they shall be used only for a certain purpose and by a change in law such use is made unlawful, it is of course perfectly clear that the tenant could not be required to abide by the restrictive term of the lease. *Baily* v. *De Crespigny*, L. R. 4 Q. B. 180. But does it necessarily follow that the whole lease is at an end or void, as said by some courts? Should such illegality of performance any more than drop such restrictive provision out of the lease? The lessee would then be left free to use the premises for any lawful purpose. If the whole lease is to be treated as at an end, must it not be on the theory that a condition to that effect is to be implied? As to whether there is sufficient reason for reading such a condition into such leases there may well be differences of opinion. It is not surprising then, as pointed out above, that the cases are not agreed; but it is believed that the cases holding the lessee completely discharged at least have gone on unsound grounds.

In support of the view that the lessee should be relieved *Hooper* v. *Mueller*, (1909), 158 Mich. 595, is apt to be cited. There it was held that the provisions of the "local-option law" having become operative in the county in which were saloon premises held by defendant as lessee, he was released from the obligation of paying rent. It must be observed that the lessors had there agreed "that in case they are unable to furnish, that is, secure, for the said second parties, or the tenant of said parties, two sufficient bondsmen required by law in case of retail dealers in malt and spirituous liquors, at second parties's own proper expense, however, then this lease shall be and become void". The vote in favor of local option having made it impossible for the lessors to furnish such bondsmen, the lease by its very terms was void, and the court so held. The case, then, does not furnish any ruling whatever on the main question under discussion. The Arkansas court, however, in *Kahn* v. *Wilhelm*, *supra*, failed completely to appreciate what the court had to decide in *Hooper* v. *Mueller*. R. W. A.

MITIGATION OF DAMAGES IN BREACH OF CONTRACT—DUTY TO ACCEPT OFFER OF DEFAULTING CONTRACTOR.—There has been a decided reluctance on the part of some courts to apply the doctrine of mitigation of damages to the extent of requiring the injured party to accept delayed or altered performance offered by the defaulting contractor after breach. Thus, in the recent case, *Coppola* v. *Marden, Orth & Hastings Co.*, (Ill. 1917), 118 N. E. 499, where the sale was on 60-day credit and the vendor's offer after breach to sell for cash was refused, the court declined to rule that the vendee's recovery would be merely the amount of interest for the period of credit on the sums involved. Other courts, however, have put the defaulter on the same plane as any other offeror on the market. An early case suggested that a discharged employee would be obliged to re-enter his master's service in order to reduce the damage. *Saunders* v. *Anderson*, 2 Hill Law, (S. C.), 486. This dictum was followed in *Birdsong* v. *Ellis*, 62 Miss. 418. And the same conclusion was reached in: *Squire* v. *Wright*, 1 Mo. App. 172; *Hamill* v. *Foute*, 51 Md. 419; *Bigelow* v. *Amer. Forcite Powder Mfg. Co.*, 39 Hun 599. That a lessee must accept the premises offered after breach of contract of lease was held in: *Hodges* v. *Fries & Co.*, 34 Fla. 63; *Huntington Co.* v. *Parsons*, 62 W. Va. 26. The idea was given a decided impetus by the decision of Lurton, J. (under facts analogous to those of the instant case) in

Lawrence v. *Porter,* 63 Fed. 62, 26 L. R. A. 167, which derived its authority from *Deere* v. *Lewis,* 51 Ill. 254 and the dictum in *Warren* v. *Stoddart,* 105 U. S. 224. But subsequent decisions have created much confusion in trying to straight-jacket the rights of the parties to fit the words 'waiver' and 'substitution' and fixed rules of law instead of considering the fundamental rights in the matter of reasonable mitigation.

Campfield v. *Sauer,* 189 Fed. 576, 38 L. R. A. (N. S.) 837 held that an offer conditional on waiver of the right to damages for the breach did not have to be accepted. See also *Coulter* v. *Thompson Lumber Co.,* 142 Fed. 706 and *Hirsch* v. *Ga. etc. Co.,* 169 Fed. 578; *Whitmarsh* v. *Littlefield,* 46 Hun 418. But what is this waiver in contracts? Acceptance of performance after breach creates a waiver which is in reality a new contract. EWART on WAIVER DISTRIBUTED, 124 et seq. The waiver, however, is only of the right to treat the contract as discharged; the right of action for damages subsists. *Garfield Co.* v. *Ry.,* 166 Mass. 119; BOWERS on LAW OF WAIVER, 35. Therefore, even though the defaulter's offer is point blank without any mention of mitigation, an acceptance would not waive the right to recover for the breach. The main objection raised by the court in the instant case is thus obviated. However, an offer may be couched in such terms as to make it conditional on express waiver of the right of action by the offeree; and Cooley, J. in *Moore* v. *Detroit Locomotive Works,* 14 Mich. 266 held that resumed performance by the offeror is adequate consideration for such waiver. This seems to be nothing other than an accord and satisfaction. Acceptance of such an offer, then, is truly dangerous. *Creve Coeur Lake Ice Co.* v. *Tamm,* 90 Mo. App. 189. But there is no good reason why it should be declared unreasonable as a matter of law. Waiver is no exception to the principle that the contract should be sent to the jury "for their consideration in determining respondent's duty as to his acceptance of such offered contract under all the circumstances". *Waldrip* v. *Hill,* 70 Wash. 187.

The state courts have also labored under the impression that to require the acceptance of the delinquent's offer would force a substitution of a contract made by the courts for one made by the parties. *Krebs Hop Co.* v. *Livesley* tendered the reason that "where a new contract is made by the parties in regard to the same subject-matter, which entirely supersedes the first contract, no action can be maintained on a ground of a breach of the first contract." 59 Ore. 586 at 589. The fallacy here is that there is no such thing as substitution after breach—indeed, the case cited as authority in the *Krebs* opinion involved substitution before breach. After a right of action accrues it can be replaced only by a release or an accord and satisfaction; any other subsequent agreement will not prejudice the remedy. *McKnight* v. *Dunlop,* 5 N. Y. 537. The substitution theory must lead to the absurd conclusion that every subsequent agreement is presumptively an accord and satisfaction. There is another way of answering the objection. No one would contend that a contract with a third person made in pursuance of an attempt to mitigate would substitute the original agreement. Nor would another contract with the defaulter, but wholly disconnected with the old, substitute that contract. *Nebraska Bridge, etc. Co.* v. *Owen Conway & Sons,* 127 Iowa 237. The contract with the delinquent might, therefore, be considered as a disconnected contract—an agreement entered into in an attempt to mitigate damages by purchase from the offeror as one on the market.

Several objections of policy have also been raised. In *Creve Coeur Lake Ice Co.* v. *Tamm, supra,* it was recognized that the injured party had a just resentment which he could nurture against one who broke a contract, consequently he could refuse the offer. To lend sanction to such an argument would be to uproot the entire doctrine of mitigation of damages that if the party entitled to the benefit of the contract can protect himself from a loss, arising from a breach, at a trifling expense or with reasonable exertions he must do so. *Miller* v. *Mariner's Church,* 7 Me. 51. The conclusion would inevitably be that the injured party would not even have to purchase from a third person. A late case, reiterating *Lawrence* v. *Porter,* very ably answered this contention. The court declared that the injured party should not be permitted to adopt a course "possibly dictated by a desire to injure another rather than save himself. A breach of contract entitles the injured party to be compensated for such loss thereby entailed upon him as he cannot avoid by the exercise of reasonable care, but is not to be made use of by him as an opportunity to gratify a feeling of resentment by inflicting unnecessary hardship upon the party in default. The law sustains his claim to compensatory damages, but does not give him the election to make them punitive". *Borden & Co.* v. *Vinegar Bend Lumber Co.,* 7 Ala. App. 335. To the same effect see: *Borden & Co.* v. *Vinegar Bend Lumber Co.,* 2 Ala. App. 354; *Birdsong* v. *Ellis, supra; Hurxthal* v. *Boom Co.,* 53 W. Va. 87, 102; *Manhattan City Interurban Ry. Co.* v. *General Electric Co.,* 226 Fed. 173. To be sure a party might reasonably be expected to refuse another offer from a contractor who has been guilty of reprehensible conduct in creating undesirable circumstances. *Levin* v. *Standard Fashion Co.,* 16 Daly (N. Y) 404. But this is a question for the jury on the matter of the reasonableness of the required mitigation. The court should not be over-zealous in its paternal protection to the innocent contractor.

But it is further asked: "What security is there that the second agreement will not be treated as lightly as the first?" The answer here is that the argument would militate with equal force against permitting any accord and satisfaction or disconnected contract; the fact that these are allowed indicates that the argument has no weight. For, might not an accord and satisfaction be broken as easily as the contract for which it is a satisfaction?

Coxe Bros. & Co. v. *Anoka, etc. Co.,* 87 Minn. 56, and *Campfield* v. *Sauer* put a further limitation on the doctrine of *Lawrence* v. *Porter.* The court in the *Coxe* case said that the latter case could not apply "because there was not testimony tending to show that the same quality of coal was 'not purchaseable from other parties',—a qualification mentioned in the *Lawrence* case". The writer after carefully examining *Lawrence* v. *Porter* has been able to find no such qualification. The conclusion in the *Coxe* case was reached no doubt by a reading of the syllabus in L. R. A. from which the quotation is copied verbatim. The language of Lurton, J. in *Lawrence* v. *Porter* cannot be taken to be more than a refutation of the resentment argument for he says, in discussing the theory of *Warren* v. *Stoddart*, that the buyer would have to accept if the duty to mitigate by replacement required him to buy from the delinquent seller "if the article can be obtained only from him, *or because he offers it cheaper than it can be obtained from others*". It seems then that a mere unimportant circumstance has been made a condition by the later decisions.

The solution seems to lie in the abandonment of the forced distinctions between waiver, substitution, and mitigation. The sole question should be: Is it reasonable under all the circumstances that the new offer should be accepted? So far the courts have borne a prejudice against a defaulting contractor which the law should not recognize, if it is to be consistent with the generally accepted principle of *Miller* v. *Mariner's Church*. If the courts would bear in mind that "the innocent party is simply entitled to his real loss" and that it is not criminal to break a contract, they would fall in line with *Lawrence* v. *Porter* with much greater alacrity.

Other cases in accord with the principle but not mentioned above are: *Ashley* v. *Rocky Mountain Bell T. Co.*, 25 Mont. 286 (but see *Brazell* v. *Cohn*, 32 Mont. 556); *Lande* v. *Hyde*, 66 Misc. Rep. (N. Y.) 259; *Heilbroner* v. *Hancock*, 33 Tex. 715. There are some pertinent dicta in: *Howard* v. *Vaughan-Monnig Shoe Co.*, 82 Mo. App. 405, 410; *Levin* v. *The Standard Fashion Co., supra*, at 409; *Chisholm* v. *Assurance Co.*, 112 Mich. 50, 56; *Jackson* v. *Independent School District*, 110 Iowa, 313 (but see *The Louis Cook Mfg. Co.* v. *Randall*, 62 Iowa, 244).

There is a comprehensive note taking an opposite view from this one in 10 MICH. LAW REV. 315. A. J. L.

"ANGLO-SAXON" AND "TEUTONIC" STANDARDS OF JUSTICE.—In *The Kaiser Wilhelm II*, 230 Fed. Rep. 717, the British shipbuilding firm of Harland & Wolff filed a libel against the steamship *Kaiser Wilhelm II*, owned by the North German Lloyd, a German corporation, for repairs made on the ship in libelant's shipyard in England. This suit was commenced before the United States entered the war, and the court made an order dismissing the libel on the ground that Great Britain and Germany had each enacted laws forbidding its subjects from making any payments to the subjects of the other, and as these enactments were merely declaratory of the common law of nations, neutrality would be best preserved by applying them to litigation in a neutral court. This order was reversed on appeal, for the reason that the vessel had been enabled to seek protection in an American port through the very repairs the libelant had made, and the lien which the libelant had upon the vessel would be lost if the cause were dismissed. 246 Fed. Rep. 786.

But while this appeal was pending the United States entered the war as an ally of Great Britain against Germany, and the vessel was taken over by the United States government. These facts, under the admiralty practice, came properly before the court on the appeal, and it was held that justice to both litigants could best be secured by retaining jurisdiction until after the war, so that the German owner might have an opportunity to litigate its rights in case relations with this country were hereafter resumed, and the rights of the United States government might be determined in relation to the rights of the British lienor. In explaining this decision the court, made up of BUFFINGTON, MCPHERSON and WOOLLEY, circuit judges, proceeded to say:—

"In following this course, and protecting the unprotected rights of an absent German citizen while this country is at war with the Imperial Government of its country, we are impelled by three all-sufficient reasons: First, the *innate sense of fairness, decency, and justice, which respects the rights of an enemy;* second, the *broad principles of international intercourse,* which leads courts and nations that believe in international rights, to be the more careful to observe them toward belligerents; and lastly, because the awarding to this German citizen, with whom our country is at war, the careful preservation until times of peace of its rights is in line with those *high ideals of Anglo-Saxon justice* which led the British courts years ago, in *Ex-parte Boussmaker,* 13 Vesey, 71, decided in 1806, to allow the claim of an alien enemy to be proved in time of war and the dividends held by the British court until peace. Indeed, the fact that our country is now at war with Germany is all the more reason why this court should most scrupulously award to this German citizen those international and equitable rights which no fair-minded people ever deny even to their enemies in times of war."

In contrast with Germany's cynical, brutal and systematic policy of denying all rights to its enemies in time of war, this striking illustration of the moral quality underlying the Anglo-Saxon common law brings out into strong relief the reason for the world war and the immense issue at stake.

E. R. S.

THE FEDERAL BANKRUPTCY ACT AND ITS EFFECT ON STATE INSOLVENCY LAWS.—Since *Sturgis* v. *Crowninshield,* 4 Wheat. 122, it has been clear that State Insolvency Laws were valid (within certain well-defined limits) during the non-existence of a Federal Bankruptcy Act, and that upon the enactment of a Federal Bankruptcy Act the State laws were superseded and suspended so far as they were in conflict with the Federal legislation. The difficulty has been in determining when there was such conflict, and it has arisen in various ways. For instance, the Federal Bankruptcy Act permits any natural person to become a voluntary bankrupt, but provides that no involuntary proceedings shall be taken against a farmer or a wage earner, or a person owing less than $1,000. The question has frequently been raised whether State Insolvency Laws are still effective in the cases of persons thus exempted by the Federal Act, and has been variously decided. See *Littlefield* v. *Gay,* 96 Me. 422; *Lace* v. *Smith,* 34 R. I. 1 (commented on in 11 MICH. L. REV. 60); *Rockville Bank* v. *Latham,* 88 Conn. 70; and *Pitcher* v. *Standish,* 90 Conn. 601 (commented on in 15 MICH. L. REV. 68). The Supreme Court of the United States, in the recent case of *Stellwagen* v. *Clum,* 38 Sup. Ct. 215, has now passed on another phase of the same question.

An Ohio statute (§§ 6343-4, Rev. Stat. Ohio; §§ 11102-5, General Code of Ohio) provides that if an insolvent debtor makes a conveyance or suffers a judgment with intent to hinder, delay or defraud creditors, or with intent to prefer one or more creditors, such conveyance or judgment shall be void at the suit of any creditor; and in such creditor's suit "a receiver may be appointed who shall take charge of all the assets of such debtor * * * including the property so sold, transferred, mortgaged, or assigned, which receiver shall administer all the assets of the debtor * * * for the equal benefit of all the creditors of the debtor * * * in proportion to the amount of their respective demands * * *." An insolvent corporation in Ohio made conveyances of lumber, which fell within the terms of the above statute; more than four months later it made a general assignment for the benefit of its creditors and a few days later was adjudicated bankrupt. Its trustee in bankruptcy was in possession of the lumber thus conveyed, and the vendee in the conveyances filed a petition asking that the lumber be turned over to him. The trustee in bankruptcy insisted that the conveyances made to the petitioner were fraudulent and voidable. But as the conveyances were made and completed more than four months before bankruptcy he could not rely upon § 60b, which gives the trustee power to avoid and recover preferences, nor upon § 67e, which gives him power to avoid fraudulent transfers; both of these sections require that the transaction avoided must have taken place within four months before bankruptcy. § 70e, however, provides that "the trustee may avoid any transfer by the bankrupt which any creditor of such bankrupt might have avoided" and places no four months' limitation of time upon the trustee. The trustee of the bankrupt corporation therefore relied on § 70e in seeking to avoid the conveyances to the petitioner, and based his right upon the right which "any creditor" would have under the Ohio statute. He was met with the contention that the Ohio statute, because it provides for the appointment of a receiver to administer the debtor's assets for the benefit of all his creditors, is suspended by the existence of the Federal Bankruptcy Act. The District Court dismissed the petition, holding that the Ohio statute was not suspended and that the trustee in bankruptcy was therefore empowered to avoid the conveyances. The Circuit Court of Appeals for the Sixth Circuit (in 218 Fed. 730, 134 C. C. A. 408) was unable to reach a satisfactory conclusion, and certified the question to the Supreme Court, which held that the Ohio statute was not suspended by the Federal Bankruptcy Act.

The Supreme Court cited, in support of its decision that the Ohio statute was not a bankruptcy law, *Mayer* v. *Hellman*, 91 U. S. 496 and *In re Farrell*, 176 Fed. 505, 100 C. C. A. 63. Both of these cases passed on an Ohio statute governing assignments for the benefit of creditors and containing provisions, both for a receiver and for distribution of the debtor's assets, substantially like those in the statute considered in the principal case; and both cases held that the assignments made under the statute were good. The principal case of course goes much further; it holds not merely that a statutory assignment passes title—which might have passed without the aid of the statute—but that the making of a fraudulent or preferential transfer shall have the possible effect of turning all of the debtor's property into the hands of a receiver who shall use it for the benefit of all the creditors.

The legality, pending the existence of a Federal Bankruptcy Act, of similar provisions in State Insolvency laws has been questioned in numerous cases, and it seems clear that in most cases the decisions have been against their validity. In *Ketcham* v. *McNamara*, 72 Conn. 709; *Capital Lumber Co.* v. *Saunders*, 26 Idaho 408; *Closser* v. *Strawn*, 227 Fed. 139; and *Hasbrouck* v. *La Febre*, 23 Wyo. 367, State statutes provided for insolvency proceedings and gave power to an assignee or receiver to set aside preferential and fraudulent transfers made by the insolvent; in all of these cases suits were brought to set aside such transfers, and in each case it was held that the suit must fail because the State statute, being in conflict with the Bankruptcy Act, was suspended. And in *Pelton* v. *Sheridan*, 74 Ore. 176, it was held, under a similar statute, that the insolvent's subsequently appointed trustee in bankruptcy could not invoke the provision of the State statute to set aside an attachment. It is difficult to reconcile these decisions, especially *Pelon* v. *Sheridan*, with the principal case, except on one ground, namely, that in all of these cases the State statutes provided for a discharge of the insolvent's debts, while in the Ohio statute there is no such provision. This point is referred to in the opinion of Mr. Justice DAY, who says: "And while it is not necessary to decide that there may not be state insolvent laws which are suspended although not providing for a discharge of indebtedness, all the cases lay stress upon the fact that one of the principal requisites of a true bankruptcy law is for the benefit of the debtor in that it discharges his future acquired property from the obligation of existing debts."

An interesting instance of the same distinction is furnished by the two Maine cases of *Moody* v. *Development Co.*, 102 Me. 365, and *Carter, Carter & Meigs Co.* v. *Stewart Drug Co.*, 115 Me. 289. A Maine statute, passed in 1905, provided for the winding up of insolvent corporations by the appointment of a receiver, and also provided, *inter alia*, that all claims not duly presented should be barred. Proceedings under this statute were dismissed in the *Moody* case on the ground that the statute was an insolvent law and was therefore overridden by the Federal Bankruptcy Act. Subsequently the State statute was amended by repealing the provision for the barring of claims, and when the validity of the amended law was presented in the *Carter* case the Supreme Judicial Court of Maine upheld it, saying: "It was evidently the judgment of the Legislature that the amendment met and overcame the objections set forth in *Moody* v. *Development Co.* * * * [and] freed the Act of 1905 from its unconstitutional features, and such appears to have been the opinion of this court."

There is, therefore, authority for making the broad distinction which has been suggested, namely, that a State statute is suspended and superseded if it attempts to bar or discharge debts, and it is continued in force if it does not. But it is clear that this distinction, broad and simple though it be, has not been unanimously approved. See *In re Weedman Stave Co.*, 199 Fed. 948, holding that a State statute will be suspended even though it does not provide for a discharge, and see also the cautious language of Mr. Justice DAY, quoted above from the opinion in the principal case.

And on the other hand, it is argued with some plausibility that such a State statute, even though it provides for a discharge of the debtor, may yet be given effect as to its other provisions. The provisions for discharge are of course suspended by the Federal Bankruptcy Act, but this does not necessarily suspend the statute *in toto,* (*Boese* v. *King,* 108 U. S. 379) and other provisions of the statute may well be enforced, especially under circumstances like those in the principal case and in *Pelton* v. *Sheridan, supra,* where because of the four months' limitation, the trustee would be remediless under the Bankruptcy Act, and where the enforcement of the apposite provisions of the State statute would result in a benefit to many creditors instead of one transferee. As is pointed out in the principal case, the suspension of the Ohio statute would result in turning over to the fraudulent vendee "a part of the estate which is being administered in bankruptcy, although the conveyance under which the property is claimed is voidable under the laws of the State where it was made and the alleged right in the property secured. We think that Congress in the Bankruptcy Act did not intend any such result, but meant to permit the trustee in bankruptcy to have the benefit of state laws of this character which do not conflict with the aims and purposes of the Federal law." So, too, in *Pelton* v. *Sheridan, supra,* in a dissenting opinion by Mr. Justice BENNETT, it is said: "The tendency of the federal decisions on this point, of which *Randolph* v. *Scruggs,* 190 U. S. 533, 537, is an example, seems to be to treat the assignment as valid and to recognize it so far as it is an aid of the purpose of the law and beneficial to the bankrupt's estate. In its effect of dissolving the previous attachment in the state court, the assignment was advantageous to the bankrupt's estate and efficient in carrying out the general design of the law to provide an equal distribution of his estate for the benefit of all his creditors in proportion to the amounts of their respective claims. * * * Upholding the attachment, under the circumstances of this case, is at variance with this policy and secures to one creditor a preference by reason of his attachment, which was dissolved by the assignment under the state law, while the opposite determination of the issue will give effect to the intent of both state and federal legislation." The cogency of this argument is obvious, and it applies to provisions in state statutes which contain other provisions barring claims of creditors (as in the Connecticut, Idaho, Oregon, Pennsylvania and Wyoming statutes considered in the cases cited *supra*) just as effectively as to provisions in state statutes which do not contain such other provisions (as the Ohio statute in the principal case). As is indicated above, the cases in the state courts are clearly against this view, but the Supreme Court of the United States is not yet committed on the question, and there is basis in its opinions for an argument in favor of the more liberal view—a view which, it is submitted, would serve better to accomplish the desirable result of administering all of a bankrupt's estate for the benefit of all his creditors. E. H.