Michigan Law Review

Volume 11 | Issue 1

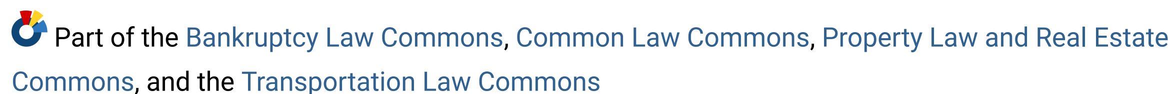
1912

Note and Comment

Ralph W. Aigler
University of Michigan Law School

Robert L. Mayall

Follow this and additional works at: https://repository.law.umich.edu/mlr


Part of the Bankruptcy Law Commons, Common Law Commons, Property Law and Real Estate Commons, and the Transportation Law Commons

Recommended Citation
Ralph W. Aigler & Robert L. Mayall, *Note and Comment*, 11 MICH. L. REV. 56 (1912).
Available at: https://repository.law.umich.edu/mlr/vol11/iss1/5

This Regular Feature is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

MICHIGAN LAW REVIEW

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

SUBSCRIPTION PRICE $2.50 PER YEAR. 35 CENTS PER NUMBER

EVANS HOLBROOK, Editor

ADVISORY BOARD.

HENRY M. BATES VICTOR H. LANE HORACE L. WILGUS

Editorial Assistants, appointed by the Faculty from the Class of 1912:

CHARLES H. AVERY, of Wisconsin.
PETER BALKEMA, of Iowa.
GEORGE S. BURGESS, of Michigan.
JAMES CLEARY, of Ireland.
GEORGE A. CRAM, of Michigan.
SIDNEY E. DOYLE. of Michigan.
MORRIS FELDSTEIN, of Pennsylvania.
JACK M. HENDRICK, of Michigan.
WILLIAM T. HOFFMAN, of Pennsylvania.
JOSEPH J. KENNEDY, of Ohio.
ROBERT L. MAYALL, of Oklahoma.
WILSON W. MILLS, of New Mexico.
SAMUEL H. MORRIS, of Arizona.
FRANCIS M. MURPHY, of Ohio.
CLARENCE H. ROYON, of Ohio.
BURKE W. SHARTEL, of Oklahoma.
FREDERICK R. SHEARER, of Indiana.
MAURICE SUGAR, of Michigan.
CHARLES A. WAGNER, of Michigan.
HECTOR S. YOUNG, of Ohio.

NOTE AND COMMENT.

THE LAW SCHOOL.—The opening of the year brings two changes in the teaching staff. Professor George L. Clark and Assistant Professor Victor R. McLucas have resigned, and their places have been filled by the appointment of John B. Waite and Willard T. Barbour. Mr. Waite is a graduate of Yale College and of this Law School, and since his admission to the bar in 1907, has been practicing in Toledo, Ohio. Mr. Barbour is a graduate of both the Literary and Law Departments of this University and in his senior year was a member of the Board of Editorial Assistants of this Review; in 1908 he was appointed to a Rhodes Scholarship and since that time has been at Oxford University, where he has been principally engaged in work on the history of English Law, with especial reference to the development of the early forms of action.

The increase in the requirements for admission has, as anticipated, resulted in a decrease in the number of students; the decrease is not, however, so considerable as was expected, and the wisdom of requiring a better preparation for the study of the law has already been shown by the greatly superior quality of work which is being done by the present first-year class.

Possession Under Mistake as Adverse Possession.—In *Wissinger* v. *Reed et al.,* 125 Pac. 1030 (Aug. 24, 1912) the Supreme Court of Washington held that actual possession of land for the statutory period would confer title upon the occupant, although the possession was under a mistaken belief of ownership. While the doctrine that title to real property may be acquired by adverse possession has been firmly established in English and American law for a great many years, no little difficulty and confusion have arisen in determining what possession is *adverse,* especially where the actual possession upon which the claim of title is based has been under a mistaken belief that the land so occupied was properly in the possession of the claimant as owner.

Perhaps the most frequently cited case in this country on this matter is *French* v. *Pearce* (1831) 8 Conn. 439. In that case the lower court had instructed the jury that if the defendant had occupied the tract in dispute for the statutory period, but claiming and intending to occupy only to the true line, then his possession must be referred to his deed, and was not adverse. The Connecticutt court, in reviewing the case, held the charge erroneous, and laid down the doctrine that to constitute adverse possession it was sufficient that the claimant had occupied the land *as his own.* In a great many cases the doctrine of *French* v. *Pearce,* that the fact of the possession having been under such a mistaken belief does not prevent the possession from being considered adverse, has been approved and followed. But the courts following the rule of *French* v. *Pearce* in that regard refuse to follow it to the extent of holding that the possession under mistake is adverse even though the occupant is shown to have intended to claim only to the true line. In other words, in those courts professing to follow *French* v. *Pearce* there has been a modification of its doctrine which makes the rule substantially in accord with the instruction by the lower court in that case. *Stirling* v. *Whitlow,* 80 Ark. 444; *Goodwin* v. *Garibaldi,* 83 Ark. 74; *Shotwell* v. *Gordon,* 121 Mo. 482; *Richardson* v. *Watts,* 94 Mo. 476; *McDonald* v. *Fox,* 20 Nev. 364; *Thornley* v. *Andrews,* 45 Wash. 413; *Ayers* v. *Reidel,* 84 Wis. 276; *Edwards* v. *Fleming,* 83 Kans. 653, 33 L. R. A. N. S. 923; *Silver Creek Cement Co.* v. *Union Lime & Cement Co.,* 138 Ind. 297; *Humes* v. *Bernstein,* 72 Ala. 546; *Pollit* v. *Bland,* 15 Ky. L. Rep. 227; *King* v. *Brigham,* 23 Ore. 262; *Fieldhouse* v. *Leisburg,* 15 Wyo. 207; *Brown* v. *Clark,* 73 Vt. 233 (dictum); *Schaubuch* v. *Dillenmuth,* 108 Va. 86, 15 A. & E. Am. Cas. 825. The doctrine of *French* v. *Pearce* has been approved by the Connecticut court in the late case of *Searles* v. *De Ladson,* 81 Conn. 133.

On the other hand, in *Grube* v. *Wells* (1871) 34 Ia. 148, the Iowa supreme court held that mere possession as though the occupant were the owner, if under a mistake as to the true boundary line, was not adverse to the real owner, and title could not be acquired upon the strength of such possession. The doctrine of the Iowa court in that case would seem to require intentional occupancy of the land of another in order to have a case of adverse possession, and because the doctrine seems to place a premium upon conscious wrongdoing it has been criticized not a little. In *Doolittle* v. *Bailey,* 85 Ia. 398, the Iowa rule was somewhat clarified by a holding to the effect that the possession is adverse if the occupant claims the land occupied as his own

regardless of whether it shall ultimately be shown that there was a mistake in the boundary. With that modification the rule of *Grube* v. *Wells* has been adopted by a number of courts.

When the mere actual occupancy is insufficient, and it becomes a question of the intention of the occupant, the difficulties are obvious, and the result is that most of the cases are decided upon the application of one of two presumptions. The courts following what we may designate as the Iowa rule apply the presumption that the possession is subordinate to the paper title. *Lecroix* v. *Malone,* 157 Ala. 434; *Barret* v. *Kelley,* 131 Ala. 378; *Williams* v. *Bernstein,* 51 La. Ann. 115; *Edwards* v. *Fleming,* 83 Kans. 653; *Preble* v. *Maine C. R. Co.,* 85 Me. 260; *Kirkman* v. *Brown,* 93 Tenn. 476; *Treece* v. *Am. Assoc.,* 122 Fed. 598 (applying Tennessee law). But the great weight of authority is to the contrary, and the trend of the late decisions is certainly to the effect that the possession, though under a mistake, is presumed to be not subordinate to the real owner. *Johnson* v. *Elder,* 92 Ark. 30; *Searles* v. *De Ladson,* 81 Conn. 133; *O'Flaherty* v. *Mann,* 196 Ill. 304; *Krause* v. *Nolte,* 217 Ill. 298, 3 A. & E. Ann. Cas. 1061; *Dyer* v. *Eldridge,* 136 Ind. 654; *Diers* v. *Ward,* 87 Minn. 475; *Andrews* v. *Hastings,* 85 Neb. 548; *Sommer* v. *Compton,* 52 Ore. 173; *Bruce* v. *Washington,* 80 Tex. 368; *Hesser* v. *Seipman,* 35 Wash. 14; *Cole* v. *Brunt,* 35 U. C. Q. B. 103; *Lucas* v. *Provinces,* 130 Cal. 270; *Milligan* v. *Fritts,* 226 Mo. 189; *Johnson* v. *Thomas,* 23 App. D. C. 141.

Both of these rules being founded upon presumptions, evidence is admissible in practically all cases to rebut the presumption and to show the real nature and extent of the claim of the occupant. *Schaubuch* v. *Dillenmuth,* 108 Va. 86, 60 S. E. 745, is interesting along this line. Often the evidence is such that it is difficult to decide the character of the claimant's possession, whether he is claiming only to the true line, wherever it may be determined to be, or to the disputed boundary at all events, whether correct or not. In *Johnson* v. *Thomas, supra,* an ignorant colored woman became entitled under a certain will to a tract of land, eight acres in extent. She enclosed and occupied for the statutory period eleven acres. In an action for the possession of the three acres she claimed title thereto by adverse possession. The evidence showed that she had said repeatedly that all she wanted and claimed was what the will gave her, but she said that the will gave her the entire tract which she had occupied, and she insisted upon this claim despite the fact that repeated surveys showed her to be wrong. The court held that she was claiming the entire tract of eleven acres whether the line was correct or not. See also along the same line, *Cole* v. *Parker,* 70 Mo. 372. R. W. A.

LIMITATION OF CARRIER'S COMMON-LAW LIABILITY.—The right of a common carrier to limit its common law liability by a special contract with the shipper is recognized in most of the States. What is necessary on the part of the shipper to constitute assent to the special contract is a question on which the courts are divided. The question usually arises in connection with

the use by railroads and express companies of printed contracts, containing limitation clauses which are admittedly binding on the shipper, provided he assents to the contract. Two recent cases show conflicting views of State courts on this point. *St. L. & S. F. R. Co.* v. *Ladd* (Okla. 1912) 124 Pac. 461; *Wichern* v. *United States Express Co.* (N. J. 1912) 83 Atl. 776.

In the former case, plaintiff shipped cattle over defendant's road and accepted a contract limiting the liability of the carrier. Plaintiff executed the contract without reading it or being aware that it contained any limitation, and his attention was not called to this fact by the agent of the carrier. In the latter case, plaintiff delivered a trunk to the defendant company, and received an express contract or receipt in the ordinary form, containing a clause limiting the carrier's liability to fifty dollars unless a higher valuation was shown. In both cases, the question was whether the shipper had assented to the contract so as to be bound by the limitation clause therein. The New Jersey court held, basing its decision on a former case, *Hill* v. *Adams Express Co.*, 78 N. J. L. 333, that the burden of showing an agreement limiting the liability of the carrier rests on the carrier; that to establish such an agreement, the carrier must show that the attention of the shipper was called to the limitation clause in the contract, and that he assented thereto. As no proof of this was offered, it was held that the common law liability attached. The Oklahoma court recognized no such duty on the part of the carrier, but held that by executing the contract, the shipper assented to the limitation clause contained therein, even though it had not been called to his attention and he did not know such a clause was in the contract.

The leading case on this point is *McMillan* v. *M. S. & N. I. R. R. Co.*, 16 Mich. 79, in which COOLEY, J., laid down the rule that the evidence of assent, derived from the acceptance of the contract without objection, is conclusive against the shipper. This view expresses the weight of authority, many courts holding with Michigan that if the shipper accepts the contract, whether he signs it or reads it is immaterial; the mere acceptance raises a conclusive presumption of assent. *Hopkins* v. *Wescott*, 6 Blatch 64; *Mulligan* v. *I. C. Ry. Co.*, 36 Ia. 181; *Ballou* v. *Earle*, 17 R. I. 441. The Illinois court has refused to follow this rule, and in a long line of decisions has held that the limitation of liability must be brought to the shipper's notice, and understood and expressly assented to by him, and that whether he has understood and assented is a question of fact for the jury. *Adams Express Co.* v. *Stettaners*, 61 Ill. 184; *Chicago and Alton Railroad Co.* v. *Davis*, 159 Ill. 53. The Tennessee court (*Dillard Bros.* v. *L. & N. R. R. Co.*, 2 Lea (Tenn.) 288) took a middle ground, holding that the acceptance of the bill of lading or receipt without objection by the shipper raised a *prima facie* presumption that he understood it and assented to its limitation, but that this presumption may be rebutted. The New Jersey supreme court had held this view in two cases, *Florman* v. *Dodd and Childs Express Co.*, 79 N. J. L. 63; *Saunders* v. *Adams Express Co.*, 76 N. J. L. 228, but they were expressly overruled by *Hill* v. *Adams Express Co.*, *supra*, on which the present decision was based.

R. L. M.

THE FORCE AND EFFECT OF STATE INSOLVENCY LAWS UNDER THE BANKRUPTCY ACT OF 1898.—The question whether a person who is included in some of the provisions of the Federal Bankruptcy Act, but expressly excluded from others, is amenable to the State insolvency laws, in so far as he is excluded from the Federal Act, came squarely before the court in *Lace* v. *Smith* (R. I. 1912) 82 Atl. 268. This case holds that a farmer, who is permitted to become a voluntary bankrupt under § 4a of the Federal Act, but who is exempt from involuntary bankruptcy under § 4b of the same statute, could be thrown into the involuntary insolvency proceedings of the State law. Upon the issue here involved the courts are still in conflict. The cases turn upon the construction of Art. I, § 8, clause 4 of the Constitution, which reads: "The Congress shall have power * * * to establish * * * uniform laws on the subject of bankruptcies throughout the United States." The point was first raised in *Sturges* v. *Crowninshield,* 4 Wheat. 122, in which case Chief Justice MARSHALL says: "It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the States. It is not the right to establish these uniform laws, but their actual establishment which is inconsistent with the partial acts of the States." And therefore: "Until the power to pass uniform laws on the subject of bankruptcies be exercised by Congress, the States are not forbidden to pass a bankrupt law provided it contained no principle which violates the 10th section of the first article of the Constitution of the United States." *Sturges* v. *Crowninshield, supra; Baldwin* v. *Hale,* 1 Wall. 223; *Steelman* v. *Mattix,* 36 N. J. L. 344; *Old Town Bank* v. *McCormick,* 96 Md. 341, 53 Atl. 934; *In re Bruss-Ritter Co.,* 1 A. B. R. 58, 90 Fed. 651; *Farmers' & Mechanics Bank* v. *Smith,* 6 Wheat. 131; *Ogden* v. *Saunders,* 12 Wheat. 213; *Tua* v. *Carriere,* 117 U. S. 201; *Herron Co.* v. *Sup. Ct.,* 136 Cal. 279, 8 A. B. R. 492; *Potts* v. *Mfg. Co.,* 12 A. B. R. 392, 25 Pa. Supr. Ct. 206; *Singer* v. *Nat'l Bedstead Co.,* 65 N. J. Eq. 290, 11 A. B. R. 276.

But after the Federal Congress has established a bankruptcy law, a very different question is presented. Such an enactment is plenary and is paramount and superior to any State law, at least in so far as it covers the same ground, and such a State law is thereby superseded. *Ogden* v. *Saunders,* 12 Wheat. 213; *Mauran* v. *Crown Carpet Lining Co.,* 6 A. B. R. 734; *Ketcham* v. *McNamara,* 72 Conn. 709, 6 A. B. R. 160; *In re E. Wright et al.,* 2 A. B. R. 592; *In re Kersten & Kersten,* 6 A. B. R. 516; *Re Independent Insurance Co.,* Fed. Cas. No. 7018; *Re Lengert Wagon Co.,* 110 Fed. 927, 6 A. B. R. 535; *Re Smith,* 92 Fed. 135; *Re Richard,* 3 A. B. R. 506; *Re Gutwillig,* 92 Fed. 337; *Re Etheridge Furniture Co.,* 92 Fed. 329; *Van Nostrand* v. *Carr,* 30 Md. 128; *Ex Parte Eames,* Fed. Cas. No. 4237; *Davis* v. *Bohle,* 92 Fed. 325; *Re Safe Deposit & Savings Institution,* Fed. Cas. No. 12, 211; *Carling* v. *Seymour Lumber Co.,* 113 Fed. 483; *Wescott Co.* v. *Berry,* 69 N. H. 505, 45 Atl. 352; *Re Adams,* 1 A. B. R. 94; *Re Curtis,* 1 A. B. R. 440; *Re Merchants' Insurance Co.,* Fed. Cas. No. 9441. For further citations from various States see note 1 A. B. R. 41, and 16 AM. & ENG. ENC., Ed. 2, p. 642.

But the extent to which the federal law supersedes a State law and the time at which this suspension takes place, are matters which have been

questioned. In *Shryock* v. *Bashore,* 11 Phila. 565, Fed. Cas. No. 12820, the cases were arranged into the following three classes:

First: Those which hold that the passage of the federal law *ipso facto* suspended the State laws upon the same subject as to the persons and cases within the purview of the federal law, and such cases are now the overwhelming weight of authority.

Second: Those which hold that though the State law may cover persons and acts within the purview of the federal law, yet so long as both statutes square to the same purpose the State law is not unconstitutional until the federal law is put into force in the United States Courts, for until then there is no actual conflict. *Beck* v. *Parker,* 65 Pa. 262; *Cook* v. *Rogers,* 13 B. R. 97; *Reed* v. *Taylor,* 32 Iowa 209; *Sedgwick* v. *Place,* 1 B. R. 204; *Langley* v. *Perry,* 2 B. R. 180; *In re Hawkins,* 34 Conn. 548.

Third: Those which assert that not until the federal law has actually been called into operation and attached to the person and the act by an adjudication in bankruptcy, is it in conflict with the State law and the latter, therefore, superseded. *Ex parte Ziegenfuss,* 24 N. C. 463; *Clarke* v. *Rist,* 3 McLean 494; *Reed* v. *Taylor,* 32 Iowa 209; *Maltbie* v. *Hotchkiss,* 38 Conn. 80.

But the general rule broadly stated in *Ex Parte Eames,* Fed. Cas. No. 4237, and adopted in *Lace* v. *Smith, supra,* that: "As soon as the bankrupt act went into operation it *ipso facto* suspended all action upon future cases arising under the State insolvency laws where the insolvent persons were within the purview of the bankruptcy act" is now the overwhelming weight of authority. See in addition to cases cited, *supra*: *Sullivan* v. *Hieskill,* Fed. Cas. No. 13594; *Re Wallace,* Fed. Cas. No. 17094; *Thornhill* v. *Bank of La.,* Fed. Cas. No. 13992; *Day* v. *Bardwell,* 97 Mass. 246; *Re Mallory,* Fed. Cas. No. 8991; *Re Reynolds,* Fed. Cas. No. 11723; *Moody* v. *Port Clyde Development Co.,* 18 A. B. R. 275; *Parmenter Mfg. Co.* v. *Hamilton,* 172 Mass. 178, 51 N. E. 521, 1 A. B. R. 39; *Re McKee,* 1 A. B. R. 311.

So far the question, but for minor differences of opinion, has not been particularly fraught with difficulty, and there is no doubt, upon principle as well as upon authority, that when the federal power has been exercised it supersedes similar State action. However, the extent to which such State statutes are superseded by the federal act, is a question which has been disputed. As early as in *Ex parte Eames,* it was said, in speaking of the two systems: "Both cannot go on together without a direct and positive collision, and the moment that the bankrupt act *does* or *may* operate upon the person or the case, that moment it virtually supersedes all such legislation." This view obviously intends that the moment Congress provides a system of bankruptcy, that moment any and all State action is superseded; but the better view now is that State law is superseded by the federal action only in so far as the two actually conflict. *Ogden* v. *Saunders,* 12 Wheat. 213; *Baldwin* v. *Hale,* 1 Wall. 223; *Singer* v. *Nat'l Mfg. Co.,* 11 A. B. R. 276; *Tua* v. *Carriere,* 117 U. S. 201 and 16 Am. & Eng. Enc. (2nd Ed.) 642.

And the question always for determination then is whether or not there exists such a conflict. In determining this question the cases easily divide into three general classes:

First: Where both the federal and State laws expressly provide both for the person and for the act which is the basis for invoking the operation of the law. In such a case, by the great weight of authority, it has been held ever since *Sturges* v. *Crowninshield* that both the person and the act of bankruptcy being within the purview of the federal law, all State laws as to them are superseded. *Harbaugh* v. *Costello*, 184 Ill. 110, 56 N. E. 363; *National Bank* v. *Ware*, 95 Me. 388, 50 Atl. 24.

Second: Where the federal law omits entirely to provide for either the person or the act as contained in the State statute. Under this class two types of cases have occurred. (a) Where the person is not within the scope of the federal law, and is within the State statute, it has been held that there is no conflict and that the State statute,since it can operate without inconsistency, is not superseded but remains in full effect and governs the case. *Shepardson's App.*, 36 Conn. 23; *Herron Co.* v. *Supr. Ct.*, 136 Cal. 279, 68 Pac. 814. (b) Where the act is not within the purview of the federal law, but is within the purview of the State statute, it has been held that federal jurisdictional facts, not being shown to exist, cannot be assumed to exist, and when such is the case it must be assumed that the federal law cannot properly be invoked, and that the State statute can therefore operate without inconsistency, and is not superseded as to the particular case. *Geery's App.* 43 Conn. 289.

It is clear then in cases of this second class that both the person and the act must be within the purview of the Federal law if it is to supersede the State statute, and wherever such is not the case the State law remains in full effect. *Singer* v. *National Bedstead Co., supra; Dillie* v. *People*, 118 Ill. App. 426.

Third: Where both the person and the act being included in some of the provisions of the federal statute, but expressly excluded from others, are included in the State law only in so far as they are excluded from the federal statute. Here it is that the most difficulty is presented, for on this question the courts have squarely divided.

One line of cases, represented by the decision in *Littlefield* v. *Gay*, 96 Me. 422, 52 Atl. 925, following the precedent first enunciated in *Ex parte Eames, supra*, hold that: "The test of jurisdiction under the State law does not rest upon the volition of the debtor. If his person or property are or may be subject to the bankrupt law, then as to him and his possessions the State insolvency law is in abeyance and powerless. Upon any other view it would be in the power of the debtor at any time to oust the jurisdiction of the State court after it had been assumed. This would result in great confusion. It may be avoided by holding, as we do, that where the person falls within the purview of the bankrupt act, whether by voluntary or involuntary proceedings, the State insolvent law must be silent." *Parmenter Mfg. Co.* v. *Hamilton*, 172 Mass. 178, 51 N. E. 529; *Moody* v. *Development Co.*, 102 Me. 365, 66 Atl. 967; *Re Bruss-Ritter Co.*, 90 Fed. 651, 1 A. B. R. 58; *Mauran* v. *Carpet Lining Co., supra.* See also *Harbaugh* v. *Costello, supra; Re Watts & Sachs*, 190 U. S. 1.

The other line of cases, taking the directly opposite view, are represented

by *Old Town Bank* v. *McCormick, supra*, where, in speaking of the jurisdiction of the State over the involuntary bankruptcy of farmers, it is said: "It is true that while this class is not included in and is expressly excluded from the involuntary feature of the system, yet it is included in the voluntary feature, and (defendant contends) is therefore within the scope of the national system. * * * It is not within the power of Congress to render inoperative the involuntary feature of State insolvency laws as to any particular class by excepting that class from the involuntary part of the national law. Otherwise the result would be that the State laws as to involuntary insolvency would become inoperative by the mere existence of the power in the United States to establish a system of involuntary bankruptcy. We have seen, however, that it is not the mere existence, but the exercise of the power to establish a genuine bankrupt law in conflict with the State laws which renders the latter inoperative."

The question which this direct conflict presents simply is: when the federal statute provides for a person as to some contingencies, and either fails to provide for the same person as to other contingencies, or else expressly excepts him from terms provided for others, is or is not a State insolvent law superseded by the national act, when the State law expressly includes him within its terms as to those contingencies for which the bankruptcy act makes no provision for him or from which it expressly excepts him; or, in other words, when the federal statute includes a person partly and excludes him partly, does that exclusion or silence imply a prohibition upon State action, or imply a willingness upon the part of Congress to have the several States make such further provisions as they see fit.

If it be urged that express exception from any of the provisions of the federal statute implies a prohibition upon the States to act as to the person so excepted, then by the very act of excepting him from part of the statute and including him within part, Congress has exercised its constitutional power in such a way as to bring this person within its purview and to supersede any State legislation as to him, and it is the mere existence, not the exercise, of the federal power which nullifies the State law. But on the contrary, if express exception from the federal statute implies freedom on the part of the State to make such provision as it sees fit, though the person be within the purview of the federal statute as to all other provisions, the State may freely legislate as to those provisions from which he has been excepted without any inconsistency or conflict arising between the two statutes.

That this latter view is the sound construction, seems clear. Practical difficulties will arise in either case, but if these become distressing Congress can easily remedy them by amendment. In the first great case upon this subject Chief Justice MARSHALL laid the foundation for this construction when he said: "It is obvious that much inconvenience would result from that construction of the Constitution which should deny to State legislatures the power of acting upon this subject in consequence of the grant to Congress. It may be thought more convenient that much of it should be regulated by State legislation, and Congress may purposely omit to provide for many cases to which their power extends. It does not appear to be a violent con-

struction of the Constitution—and it is certainly a convenient one—to consider the power of the States as existing over such cases as the laws of the Union may not reach."

Later in *Simpson* v. *Savings Bank,* 56 N. H. 466 at 475, it was said: "No doubt that as a general rule as soon as Congress has exercised its power of making a general bankrupt law and it has gone into operation, the State insolvency laws are suspended, but where the bankrupt act expressly excepts a class of cases, it must have been the intention of Congress not to interfere in such specified class with the laws of the several States." Again in *Singer* v. *National Bedstead Co.,* 65 N. J. Eq. 290, 11 A. B. R. 276: "Congress is not obliged to legislate on the whole subject of bankruptcy. It may deal with one or several parts. It is the enactment by Congress of a law applicable to a particular case which suspends any State law which otherwise would be applicable to that case. * * * The present system of bankruptcy which Congress saw fit to enact in 1898 does not pretend to cover the whole field of either voluntary or involuntary bankruptcy and insolvency. It is perfectly plain that State systems of voluntary and involuntary bankruptcy may remain today in full operation upon large numbers of insolvent persons who cannot be brought within the operation of the national bankrupt act under any possible state of facts. It is also, it seems to me, equally plain that a State system of involuntary insolvency also remains in full operation upon persons and corporations who are possible bankrupts within the operation of the national bankrupt act so far as the State system deals with cases of which the bankruptcy courts under the federal act can obtain no jurisdiction."

After the decision of *Sturges* v. *Crowninshield,* the courts, following the example of *Ex parte Eames* and the tendencies of the times, leaned toward a construction which curtailed and limited State powers, and extended and added to national powers; but as the pendulum swung back, and public opinion as well as judicial construction leaned more toward a less powerful federal system and a greater extension of States' rights, the determination of this question changed by degrees, until now in the latest case upon the subject the view first laid down in *Sturges* v. *Crowninshield* is upheld without qualification.

G. E. H., C. H. A.