INSOLVENT DECEDENTS' ESTATES

Kurt H. Nadelmann

Special Committee on Conflict of United States and Foreign Law of the National Bankruptcy Conference

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THE problems of insolvent decedents' estates have created special difficulties in all legal systems. Two unrelated fields of the law are involved: decedents' estates and insolvency. Treatment of the topic in works on one or the other field is often scanty and few studies exist which deal exclusively with insolvent decedents' estates law. Research in the conflicts problems of the field has led the writer to investigate the differences in the treatment of insolvent decedents' estates in this country, other common law countries, and countries of the civil law. Results of this study are used to discuss problems of the domestic law on insolvent decedents' estates against the background of developments abroad.

In the administration of an insolvent estate of a deceased person the assets are exhausted by the debts which the deceased has left. Nothing remains for distribution to legatees, devisees, and others entitled thereto. Because all goes to the creditors, the problems involved are in the main the same as in the case of a living debtor who becomes insolvent. Acknowledging this fact, most countries regulate the settlement of insolvent decedents' estates by making their legislation on insolvent estates, that is, their bankruptcy law, applicable to decedents' estates. This has been done in civil law and common law countries as well. While for solvent estates the methods employed for the liquidation of the debts of a deceased person differ greatly under the common law system and the systems primarily used on the civil law side,¹ the same is not true for insolvent decedents' estates.

Civil Law Countries

In the civil law countries, the bankruptcy law has long been made applicable to estates of deceased persons. Where the bankruptcy law covers only merchants a similar proceeding is generally available for nonmerchants and this proceeding has been also extended to decedents' estates.

¹ In most civil law countries, appointment of a personal representative for the liquidation of an estate is not necessary as a rule. See Rheinstein, "European Methods for the Liquidation of the Debts of Deceased Persons," 20 IOWA L. REV. 431 (1935).
The first modern codification of bankruptcy law, in the French Code of Commerce of 1807, did not say whether a bankruptcy adjudication was possible after the death of a debtor. The courts were divided on the issue, the prevailing view being that an adjudication could be made if the debtor had "ceased payments" before his death. Cessation of payments was, and still is, the "act of bankruptcy" required for an adjudication under French law. When the bankruptcy part of the Code was revised in 1838, an express provision codified the majority view. Under the provision, which has remained unchanged, bankruptcy may be declared if the debtor had ceased payments at the time of his death but the petition must be filed not later than one year after his decease. For the "judicial liquidation," a second type of bankruptcy proceeding, the law of 1889 provides that it is available to the heirs in the case of an insolvent estate provided the death took place within two weeks after the cessation of payments. These two weeks are the time limit within which a debtor may take advantage of this—attenuated—bankruptcy proceeding. The heirs must file the petition within one month following the death.

The French Code of Commerce has served as a model for legislation in many countries in Europe, Latin America, and elsewhere. Thus the commercial codes or bankruptcy statutes of, for example, the Netherlands, Belgium, Luxemburg, Portugal, Italy, Argentina, and Uruguay have been modeled on the French Code.

2 The coutumes of Normandy, Brittany, and Lille had provided for a kind of bankruptcy administration of insolvent decedents' estates. GARRAUD, DE LA DECONSTITUTION DU DROIT COMMERCIAL (1880); 1 THALLER, DES FAILLITES EN DROIT COMPARU, 194 (1887).


4 In most of the civil law countries, "cessation of payments" or "inability to pay," evidenced by cessation of payments, are the statutory requirements for a bankruptcy adjudication. See FERNANDEZ, LA CESACION DE PAGOS EN EL DERECHO ARGENTINO Y UNIVERSAL (1939). The Italian bankruptcy law of 1942 requires existence of a "state of insolvency," normally evidenced by stoppage of payments, and so does the Argentine draft of 1950. The statutes of some civil law countries list "acts of bankruptcy" as rebuttable presumptions of cessation of payments (inability to pay obligations which are liquidated and due). See, e.g., the Mexican bankruptcy law of 1942. In at least one of the common law countries, "ceases to meet liabilities generally as they become due" has been made one of the statutory acts of bankruptcy: Canadian Bankruptcy Act of 1949, §20(1)(g). Cf. the South African Act No. 24 of 1936, §10(b).


guay,13 Peru,14 Chile,15 Colombia,16 Venezuela,17 Haiti,18 Honduras,19 Mexico,20 and Egypt21 provide, as does the French law, that a bankruptcy adjudication is possible if a debtor had at his death ceased payments. There is a difference in the time limits set forth for the filing of petitions. The period runs from three months after death, as in Venezuela, to two years, as in Portugal and Mexico. Belgium, the Netherlands, Argentina, and Peru have a six months limitation and the other countries have the one year period of the French Code. In a few countries, Honduras, for example, the period is counted not from the date of death but from the date of the cessation of payments.

The setting of a time limit has been criticized by some authors. It has also been argued that the availability of the bankruptcy procedure should not depend upon cessation of payments before death. The example cited is the insolvent debtor who omits to "cease payments" before killing himself because of his financial difficulties.22 At least one of the Latin American countries, Brazil, has given up the cessation of payments requirement.23 The time limitation is not found in the Span-

9 Code de Commerce art. 437(3).
10 Codigo de Processo Civil art. 1137 (Decree 29.637 of May 28, 1939). Borges Pires, Processo civil e comercial (execucoes, falencias e insolvenncias) 202 (1941).
12 Bankruptcy Law No. 11,719 of 1933, art. 4. 1 Garcia Martinez, El Concordato y la Quiebra 121 (1940); I Castillo, La quiebra en el Derecho Argentino 70 (1940); Odone, "Exposicion y Critica de la Ley de Quiebras," 1 Quiebras 91 (1935); 5 Rivarola, Tratado de Derecho Comercial Argentina 34 (1940). Cfr. Pary, El Concurso Civil de Acreedores, 3d ed., 107 (1944).
14 Bankruptcy Law No. 7,566 of 1932, art. 10, 22. Arce Mas, Quiebras 28 (1938); Sánchez Palacios, Ley procesal de quiebras 18 (1939).
15 Bankruptcy Law No. 1297 of 1931, art. 45. 1 Duran Bernales, Explicaciones y jurisprudencia de la Ley de Quiebras de Chile 216 (1935).
16 Bankruptcy Law No. 750 of 1940, art. 1. Spath Nérel, La quiebra 83 (1940).
17 Codigo de Comercio art. 934 (1919).
19 Codigo de Comercio art. 1063 (1940).
21 National Bankruptcy Law No. 56 of 1945, art. 209. 3 Wahl et Kamel A. Malacoe, Traite de droit commercial mixte et national 14, 29 (1946).
23 Bankruptcy Law No. 7.661 of 1945, art. 3(I), 4(VIII), §2. 1 Miranda Valverde, Comentarios a lei de falencias 49, 64 (1948); 7 Carvalheiro de Mendonca, Tratado de Direito Comercial Brasileiro, 4th ed., 171, 172, n. 3 (1946).
ish system. Under the Spanish law, both the bankruptcy proceeding for merchants and the distribution proceeding for nonmerchants may be used without limitation for the administration of insolvent decedents' estates.

As for other systems, the law of Austria has provided, since the first bankruptcy codes were passed late in the eighteenth century, that insolvent decedents' estates shall be liquidated under the provisions of the bankruptcy law. Both the present bankruptcy law and the arrangement law are available for decedents' estates. The provisions of the Austrian law have been taken over by Yugoslavia and Czechoslovakia. The bankruptcy law of Hungary follows the Austrian law.

In Switzerland, the federal civil code prescribes that insolvent decedents' estates shall be administered according to the provisions of the federal bankruptcy law. In Sweden, the creditors may ask for a bankruptcy adjudication and the administrator must file a bankruptcy petition in the case of insolvency. Similar rules obtain in the other Scandinavian countries.

26 General Bankruptcy Law of 1781, art. 2; Courts Law for Western Galicia of 1796, art. 79; Italian Courts Law of 1803, art. 74. Haimerl, Vortraege uber den Concurs der Gläubiger 19 (1840). Cf. 2 Levy, Commercial Law 376, 377 (1852).
27 Bankruptcy Law of 1914, art. 64, 69, 70, 100, 164; Arrangement Law of 1934, art. 1(3). 1 Bartsch and Pollak, Konkurs-, Ausgleichs-, und Anfechtungsordnung, 3d ed., 13 (1937), 2 id. 65.
32 Law on Execution and Bankruptcy of 1889, art. 193. Blumenstein, Handbuch des Schweizerischen Schuldbetreibungsrechtes 606 (1911); 1 Carl Jaeger, Schuldbetreibung und Konkurs 605 (1911); von Overbeck, Schuldbetreibung und Konkurs, 2d ed., 156 (1940).
Of older German laws, the Bavarian Procedural Code of 1753\textsuperscript{35} and the Prussian Procedural Code of 1793\textsuperscript{36} had already provided that the bankruptcy procedure shall be followed for insolvent decedents' estates. The Prussian bankruptcy law of 1855, modeled after the French Code, did likewise.\textsuperscript{37} The first national legislation on bankruptcy in Germany, the Bankruptcy Act of 1877, was to the same effect except that the "cessation of payment" requirement in the Prussian law was not taken over. Instead, insolvency, in the sense of excess of debts over the assets, was made the condition for bankruptcy adjudications in the case of decedents' estates.\textsuperscript{38} The revision of the Act of 1877 in 1898 in connection with the enactment of the German Civil Code left the system unchanged but new provisions were added\textsuperscript{39} to coordinate it with the code's system of liquidation of debts of deceased persons under which a bankruptcy petition is one of the means for the heirs to remove personal liability for the debts of the deceased. One of the new provisions states that, also in the case of decedents' estates, the bankruptcy proceeding may terminate by way of a composition.\textsuperscript{40} The benefits of the modern arrangements law have likewise been made available to the heirs in the case of insolvency of the estate.\textsuperscript{41}

The European example has been followed in the Far East. The Chinese bankruptcy and arrangement law of 1935 provides that "bankruptcy may . . . be declared against the deceased's . . . [estate] if it is insufficient to pay the debts of the deceased. . . ."\textsuperscript{42}

**British Commonwealth**

In England, the administration of insolvent decedents' estates had no connection with the bankruptcy legislation until 1873, the year of the great reform of the courts system. The Supreme Court of Judicature Act of 1873 which remodeled the court system contained also a

\textsuperscript{35}Codex Juris Bavarici Judiciarii of 1753, c. 19, \$4, c. 20, \$3.

\textsuperscript{36}Allgemeine Gerichtsordnung of 1793, pt. I, tit. 50, \$4; app. \$311, 312. Cf. 2 LEVI, COMMERCIAL LAW 291 (1852).

\textsuperscript{37}Bankruptcy Code of May 8, 1855, art. 14, 114(2), 319, 342.

\textsuperscript{38}Bankruptcy Code of 1877, art. 202.


\textsuperscript{40}Under the Roman law compositions were allowed in the case of decedents estates.

\textsuperscript{41}Arrangement Law of Feb. 26, 1935, art. 113; KRIEG, VERGLEICHSORDNUNG 266 (1937).

\textsuperscript{42}Bankruptcy Law of 1935, art. 59 (Chang and Yung trans. 1936).
few sections on law reform. One of them dealt with the law applicable
to insolvent decedents' estates. It provided that in the administration
of the assets of any deceased whose estate may prove to be insufficient
for the payment in full of his debts, the same rules shall prevail as to
the respective rights of creditors and as to the debts and liabilities prov­
able as may be in force under the law of bankruptcy, at the time the
Bankruptcy Act of 1869, with respect to the estates of persons adjudged
bankrupt.48 The Lord Chancellor, Lord Selborne, in introducing the
Bill, had said: "It is proposed that in the administration of insolvent
estates by the Court after the death of the debtor, substantially the rules
applicable to bankruptcy shall be adopted. There seems to be no good
reason why the estate of an insolvent debtor should be administered in
one way while he is living and in another way when he is dead."44
Scotland had preceded England with legislation in the field. The
Sequestration Act of 1839 had extended the process of sequestration in
bankruptcy to deceased debtors, whether traders or not,45 and this is
still the law in Scotland under the present bankruptcy legislation.46
The provision on insolvent decedents' estates in the Supreme Court
of Judicature Act of 1873 never took effect but was replaced by a simi­
lar provision in the Supreme Court of Judicature Act of 1875 which
declared the rules of the bankruptcy law applicable not only to insol­
vent decedents' estates, as in the Act of 1873, but also to the winding­
up of insolvent companies.47 This has remained the law both for com­
panies48 and decedents' estates. For decedents' estates, the Adminis­
tration of Estates Act of 1925 now provides that, when an estate is
insolvent, funeral, testamentary and administrative expenses shall have
priority and that the same rules shall be observed regarding the rights
of creditors and priorities as in force under the Bankruptcy Act.49

43 Supreme Court of Judicature Act, 1873, §25(1), 36 & 37 Vict., c. 66. Cf. 55 L.T.
197 (Bill amendment), 372 (comment) (1873).
CATURE ACTS, 3d ed., 278 (1877).
45 2 & 3 Vict., c. 41, §4 (1839). BURTON, LAW OF BANKRUPTCY IN SCOTLAND 277
(1845). Bankruptcy (Scotland) Act, 1856, §13(2). MURDOCH, MANUAL OF BANKRUPT
LAW 11 (1856).
46 Bankruptcy (Scotland) Act, 1913, §11(2). 13 ENCYCLOPAEDIA OF THE LAWS OF
SCOTLAND 357 (1932); GOUDY, LAW OF BANKRUPTCY IN SCOTLAND, 4th ed., 117 (1914).
47 Supreme Court of Judicature Act, 1875, §10, 38 & 39 Vict., c. 77. GRIFFITH AND
LOVELAND, THE SUPREME COURT OF JUDICATURE ACTS, 2d ed., 34 (1877); 1 WILLIAMS,
49 Administration of Estates Act, 1925, §34(1). 14 HALSURY'S LAWS OF ENGLAND,
HAILSHAM ed., 461; 1 WILLIAMS, LAW OF EXECUTORS AND ADMINISTRATORS, 12th ed.,
634 (1930).
A further development took place shortly after the 1873/75 reform. When the bankruptcy law was revised under Joseph Chamberlain, a new section was incorporated in the Bankruptcy Act of 1883 on “Administration in Bankruptcy of the Estate of a Person Dying Insolvent.” Upon the section, maintained in the current law, the Bankruptcy Act of 1914, any creditor whose claim would have been sufficient to support a bankruptcy petition against the debtor, had he been alive, may obtain an “order for the administration of the estate according to the law of bankruptcy,” unless the court is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts owing to the deceased. The personal representative is served notice of the petition. He may also present such a petition himself. The law provides that, if proceedings have been commenced in the chancery court for the administration of the estate, it is too late for a petition to the bankruptcy court. The chancery court may, however, in its discretion transfer the proceedings to the bankruptcy court when satisfied that the estate is insufficient to pay its debts.

Under the section and the “rules of procedure” complementing it, the proceeding before the bankruptcy court is, generally speaking, the same as in a normal bankruptcy proceeding. Funeral and testamentary expenses are given a first priority. Any surplus which may remain after the payment of all debts, is turned over, in principle, to the personal representative. The provisions of the Bankruptcy Act on proof of debts, property available for payment of debts, effect of bankruptcy on antecedent and other transactions, realization of property and distribution of property are declared applicable.

A controversy had developed soon after the passage of the Supreme Court of Judicature Act as to whether the rules in the bankruptcy law which, under the English terminology, “increase” the assets, namely, the reputed ownership clause, the fraudulent preference clause, and the sections which defeat certain settlements and executions, shall apply to the administration of the assets of a deceased person. Sir George Jessel, Master of the Rolls, ruled in the affirmative in a winding-up case involving the identical question but the decision was overruled a few

50 Bankruptcy Act, 1883, §125, 46 & 47 Vict., c. 52. WACE ON BANKRUPTCY 329 (1904). Taken from the Scotch law: Memorandum, Board of Trade, in CHALMERS AND HUGH, THE BANKRUPT ACT 1883, pp. xii et seq. (1883).
52 In re Printing and Numerical Registering Co., L.R. 8 Ch. D. 535 (1878).
years later, and it is well settled also for insolvent decedents' estates that these rules of the bankruptcy law do not apply. This holds as well for the section in the Administration of Estates Act as the section in the Bankruptcy Act.

Northern Ireland has followed the development in England. In 1929, a section was added to the Irish Bankruptcy Act similar to that in the English Bankruptcy Act on the "Administration in Bankruptcy of the Estate of a Person Dying Insolvent."

The system of the English legislation has been incorporated, often without any change, in many of the Bankruptcy Ordinances for British Colonies or former Colonies. The Indian Presidency-Towns Insolvency Act of 1909 may be cited as an example. The Palestine Bankruptcy Ordinance of 1936 is another but the text varies in some respects. One of the differences concerns the case where proceedings for the administration of the estate had been commenced in another than the bankruptcy court. If a petition is presented to the bankruptcy court for the "administration in bankruptcy of the estate of the deceased debtor according to the law of bankruptcy," it is then for the bankruptcy court, and not the other court, to decide whether the proceedings shall be transferred to the bankruptcy court.

In South Africa, the Amsterdam Bankruptcy Ordinance of 1777 was long used as a model for the local bankruptcy ordinances. The Ordinance applied to living and deceased persons as well. The present

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56 References in: Federation of Chambers of Commerce of the British Empire, Bankruptcy Law in the British Empire (1932).


legislation of the Union of South Africa is the Administration of Estates Act of 1913. The act provides that the creditors may ask the court for an adjudication of the estate as insolvent. In the absence of a petition, the judicial administrator liquidates the estate under the bankruptcy rules, unless a majority of the creditors asks for a surrender of the estate to the bankruptcy court.

New Zealand has followed the development in the English law but with some major differences. The Administration Act of 1908 has a special part, "Administration by the Court," where rules for insolvent estates are provided. Creditors and administrator may ask for the liquidation of the estate under that part of the act. In such an administration the rules of the Bankruptcy Act apply. Without the administrator's consent a creditor petition is not possible before the expiration of two months from the date of grant of probate or letters of administration unless the creditor proves that the deceased made some fraudulent preference or committed an act of bankruptcy within three months prior to his decease. Transfers made or suffered by the deceased which would have been void as against the trustee or the creditors, had the deceased become bankrupt at the date of his death, are liable to be treated as void or to be set aside by the trustee, as if the deceased had been alive.

In the Commonwealth of Australia where, under the Constitution, the Commonwealth Parliament has power to legislate on "bankruptcy and insolvency," the Commonwealth Bankruptcy Act 1924-1933 provides for the administration in bankruptcy of the estate of persons dying insolvent. Except for minor differences, the system is the same as that in the English Bankruptcy Act. As in England, it is provided that a petition may not be lodged if proceedings for the administration of the estate have been commenced in any court, but that such court may transfer the proceedings to the bankruptcy court. The Federal Court of Bankruptcy has held that the administration in bankruptcy of insol-

60 Administration of Estates Act No. 24 of 1913, §48(3). MEYEROWITZ, ADMINISTRATION OF ESTATES 71, 153 (1949).
62 Administration Act, 1908, No. 3, pt. IV, §§54 to 67. GARROW, LAW OF WILLS AND ADMINISTRATION, 2d ed., 590 (1949); SPRATT, LAW OF BANKRUPTCY IN NEW ZEALAND 428 (1930).
63 Aust. Const., §51 (xvii).
64 Bankruptcy Act 1924-1933, §§155, 156. LEWIS, AUSTRALIAN BANKRUPTCY LAW, 3d ed., 178 (1941); McDONALD, HENRY AND MEER, AUSTRALIAN BANKRUPTCY LAW-PRACTICE, 2d ed., 480 (1940).
vent estates of deceased debtors is not *ultra vires* the power conferred by the Constitution on the Commonwealth Parliament.\(^{65}\)

In Canada, the Dominion bankruptcy legislation which in most respects follows the English bankruptcy law has no section corresponding to that in the English Act on the "administration in bankruptcy of the estate of a person dying insolvent." The Canadian statute has, on the other hand, a statutory definition of the word "person," not found in the English Act, which includes the heirs, executors, administrators, or other legal representatives of a person.\(^{66}\) On the basis of this definition, it has been held by the courts in some provinces, Quebec\(^{67}\) and Saskatchewan,\(^{68}\) for example, that a bankruptcy adjudication is possible notwithstanding the death of the debtor. Courts in Nova Scotia have taken the contrary view.\(^{69}\) In Ontario, a decision of a Registrar (Referee) is for,\(^{70}\) and one of a court is against admission.\(^{71}\) In British Columbia the court of appeal was equally divided in a case which came before it in 1934.\(^{72}\) An amendment to the Bankruptcy Act of 1919 passed in 1932 gave to funeral and testamentary expenses a first priority.\(^{73}\) The new Bankruptcy Act of December 1949, which has left the definition of "person" unchanged,\(^{74}\) now provides especially that a bankruptcy petition may be filed against the estate of a deceased debtor\(^ {75}\) and that the legal representatives of an insolvent deceased person may start bankruptcy proceedings under the rules of the act.\(^ {76} \)

**United States**

In the United States, the administration and liquidation of insolvent decedents' estates is not covered by national legislation. The vari-

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\(^{66}\) Bankruptcy Act of 1919, as amended, §2 (cc). Duncan and Reilley, Bankruptcy in Canada, 2d ed., 851 (1933); de la Durantaye, Traité de la Faillite 80 (1934).


\(^{73}\) Section 125 B, added by 22 Geo. 5, c. 39, §42 (1932).

\(^{74}\) Bankruptcy Act 1949, 13 Geo. 6, c. 7, §2(m); cf. §25(1)(a).


\(^{76}\) Section 26(1). Bradford and Greenberg, Canadian Bankruptcy Act, 3d ed., 91 (1951).
ous national bankruptcy acts have dealt with the situation arising from the death of the debtor during the bankruptcy proceeding but not before it. The Act of 1800, in force until 1803, provided that the proceeding should continue if the bankrupt died "after any commission of bankruptcy sued forth."\(^{77}\) The Act of 1841, repealed in 1843, allowed the suit to abate on the death of the bankrupt.\(^{78}\) The Act of 1867, repealed in 1878, permitted an abatement without requiring it.\(^{79}\) The present bankruptcy statute, the Act of 1898, provides that the death of a bankrupt "shall not abate the proceedings, but [that] the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died."\(^{80}\) This is how far the national legislation has gone for bankruptcy, but there is more to be said about the national legislation.

When by Act of March 3, 1933, section 74 on "Compositions and Extensions" and section 75 on "Agricultural Compositions and Extensions" were added to the National Bankruptcy Act, the amendment provided that, for the purposes of these two sections, the term "farmer" shall include the personal representative of a deceased farmer.\(^{81}\) An amendment to section 74, the general "Compositions and Extensions" section, passed in 1934, made this extension a general one in providing that section 74 "shall include the personal representative of a deceased individual for the purpose of effecting settlement or composition with the creditors of the estate: Provided, however, That such personal representative shall first obtain the consent and authority of the court which has assumed jurisdiction of said estate, to invoke the relief provided by said Act of March 3, 1933."\(^{82}\) The amending act did not add a similar

\(^{77}\) U.S. Bankruptcy Act of 1800, §45, 2 Stat. L. 33; Caines, Lex Mercatoria Americana 479 (1802).


The same is said in this provision for insanity. Insanity will not be discussed in this paper. For the English law in this regard, see Williams, Law and Practice in Bankruptcy, 16th ed., 42 (1949).

\(^{81}\) Act of March 3, 1933, §75(2), 47 Stat. L. 1470 at 1473: "For the purpose of this section and section 74, the term "farmer" means any individual who is personally bona fide engaged primarily in farming operations . . . and includes the personal representative of a deceased farmer; and a farmer shall be deemed a resident of any county in which such farming operations occur." Gilbert's Collier on Bankruptcy, 3d ed., 1334, 1342 (1934): "It is an entirely new feature in bankruptcy practice to extend the benefits to the personal representative of a deceased debtor."

leave-requiring proviso to section 75, the section on "Agricultural Compositions and Extensions," nor was such a requirement added when the definition of "farmer" was rewritten in 1935. 83 The Supreme Court of the United States held, however, in Harris v. Zion's Savings Bank & Trust Co. 84 that the same intent of Congress as expressed for section 74 should be implied as to section 75.

Section 74, under which, it may be added, an order of liquidation or adjudication in bankruptcy could be made in the case of failure of the composition proceeding, 85 disappeared with the revision of the Bankruptcy Act in 1938. The new "Arrangements" chapter which replaced the compositions sections 74 and 12, does not provide that the personal representative of a deceased debtor may avail himself of the arrangement proceeding. Section 75 on "Agricultural Compositions and Extensions," on the other hand, has remained in force. 86 Relief under it may still be obtained by the personal representative of a deceased farmer, with the qualification resulting from the Harris case that leave must be obtained by the personal representative from the court with jurisdiction for the estate. This is therefore a situation, and the only situation, where national legislation is presently available for the settlement, in one way at least, of the insolvent estate of a deceased person.

In the United States it is state law which governs the field of insolvent decedents' estates. 87 The passing of national legislation on bankruptcy has had an effect on the state law, however. Because bankruptcy has been covered by the national legislation, state law did not develop any further in the field. The few situations to which the national legislation is not made applicable were not important enough

83 Act of May 15, 1935, §3, 49 Stat. L. 246, 11 U.S.C. §203(r): "For purposes of this section, section 4(b), and section 74, the term 'farmer' includes not only an individual who is primarily bona fide personally engaged in producing products of the soil, but also any individual who is primarily bona fide personally engaged in dairy farming, the production of poultry or livestock, or the production of poultry products or livestock products in their unmanufactured state, or the principal part of whose income is derived from any one or more of the foregoing operations, and includes the personal representatives of a deceased farmer; and a farmer shall be deemed a resident of any county in which such operations occur." Gilbert's Collier on Bankruptcy, 4th ed., 1362, 1375 (1937). The reference to section 74, repealed by the Chandler Act in 1938, has been dropped by Act of March 4, 1940, 54 Stat. L. 40.


to warrant continued action on the part of the state legislatures. As a result, state insolvency legislation is antiquated and not of the quality of the present-day national bankruptcy law. Had there been no national legislation and had the states continued to legislate on insolvency, the legislation might well have been extended to decedents' estates as has happened elsewhere.

A presentation of the law on insolvent decedents' estates in the forty-eight states, the District of Columbia, and the Territories would be a considerable undertaking. Woerner's summary account in his *American Law of Administration* 88 will be relied upon for the purposes of this discussion. Though no new edition of the work has appeared since 1923, the account given of the insolvent estates' law is, on the whole, still accurate. The recent revisions of the law of administration in many states did not affect, in general, the law for insolvent estates.

As outlined by Woerner, a few states prescribe a procedure for the administration of insolvent estates different from that applicable to ordinary cases. This special procedure varies from state to state 89 but, broadly speaking, it is insolvency legislation adapted to the case of the estate of a deceased person. Insolvency legislation in force when these statutes were passed apparently furnished the pattern for the procedure. 90

Woerner saw no need for a separate procedure. He wrote in 1889, at a time when no national bankruptcy law was in force, and this was carried over in the later editions: "The functions of the executor or administrator seem to be fully adequate in either case, since they possess all the powers of assignees, or receivers of insolvent debtors; and the powers of Probate courts are peculiarly adapted to secure the rights of creditors with full protection to executors and administrators." 91 It is difficult to agree with this view on principle even if the status of present-day bankruptcy law is not considered. The law of administration of estates has evolved for the purposes of estates where the assets are not absorbed by the debts and something goes to the beneficiaries. Insolvent

89 Id. at 1339.
91 2 WOERNER, THE AMERICAN LAW OF ADMINISTRATION 852 (1889); 2 id. 1338 (3d ed. 1923).
estates law has had its own evolution which has resulted in a highly developed technique to deal with the problems typical for insolvent estates. In insolvency proceedings, choice of the trustee by the creditors is an important factor. The executor designated by the debtor or the close relative of the debtor appointed as administrator is certainly not as logical a choice for liquidating an insolvent estate. The point could be carried further by discussing other important features of insolvency procedure and by considering the status of immovable property in estates' law. The same procedure is not likely to be adequate for two different situations. Each situation asks for a proceeding adapted to its special needs.

Whatever the answer to the question of a distinct procedure, does the law in the states provide all the powers necessary to secure the rights of the creditors if the present-day bankruptcy law is taken as a test? To start with fraudulent conveyances, executors and administrators hold in many states the powers needed but they do not have them everywhere. The drafters of the Model Probate Code published in 1946 have found it advisable to include a special provision to that effect because of existing uncertainty and consequent litigation.

As for preferences, the late Professor Glenn wrote in 1940 in his work, *Fraudulent Conveyances and Preferences*: "A serious defect in our system, so far as preferences are concerned, appears with the estate of decedents." Hardly anywhere does state law provide that preferences may be set aside in the case of decedents' estates. In Massachusetts, a law was passed in 1922 which embodied in the law on insolvent decedents' estates contents of the section on preferences in the National Bankruptcy Act. Massachusetts has not incorporated the contents of present section 67(a) of the Bankruptcy Act under which

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93 Section 125 of the Model Probate Code, contained in BASYE AND SIMES, PROBLEMS IN PROBATE LAW 134 (1946).
94 Model Probate Code §125, Comment.
97 Bankruptcy Act of 1898, as amended, §60(a), 32 Stat. L. 799 (1903), §60(b), 36 Stat. L. 842 (1910) (preference within four months voidable if person benefited thereby had reasonable cause to believe that the enforcement of judgment or transfer would effect a preference). 2 COLLIER, BANKRUPTCY, 13th ed., 1239 (1923).
liens obtained by attachment, judgment, levy, or other legal or equitable process within four months before the filing of a petition in bankruptcy are deemed null and void if at the time when the lien was obtained the debtor was insolvent, irrespective of whether the lienholder had cause to believe that the debtor was insolvent. The example set by Massachusetts in 1922 does not seem to have been followed elsewhere. If the national legislation is taken as an expression of what is now held proper legislation on insolvent estates, Glenn's statement certainly cannot be contradicted.

Priorities of debts is another subject where state law has not always followed general developments. In some states, certain priorities at common law, like the priority of judgment debts and the one for debts by specialty, are still applicable to the liquidation of insolvent decedents' estates. A statute of Georgia recognizes the priority in favor of debts by specialty. Quite a number of states have kept judgments as a class entitled to priority. The priority for judgments is found also in the District of Columbia. Bankruptcy legislation has never granted priority to these debts.

The Model Probate Code has not carried over the priority at common law for judgments and debts by specialty; nor is the priority of debts due and payable over debts not due recognized. Under the code, section 142, the order of payment in the case of insufficient assets to pay all claims and allowances in full is (1) costs and expenses of administration, (2) reasonable funeral expenses, (3) allowance made to the surviving spouse and children of the decedent, (4) all debts and taxes having preference under the laws of the United States, (5) reasonable and necessary medical expenses of the last illness of the dece-


100 The four months rule against attachments is also in the Uniform Insurers Liquidation Act, §9, [9 U.L.A. 417, 423 (1942)].


103 D.C. Code §18-520 (1940).


dent, including compensation of persons attending him, (6) all debts and taxes having preference under the laws of the state, (7) all other claims allowed. The principle of pro rata payment is stated in a provision to the effect that no preference shall be given in the payment of any claim over any other claim of the same class. The code does not provide for the voidance of preferences. The procedure for solvent and insolvent estates is fundamentally the same. The primary concern of the drafters of the code was, it would seem, a model procedure for solvent estates.106

A detailed comparison of the laws on insolvent decedents' estates in the states and of these laws with the national bankruptcy law should yield valuable information on efficacy, duration, costs, and other elements of importance to judge the merits of the respective procedures. Such information would provide an incentive to improve the status of the law wherever necessary. A Model Code for Insolvent Decedents' Estates could be drafted on the basis of the study.

II

The frequency of conflicts of jurisdictions and of laws under a federal system where the jurisdiction over insolvent decedents' estates is in the hands of the states makes a discussion of the conflicts problems advisable in any consideration of the American law on insolvent decedents' estates. The discussion will be limited here to some questions which arise in connection with proof of claims. References to foreign conflicts rules are included for the purposes of comparison.

In connection with conflicts on the international level, a word may be said about consular treaties with provisions on decedents' estates. Some of these treaties not only permit consuls to intervene in local proceedings involving the estate of a deceased national but allow them to take direct charge of the personal property of the deceased. When the local assets are insufficient to pay all debts, such treaties provide especially that the creditors may request the local authorities to open bankruptcy proceedings and this terminates the consul's powers.107

106 Model Probate Code §148, "Payment of Claims," provides: "If it appears at any time that the estate is or may be insolvent, that there are insufficient funds at hand, or that there is other good and sufficient cause, the personal representative may report that fact to the court and apply for any order that he deems necessary in connection therewith." That is how far the Code goes in this respect.

Civil Law Countries

In the civil law countries, where the bankruptcy law has long been applied to insolvent decedents' estates, conflicts problems for insolvent decedents' estates are not treated separately from problems arising in bankruptcy. Whether assets of the insolvent estate are administered abroad in bankruptcy or under estates' law will make no difference from the conflicts viewpoint. Problems resulting from the insolvency will be treated as bankruptcy problems.

The bankruptcy treaties now in force between many civil law countries108 which provide for the administration of the whole estate at one place apply automatically to insolvent decedents' estates because of the extension of the bankruptcy law to estates of deceased persons.109 Separate treatment of debts of deceased persons is found only in the system of the Montevideo Treaties on Private International Law which also follow a different policy for bankruptcy. Several bankruptcy administrations are allowed and priority rights are given to creditors with claims payable in the country where the separate administration takes place.110 The Treaty on International Civil Law, the one dealing with decedents' estates,111 prescribes that the law of the location of the assets, movable or immovable, shall apply to questions of succession. It also provides that debts payable in one of the contracting states shall have priority in regard to property located in that state at the time of the death of the debtor. If that property is insufficient to pay such debts, the creditors shall recover the balance proportionally from the assets left in other places, and when the debts are payable at a place where no assets are left, the creditors shall demand payment proportionally from the assets left in other places, subject to the priority right of the creditors with debts payable at such places.112


109 The reservation in the Scandinavian Bankruptcy Convention of Nov. 7, 1933, Art. 11, 6 Hudson, International Legislation 496 (1937), has been removed by the Scandinavian Decedents’ Estates Convention of Nov. 19, 1934, §24, 6 id. at 947, Munch-Petersen, Skifterretten, 3d ed., 310, 328 (1949).
112 Sections 46 to 48.
The drafter of this unique system for the payment of debts owed by one and the same person thought that, in adopting the principle of "territoriality" for questions of succession, one had to make "territorial" also the liquidation of debts. Wrote he: "What the territorial interests ask for is that the claims located in one state shall affect with priority the assets located in that territory because the holders of these claims must have taken into account the assets and debts which the deceased had in the state. . . ."\(^{113}\) He also emphasized that the same priority system was prescribed for bankruptcy by the commercial codes of Uruguay—his country—and Argentina.

It may be recalled that, under the law of Argentina, Uruguay, and a number of other Latin American countries, the local creditors are paid with priority in the case of concurrent bankruptcies up to the full amount of their claims.\(^{114}\) The priority system has been under attack for a long time.\(^{115}\) Should it be abandoned for bankruptcy, its disappearance from the field of decedents' estates may also be expected.\(^{116}\)

The breaking up, for the payment of claims, of an insolvent estate according to the location of its assets with priority rights assigned to "local" claims is a feature in Latin American law which does not have its source in European law. In European law, the general principle has long been the admission without differentiation of all claims in the administration of an insolvent estate, regardless of whether another administration takes place abroad.\(^{117}\) Payments received by a creditor out of assets abroad are taken into account in the domestic distributions for equalization purposes. This is the prevailing rule, expressed in a statutory provision in the Netherlands\(^{118}\) and established by court decisions in France,\(^{119}\) Italy,\(^{120}\) and Switzerland.\(^{121}\)

\(^{113}\) Gonzalo Ramírez, Proyecto de Código de Derecho Internacional Privado y su Comentario 180 (1888) (our trans.).


\(^{116}\) The system was kept unchanged though in the revised Montevideo Treaty of 1940 on International Civil Law, 8 Hudson, International Legislation 514 (1949). Peru, one of the signatories of the treaty of 1889, signed the new treaty with reservations. See Bustamante i Rivero, El Tratado de Derecho Civil Internacional de 1940, p. 134 (1942). For criticism from Brazil, see Espinola, "O Tratado de Montevideo de 1940 e o parecer do professor Haroldo Valadão," 58 DIREITO 7 (Brazil 1949).


\(^{118}\) Bankruptcy Law of Sept. 30, 1893, art. 203, [1893] Staatsblad No. 140.

\(^{119}\) E.g., Appeal Paris, July 22, 1929, Banque Russo-Asiatique, 56 Journal du Droit International 1116 (France 1929), 25 Revue de Droit International Prive 119
England

In England, because of the separate treatment, only recently abandoned, of insolvent decedents' estates and insolvent estates of living persons, there have been conflicts decisions for each field. Decisions for bankruptcy are more numerous than for insolvent decedents' estates. The authors on conflict of laws still deal with the subjects separately.

*Re Kloebe*, a decedents' estates case, is the leading case for the principle of equal admission of foreign and domestic creditors in the administration of an insolvent estate which has assets also abroad. *Re Kloebe* was begun shortly before the enactment of the Bankruptcy Act of 1883 with its new decedents' estates section and decided shortly afterwards. The principle of *Re Kloebe* has been followed by the courts in Ontario and other common law jurisdictions of the British Commonwealth.

For bankruptcy, it was well established long before *Re Kloebe* that a creditor who has received payments outside England and wants to participate in the distributions in the English bankruptcy proceeding must wait until the other creditors have received as much as he obtained abroad. This rule implies the right of all creditors to prove in the proceeding.

The principle of equalization when payments were received abroad, called in England the hodge podge rule, has been derived from the equity principle that "he who asks for equity must do equity." Its application in the English courts goes back to at least 1762 as is now known from the opinion of Lord Mansfield in *Rickards v. Hudson* which has been recently uncovered. In *Rickards v. Hudson*, an ap-
peal to the Privy Council from Virginia, the validity of an attachment in Virginia made after bankruptcy adjudication of the debtor in England was the issue. Lord Mansfield is reported to have said:

"... in case of effects being abroad, if before they are got in by the assignees, a creditor residing there gets the start either by attaching the effects or by some other method allowed by the law of the country, that can't be helped; but such creditor would not be permitted to receive anything further here until the other creditors had received as much as such creditor had done out of the foreign effects. ... And this, he said he had known done." 128

Rickards v. Hudson and Cleeve v. Miller, a similar case decided in 1764, of which we now have the opinion, 129 show that the later American decisions were in line with precedent in upholding as they did attachments made after a bankruptcy decision abroad. 130 It is not likely that Solomons v. Ross, 131 decided in 1766, was meant to contradict the two Privy Council decisions. In that case, reported in different ways, 132 an Amsterdam trustee in bankruptcy was allowed to obtain assets against which foreign attachment proceedings had been begun.

It is not clear to what extent English courts will follow the principle, expressed in the Restatement of the American law of conflict of laws, that in the payment of creditors of an insolvent estate the court in each state will, as far as possible, secure pro rata payment of all claims. 133 In In re Lorillard, 134 a chancery case decided in 1922, the deceased who had his domicil in New York and whose beneficiaries were in England, left creditors and assets in New York and in England. The estate was insolvent as a whole. A judgment claim for a substantial amount was good in New York but barred in England by the statute of limitations. The English assets more than covered the local debts which were paid. The New York administrator asked for the surplus to pay the debts allowed in New York. The English court directed the surplus to be handed over to the beneficiaries and not to the New York administrator.

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128 Id. at 491, n. 99.
129 Id. at 492.
133 Conflict of Laws Restatement §501 (1934). The principle was not in the first draft; see Goodrich, "Yielding Place to New: Rest Versus Motion in the Conflict of Laws," 50 Col. L. Rev. 881 at 884 (1950).
on behalf of the creditors. The court of appeal confirmed, holding that it was a matter of discretion whether to remit the surplus to the New York administrator and that there would be no justification for interfering with the discretion as exercised.

The late A. Berriedale Keith, editor of the fourth and fifth editions of Dicey, discussed the decision critically in an elaborate note in the Appendix. This note was not included in the recently published sixth edition, nor is any reference found therein to Professor Keith’s views or the criticisms expressed in this country and elsewhere. The decision seems to call for comment if only because of the reasoning given by the court of appeal in support of the decision. It has been held in England as well as here that it is a matter of discretion whether to turn over local assets to a foreign administrator or to proceed locally with the distribution of the assets under the applicable law. But does a court remain within the realm of “discretion” when the decision affects the result as in the instant case? The real issue was recognition or non-recognition of the estate as a whole for the payment of debts. Only “comity” may ask for the treatment of a decedent’s estate as a “unitary matter.” Has it not been the practice of the courts to justify non-exercise of comity? The opinion in In re Lorillard leaves basic questions unanswered and it remains to be seen whether the courts will adopt the same policy in a similar case involving the estate of a living debtor adjudged bankrupt abroad.

136 Id. The case is discussed at 811 (6th ed. 1949).
137 3 BEALE, CONFLICT OF LAWS §523.1 (called an abuse of discretion); Note, 36 HARV. L. REV. 608 at 617 (1922). Cf. CONFLICT OF LAWS RESTATEMENT §523 (1934).
138 Sanford v. Thompson, 18 Ga. 554 (1855) is an American decision with the same factual situation as in In re Lorillard except that the beneficiaries did not reside in Georgia but in Alabama, place of the domiciliary administration. The Georgia court ordered transfer of the assets to Alabama for administration there under the laws of Alabama.
139 DEPITRE, ESSAI SUR LE SYSTEME ANGLAIS DE CONFLITS DE LOIS EN MATIERE DE SUCCESSION 42 (1936).
140 Expression used by Judge Goodrich in “Yielding Place to New: Rest Versus Motion in the Conflict of Laws,” 50 COL. L. REV. 881 at 885 (1950).
141 The English courts have applied “comity” to a very large degree in the field of bankruptcy. See DICHEY, CONFLICT OF LAWS, 6th ed., by Lipstein, 440 (1949); GRAVESON, CONFLICT OF LAWS 358 (1948); SCHMIDTROFF, ENGLISH CONFLICT OF LAWS, 3d ed., 259 (1948). The title of foreign assignees, in whom the property of the bankrupt is vested by the law of the country, in which he is domiciled, would be recognized in the English courts. The effect of a foreign bankruptcy upon an attachment in England must depend on the stage of the proceedings, when the bankruptcy takes place, and the steps, which the assignees take, to defeat the attachment.” Opinion dated Temple, Dec. 25, 1837 of the Attorney General (J. Campbell, afterwards Lord Campbell) filed in Stansfield v. Horsfall’s Assignees decided by the Supreme Court Lübeck, sitting in Hamburg cases, July 21, 1841,
United States

In a discussion of the conflicts law in the United States on allowance of claims in the case of insolvent decedents' estates, various sources of law must be considered: case law and statutory provisions in the states, the National Bankruptcy Act, and the Federal Constitution. For case law, the statement of rules on insolvent decedents' estates in the Restatement of the law of conflict of laws furnishes a good starting point for the discussion. These rules in the Restatement appear in the part "Decedents' Estates" of the chapter "Administration of Estates." The chapter has no part on "Bankruptcy" but has one on "Receivership" where the same rules on proof and allowance of claims are stated again. It might have been feasible and practical to state the rules once in a part entitled "Insolvent Estates" for all types of such estates.

The main rules in the Restatement on proof and payment of claims are

Section 497. "All creditors of a decedent who have proved their claims in a competent court in which there are administration proceedings of the estate of that decedent are entitled to share pro rata in any application of the assets of the local administrator to the payment of claims irrespective of the source of such assets or of the residence, place of business, domicile or citizenship of the creditors, except (a) where there are valid claims against specific funds, or (b) where there are valid preferences given by local statute to creditors of a particular class."

Section 501. "In the payment of creditors of an insolvent estate, the court in each state will, as far as possible, secure pro rata payment of all claims."

The sections which immediately follow, 502 and 503, give methods to accomplish the result suggested in section 501. Section 503 repeats the principle stated in section 501, adding that the assets shall be "marshalled" to secure to all creditors a pro rata of their claims. An illustration which is added shows what is meant here by marshalling.
the illustration, the estate, in process of administration in three states, is taken as a whole to determine what percentage of the claims the total assets will pay. Distribution is then made by each administration of its assets to those who have proved in the state up to the percentage which can be paid to all creditors out of the total assets. If a surplus remains, it is turned over to an administration where the assets are insufficient to distribute the total percentage.

Such a marshalling presupposes cooperation of the several administrations. The percentage available for all claims out of the total of the assets cannot be determined without exchange of information. Agreement must be reached on the percentage and it must be certain also that the distributions will be made in the several administrations accordingly. The needed cooperation is not always obtainable. The Restatement acknowledges the fact that limitations exist with respect to the applicability of the suggested method by stating that the assets shall be marshalled "as far as possible."

In the illustration to section 503 no claim was proved in more than one state. Section 502 covers situations where creditors have proved several times and have received a dividend in one administration.

Section 502. "If the entire estate is insolvent, the court in each state in paying claimants who have proved their claims therein will pay only such proportion of each claim as, added to what the claimant has theretofore received in other states, will put him on an equality with the other creditors paid in the local court."

The Comment explains under the heading "Marshalling Dividends" that, "if a certain dividend is declared in a court upon claims proved therein, the amount received by each claimant in other states will be deducted from any payment that he would receive in the distribution."146 "This results," the Comment proceeds, "in such marshalling of the assets that no claimant paid in that court can receive as a result of its payment a larger proportion of his claim than other creditors have received from that court." It is the principle of equalization or hodge podge rule.

The principle of equalization can be applied whether the several administrations cooperate or not. The individual creditor who proves


his claim can be made to state what he has received elsewhere. For
the creditors proof in all administrations is often the only way in which
they can be sure of obtaining their full share in all the assets. The
possibility of a shortcut by proving only locally depends upon the im­
portance of the local assets, the amount of claims proved locally, and
the local law on the question how the local assets shall be used. In some
states the local creditors receive their pro rata with preference.

The law is not uniform on the question whether the local assets
may be used to pay the pro rata available out of the total of the assets
with priority to local creditors. The Restatement has no rule to that
effect and in the majority of the states such priority is not granted.
Statutory provisions in some states prescribe the priority payment.

One of the early conflicts decisions involving local assets of an in­
solvent nonresident was the Massachusetts case, Dawes v. Head,147
decided in 1825. The domiciliary administration was in Calcutta.
The court ordered preferential payment of the pro rata to the local cred­
itors. In the words of Chief Justice Parker it was a way “to avoid, on
the one hand, the injustice of taking the whole funds for the use of our
citizens . . . , and on the other, the equal injustice and greater incon­
venience of compelling our own citizens to seek satisfaction of their
debts in distant countries.”148

The ruling found its way into the statute books of Massachusetts.149
Since 1836 the statute provides:

(1) “If . . . [a nonresident] dies insolvent, his estate found in
the commonwealth shall, as far as practicable, be so disposed of
that all his creditors here and elsewhere may receive equal propor­
tions of their respective debts . . . .”

(2) “The estate shall not be transmitted to the foreign execu­
tor or administrator until all the creditors who are citizens of this
commonwealth have received the proportion which would be due
to them if the whole estate of the deceased, wherever found, which
is applicable to the payment of common creditors, were divided . . .
in proportion to their respective debts . . . .”

147 3 Pick. 127 (20 Mass. 1825). In addition to Massachusetts creditors, creditors from
New York, New Hampshire, and England asked for allowance of their claims.

148 Id. at 147. Cf., however, at 143: “Thus this action is determined without touching
the questions upon which it was supposed it would turn, which are of a novel and delicate
nature, and though often glanced at, do not appear to have been decided either in this or
any other State of the Union. We wish to avoid anything which may be construed into a
conclusive adjudication, and yet are of opinion that it will be useful to throw out for con­
ideration the results of our reasonings upon this subject.”

(3) "And no creditor not a citizen of this commonwealth shall be paid out of the assets found here until all those who are such citizens have received the proportion provided in the preceding section...."

(4) "If there is a residue after such payment to the citizens of this commonwealth, it may be paid to any other creditors who have duly proved their debts here, in proportion to the amount due to each of them, but no one shall receive more than would be due to him if the whole estate were divided ratably among all the creditors as before provided. The remainder may be transmitted to the foreign executor or administrator...." 150

Maine, 151 Rhode Island, 152 Missouri, 153 and North Dakota 154 have the same statutory provision as Massachusetts. In Michigan where no such legislation is in force, the highest court ordered in a recent case that the pro rata be paid with priority to the resident creditors.

In the case, In re Estate of Brauns, 155 the domiciliary administration was pending in the state of Washington and an ancillary administration took place in Michigan. The estate as a whole was insolvent. The Michigan court of first instance held that creditors from Washington and Wisconsin were entitled to present their claims for allowance in the Michigan administration; it reserved the question of the right of the nonresident claimants to participate pro rata or otherwise with any other creditors whose claims were allowed in Michigan. A Michigan creditor and the Michigan ancillary administrator appealed. The appellees argued that they had a right to participate pro rata in the Michigan assets and that "in any event the Michigan creditors should not be paid a larger percentage of their claims than is paid to all other creditors of the same class; and if necessary to accomplish this result, any funds in excess of the amount necessary to make pro rata payment to Michigan creditors... should be accounted for to the domiciliary estate." The Supreme Court of Michigan upheld the decision, declaring that it would be unconstitutional, in view of Blake v. McClung, not to allow the nonresidents to present their claims for allowance in the

154 N.D. Rev. Code (1943) §§30-2134 to 30-2136.
ancillary administration proceedings in the state. It ruled that the local creditors should be paid their pro rata "to the full extent that other creditors will be paid out of the estate . . . before nonresident creditors are permitted to participate in Michigan assets."

In *Blake v. McClung*, 156 decided in 1898, the Supreme Court of the United States declared a Tennessee statute of 1877 on foreign corporations unconstitutional insofar as it preferred the claims of resident creditors to those of natural persons who are citizens of other states of the Union. The statute involved, still on the statute book, 158 provides: "... creditors . . . who may be residents of this state shall have a priority in the distribution of assets, or subjection of the same, or any part thereof, to the payment of debts over all simple contract creditors, being residents of any other country or countries . . ." 159 The opinion expounded that "creditors who are citizens of other States are entitled, under the Constitution of the United States, to stand upon the same plane with creditors of like class who are citizens of such State, and cannot be denied equality of right simply because they do not reside in that State, but are citizens residing in other States of the Union."

One may wonder whether a priority as prescribed by the Massachusetts statute for citizens of the commonwealth with respect to the payment of the pro rata is in accordance with the clause of the Constitution applied in *Blake v. McClung* which provides that "the citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." 161 The clause would no doubt be violated if, as a consequence of the preferential payment of the pro rata, a citizen of another state did not, finally, receive his equal share in the local assets. Differential treatment may appear to some in violation of the Privileges and Immunities clause even if the share in the local assets is received through the medium of another administration. 162 From the practical

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156 172 U.S. 239, 19 S.Ct. 165 (1898), on further appeal, 176 U.S. 59, 20 S.Ct. 307 (1900).
157 Tenn. Laws 1877, c. 31, §5.
159 In Morgan Bros. v. Dayton Coal & Iron Co., 134 Tenn. 228 at 282, 183 S.W. 1019 (1915), the Bank of Montreal, one of the creditors, invoked without success against the discriminatory rule the Hay-Pauncefote Treaty between this country and Great Britain of March 2, 1899, relating to the Tenure and Disposition of Real and Personal Property, 31 Stat. L. 1939.
160 172 U.S. 239 at 258, 19 S.Ct. 165 (1898).
162 It is interesting that the drafters themselves had hesitated to recommend the differentiation. "There is no principle of comity that requires us to let in creditors from any other country, when the citizens of this Commonwealth will thereby be deprived of their just proportion. If it should be thought that this restriction ought to be confined to foreign-
viewpoint, the local administration is often unable to find out exactly to what dividend the local creditors are entitled out of the whole estate. In such cases the provision of the statute will be difficult to apply.

The merits of a provision which prescribes preferential payment of the pro rata to the resident creditors in all circumstances may be questioned regardless of the question of feasibility and of constitutionality. The highest court of Massachusetts has declined to follow the rule in a receivership case, *Buswell v. Order of the Iron Hall.* From the viewpoint of protection, the strict rule is not necessary. The creditors have the protection of the Federal Constitution against discrimination when distributions take place within the United States. With regard to assets abroad, the principle of equalization protects local creditors against the possibility of other creditors using the local assets to obtain more than their equal share in the whole estate—and that is all that can be achieved locally from the viewpoint of protection. The inconvenience of multiple proof is obvious. Multiple proof is however the logical and legal consequence of independent administrations and the argument of inconvenience made in *Dawes v. Head,* where the other administration was in Calcutta, cannot be used with the same force generally, especially not in cases where the other administration takes place within the United States. The inconvenience involved may not be such as to justify differential treatment. A rule which leaves no leeway to the courts is inadvisable particularly in the difficult conflicts field.

If a priority were to be established at all for the pro rata payment, more equitable classifications than merely "residence" could be thought of.

ers, and that citizens of all the United States ought in this case stand on the same footing with the citizens of this state, it will be necessary only to strike out the 'state,' in the two places where the word occurs in this section, and to insert 'the United States.'” Note to Section 25, II Report of the Commissioners appointed to revise the General Statutes of the Commonwealth 74 (1834).


165 Distinctions, e.g., between international and interstate conflicts situations have been always made when appropriate in the matter of "comity." See, for interprovincial conflicts in France before adoption of the Code Napoleon, Delaume, Les Conflits de Lois a la Veille du Code Civil 9 (1947).

166 Cf. the New York law on the liquidation of assets of foreign corporations which have ceased to do business or have been dissolved, liquidated, or nationalized, N.Y. Civ. Prac. Act, §977-b, subd. 16(c), which gives priority to claims which accrued or arose in favor of persons residing and corporations organized in the United States or in a state there-
Kentucky has a provision in its statute which differs in various respects from what is prescribed by the Massachusetts type statute:

"If a non-resident decedent's estate found in this state is insufficient to pay the creditors here, it shall be disposed of without preference, pro rata, among the creditors here and such of those elsewhere as prove and demand their debts here within two years after the appointment of a personal representative here. There shall be deducted from foreign debts the amount received, or which can be received, by the foreign creditors from assets of the estate not in this state, and if the foreign assets and estate are sufficient to pay all the foreign debts, then no part of them shall be allowed or paid here."

Under this rule, enacted in 1897, no priority is granted generally to the resident creditors but they are given preferential treatment under special circumstances. First, foreign debts will not share in the local assets when the foreign assets are sufficient to pay all foreign debts. In such a case foreign creditors will not want to share in the insufficient local assets. But how will it be proved, and by whom, that the foreign assets are sufficient to pay all foreign debts? Secondly, it is said that there shall be deducted from foreign debts the amount received, or which can be received, by the foreign creditors from assets outside the state. Shall no deduction be made from local debts of amounts received from outside assets? The equality among the local creditors would not be maintained. And for the foreign creditors, how will it be determined what they "can" receive from assets not in the state? Thirdly, it seems that the local creditors are to be paid in full, notwithstanding the insolvency of the estate as a whole, if the local assets are sufficient to pay all of them. Citizens of another state of the Union would be able to attack the refusal of their equal share under the ruling of Blake v. McClung. 169

of, and for claims based on causes of action which accrued or arose in the state of New York.

168 Act of 1891, c. 156, §64.
169 Cf. Duehay v. Acacia Mut. L. Ins. Co., 70 App. D.C. 245, 105 F. (2d) 768 (1939) respecting D.C. Code (1929) §29-191 now (1940) §18-501: "On the death of any person not domiciled in the District of Columbia at the time of his death so much of his real and personal estate in the District of Columbia as may be necessary for the payment and discharge of just claims against him of creditors and persons domiciled in the District of Columbia shall also be the subject of administration. . . ." In order to uphold its constitutionality, the Court of Appeals gave the last part the reading: " . . . creditors, 'wherever domiciled, and other' persons domiciled in the District of Columbia shall also be the subject of administration. . . ." [at 777].
The federal law has sought to cover the situation within its jurisdiction by a provision in the National Bankruptcy Act. Section 65(d) of the act deals with the problem of equalization arising when concurrent bankruptcies take place here and abroad.

"Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such courts shall be paid any amounts." 170

The principle involved is the one stated in Lord Mansfield's dictum in Rickards v. Hudson but it has been given limitations in the application. According to the text, only resident creditors shall be prepaid a dividend equal to that received by other creditors out of a foreign estate. Assuming two bankruptcies, one here and one in South America, if an American in Paris or a creditor in Canada has proved his claim here, and only here, why should these creditors not also receive first a dividend equal to the one paid in South America to other creditors before these other creditors may participate in the distributions? The distinction made has no basis in law or equity. 171

The text does not take into account that creditors residing within the United States may be among those who received a dividend abroad. In the absence of a text, the principle of equalization would no doubt be applied in order to maintain equality. Does the language of the text preclude application of the principle? The drafters seems to have thought only of situations where the creditors here do not prove abroad but circumstances make such proof often necessary.

The Bankruptcy Acts of 1800, 1841, and 1867 had no provision on equalization; neither had, nor have, the English acts. The idea to include one may have come from the Lowell draft of a Bankruptcy Act, introduced in Congress in 1882, which provided:

The estate of such bankrupt within the United States shall be so divided, as far as practicable, that all creditors, here and elsewhere, shall receive proportional shares of the whole assets here and elsewhere; and, especially, that creditors who are citizens of the United States, and who have not proved their debts abroad,


171 The National Bankruptcy Conference has, at its meeting in New York on February 23, 1951, adopted a resolution in favor of the removal of the limitation.
shall receive such proportionate share. When this object has been attained, or secured, the judge may order the residue of the assets to be transmitted to the assignees or other persons entitled thereto under the foreign proceedings, or to be divided here as may seem best.¹⁷²

The aim of this draft was protection of all creditors against unequal treatment as a result of distributions abroad. No differentiation between resident and nonresident creditors was intended. Judge Lowell, whom Professor Williston once called the "ablest and clearest judge in bankruptcy matters who ever sat upon the bench in this country,"¹⁷³ had closely followed the provisions in the Massachusetts law on insolvent decedents' estates but dropped the rule which prescribes preferential payment of the pro rata to Massachusetts creditors.

Section 65(d) of the National Bankruptcy Act has been left untouched in the many revisions of the act. A re-examination of the text is needed. A provision which can serve as a model will help in the efforts on international level now made to obtain removal of all remaining discriminatory rules in bankruptcy legislation.¹⁷⁴

The latest effort to write a rule on marshalling of assets is one by the National Conference of Commissioners on Uniform State Laws. The Uniform Ancillary Administration of Estates Act, adopted in 1947¹⁷⁵ and promulgated in 1949¹⁷⁶ after protracted discussions with the American Bar Association,¹⁷⁷ has the following provision on payment of claims in case of insolvency:

Section 11. (Payment of Claims in Case of Insolvency.)

(1) Equality subject to preferences and security. If the estate either in this state or as a whole is insolvent, it shall be disposed of so that, as far as possible, each creditor whose claim has been

¹⁷³ See Williston, Book Review, 13 Harv. L. Rev. 310 (1899).
allowed, either in this state or elsewhere, shall receive an equal proportion of his claim subject to preferences and priorities and to any security which a creditor has as to particular assets. If a preference or priority is allowed in another jurisdiction but not in this state, the creditors so benefited shall receive dividends from local assets only upon the balance of his claim after deducting the amount of such benefit. The validity and effect of any security held in this state shall be determined by the law of this state but a secured creditor who has not released or surrendered his security shall be entitled only to a proportion computed upon the balance due after the value of all security not exempt from the claims of unsecured creditors is determined and credited upon the claim secured by it.

(2) **Procedure.** In case of insolvency and if local assets permit, each claim allowed in this state shall be paid its proportion, and any balance of assets shall be disposed of in accordance with section 12 [transfer of residue to domiciliary representative]. If local assets are not sufficient to pay all claims allowed in this state the full amount to which they are entitled under this section, local assets shall be marshalled so that each claim allowed in this state shall be paid its proportion as far as possible, after taking into account all dividends on claims allowed in this state from assets in other jurisdictions.

Commissioners' Note: The last sentence refers to the situation where a claim is allowed in two or more jurisdictions.¹⁷⁸

The Uniform Act does not follow the example of the Restatement where the two principles, marshalling (sections 501 and 503) and equalization (section 502), are stated separately. The act deals only with marshalling. The principle as stated in section 11 will take care of situations where the assets are in states which adopt the Uniform Act. Under the act, the administrations will be obliged to cooperate to reach the result prescribed at the beginning of section 11.

With respect to assets elsewhere, if the foreign administration does not cooperate, the common law principle of equalization will have to be relied upon. If stated independently as in the Restatement, the equalization rule would have taken care of the situation dealt with especially in the first paragraph of section 11 where a creditor has been paid elsewhere with a priority not recognized under the local law. Priorities are of course governed in each administration by its own law.¹⁷⁹

¹⁷⁸ [1949] HANDBOOK 330 at 337.
¹⁷⁹ CONFLICT OF LAWS RESTATEMENT §497 (1934); GOODRICH, CONFLICT OF LAWS, 3d ed., 572 (1949). An earlier draft of the Uniform Act had provided that priorities should be governed by the domiciliary law: [1946] HANDBOOK 179.
prescribes equalization by deducting "the amount" of the benefit obtained in the other jurisdiction. It would seem that not the "amount" but the percentage of the claim so obtained has to be taken into account. This has been done in the receivership case, Carpenter v. Ludlum, where the court deducted from the claim of a Tennessee creditor the percentage the creditor had received with priority in the Tennessee receivership as a local creditor under the Tennessee statute known from Blake v. McClung.

III

Almost fifty years ago the American Bar Association authorized and directed its Committee on Commercial Law to advocate and urge proper legislation by Congress on the lines recommended in a report which stated inter alia that the bankruptcy law came short of accomplishing the full measure of equality and equity between the citizens of the different states intended by the Constitution-makers in that it did not provide for the administration in the bankruptcy court of the insolvent estate of a deceased person. “Some one has wittily, but truly said,” the report related, “that all an insolvent debtor had to do to beat the Bankrupt Law was to die before an adjudication in bankruptcy could be made against him.” “It is difficult to see,” the report continued, “... why an attachment, for instance, against a sick man who dies should be better than one against a well man who lives, or why a preferential deed given by a man on his death bed should stand when the same deed, if he lived, would be set aside.” Amendments to the Bankruptcy Act were passed in the year that followed but on other matters. In reporting to the association on the amendments passed, the committee said: “We do not think it wise affirmatively to agitate for further amendments at present. The amendments already adopted go far toward perfecting the law, and the further amendments recommended will come naturally in good time as the country sees the necessity for them.”

What the committee had foremost in mind at the turn of the century with respect to decedents' estates were the inadequacies of the law

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182 Id. at 408, 413 (Walter S. Logan, New York, was chairman of the Committee).
183 Id. at 413.
184 Id. at 415.
185 26 A.B.A. REP. 429 at 431. Attempts had been made in Congress to obtain repeal of the whole Bankruptcy Act.
in the states as compared with the new bankruptcy law. What came increasingly to the fore with the years were the difficulties resulting from multiple administrations. In one field of administration of estates, receiverships, the situation became so serious during the depression years that Congress had to act. Corporate reorganizations were made possible on a national basis. The step seemed revolutionary at first but the change was quickly accepted. Insolvent decedents' estates were touched, too, but only in connection with compositions and extensions.

A further, lasting, step remains to be taken for insolvent estates of deceased persons in the interest of good administration of justice. Creditors should not be subjected to expense, delay, and complications which are avoidable.

The committee on a "Uniform Ancillary Administration of Estates Act" of the National Conference of Commissioners on Uniform State Laws stated in one of its reports: "Experience has brought home to every practitioner these problems [of multiple administrations] which are not only difficult of solution but frequently work out as destructive of fair play and justice. Therefore, little space or time need be occupied in establishing the desirability of a Uniform Act, even though such an Act relieved against only a portion of the conflicts and confusion that now attend ancillary administrations." The Uniform Act will not improve to a substantial degree conditions in the case of insolvent estates. Multiple proof and all the problems of marshalling, for example, remain. Neither will the Uniform Powers of Foreign Representatives Act substantially reduce the number of multiple administrations for insolvent estates.

In the case of such estates requests for the opening of local administrations are always likely. Even if multiple administrations became rarer as a result of these two acts, the status of the law on insolvent estates in various states would continue to raise grave questions. Country-wide revision of the insolvent decedents' estates' law will take a long time. An extension of the national bankruptcy legislation to estates of deceased persons can solve all problems at the same time.

In discussing probate legislation, the desirability of uniformity, and the need for a single administration, one of the foremost experts in the field said recently: "What we should aim at as an ultimate goal is a

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186 On the history of former section 77B and present chapter X of the National Bankruptcy Act, see Finleitter, The Law of Bankruptcy Reorganization 19 (1939).


188 [1944] Handbook 325; Model Probate Code, §§256 to 260, in BAYE AND SIMES, Problems in Probate Law (1946). The act provides means for dispensing with ancillary administration if no application is made therefor.
single administration proceeding for the estate of each decedent, which will be effective in all states. . . . There is no more reason, on principle, why there should be an administration of a decedent's estate in every state in which he has property than that there should be an administration of an estate in a bankruptcy in every state where the bankrupt has property. 189 Alone because of the problems of marshalling, the bankruptcy devotees may argue that the need for a single administration is greater for all insolvent estates. 190 In view of the fact that Congress has power to pass uniform laws on bankruptcy, at least the problems of insolvent decedents' estates can be solved by the use of the bankruptcy power. The application of the bankruptcy legislation to decedents' estates will relieve the field of administration of decedents' estates of problems which for it are a burdensome appendage. The problems will become part of the field to which they belong.

An extension of the bankruptcy legislation to estates of deceased persons requires adjustments in the law to meet the problems of a varied and special situation. In particular the conditions for an adjudication may have to be broadened. The procedure will have to take into account all aspects of probate law. The solution of the questions involved calls for a joint effort of the experts of bankruptcy and probate law.

190 Cf. 3 Story, Commentaries on the Constitution of the United States, 1st ed., §§1107, 1109 (1833).