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BANKRUPTCY COURTS' REFUSAL TO ASSUME JURISDICTION OVER INSOLVENT DECEDENTS' ESTATES: A REBUTTAL

*CHARLES ELIHU NADLER**

WHY have the courts of bankruptcy refused to assume jurisdiction over decedents' estates where the debtor at the time of his death was insolvent and left an estate whose assets, at a fair valuation, were insufficient in amount to pay his debts? That this judicial position is indefensible under established legal principles is the purpose of this inquiry, made with the objective of dispelling a misapprehension that seems to have found lodgment in the judicial mind. Nor does there seem to be any basic difference whether the bankruptcy proceedings be voluntary or involuntary.

The concern over this refusal to assume jurisdiction is as much academic as realistic. As once before noted:

"It is Hornbook law that the fundamental purpose of bankruptcy is the equitable and proportionate distribution of the property of the bankrupt among his creditors, and to accomplish this purpose the trustee is empowered to strike down preferences, recoup concealments and retrieve fraudulent transfers. A debtor whose estate is so chargeable may be subjected to bankruptcy, even after his death so long as the bankruptcy proceedings have been initiated a minute before he died,[1] yet had his death occurred a minute before the commencement of the bankruptcy proceedings, the court will refuse to assume jurisdiction."[2]

These two minutes difference in time certainly do not justify the tremendous disadvantage to which all the creditors are put[3] where, for example, one creditor had obtained a judicially acquired lien, through attachment, garnishment, or levy, against a living individual debtor who died within four months thereafter, and before the other creditors could institute bankruptcy proceedings and thereby obtain the benefits of equitable distribution, as provided by the Bankruptcy Act.[4] State laws do not accomplish such results. Even as to preferences,[5] priorities,[6] and

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1. 11 U.S.C.A. § 26 (Supp. 1956). See, e.g., In re Hicks, 107 Fed. 910 (D. Vt. 1901).

2. Nadler, The Law of Bankruptcy 97-98 (1948).

3. Compare In re Morgan, 15 F. Supp. 52 (E.D.N.Y. 1936) with In re Hicks, 107 Fed. 910 (D. Vt. 1901).

4. 11 U.S.C.A. § 107(a) (1953).

5. E.g., some state statutes impose upon creditors the extra burden of proving intent on the part of the debtor as well as upon the creditor receiving the alleged preference. See In re Tobin, 24 F. Supp. 825 (D. Minn. 1938).

6. E.g., some state statutes grant priority to judgments under seal.

fraudulent conveyances,[7] most state provisions are not nearly as beneficial to creditors as are sections 60 and 70 of the Bankruptcy Act.[8]

Greater becomes the concern over the practical effects of this rejection of jurisdiction when the decedent's estate was or has become insolvent during or as a result of the continued operation of the business of the deceased by his executor or administrator under probate court order or testamentary authorization. Obviously, the new creditors, along with the old, have their hands tied in any efforts that might benefit all creditors under the Bankruptcy Act.[9] The immunity for such insolvent debtors can only be justified on sound and certain legal grounds, which, it is submitted, do not exist.

A review of relevant and pertinent principles should first be predicated upon an examination of the available reported cases dealing with this subject. Fortunately for the limitation of space, but unfortunately for the infertility of content, careful research has discovered but five cases "directly" and seven "indirectly" (by way of dicta) involving this jurisdictional question.

In the earliest "direct" reported case, *Graves v. Winter*,[10] we have a factual situation similar to one mentioned before involving the continued operation of a decedent's estate.[11] "This is the first case," the court noted, "so far as I am aware, to which executors as such have been proceeded against under our bankrupt act, either the present or former, or who applied for its benefits."[12] As the only rationale for its conclusions, the court pointed out that the American Bankruptcy Act:

7. E.g., the statute of limitations in most jurisdictions may react more unfavorably for creditors.

8. 11 U.S.C.A. §§ 96, 110 (1953).

9. E.g., Graves v. Winter, 10 Fed. Cas. 999 No. 5710 (S.D. Miss. 1874).

10. Ibid. Note that the instant case is cited in two subsequent cases, neither of which involved a decedent's estate and where the reference is clearly dictum, i.e., In re Jacobson, 181 Fed. 870 (D. Mass. 1909) where the jurisdiction of the bankruptcy court was challenged as to an involuntary petition in bankruptcy that was filed to supersede an assignment made for the benefit of creditors, and Lyon Realty Co. v. Milburn Realty Co., 56 F.2d 187 (D. Md. 1932) where the jurisdictional question related to a dissolved corporation.

11. The only ground noticed ". . . is whether or not the defendants, under the powers conferred upon them, are subject to the bankrupt act." 10 Fed. Cas. at 1000. It appears that pursuant to a permissive peculiar Texas statute, the decedent, a private banker, made a codicil nominating the defendants his executors for the limited purpose of winding up his banking business and clothing them for that purpose with such powers as were necessary to carry on the business and to effect that object without injury to his estate (which he had devised to his wife) or to those dealing with him as banker. Seemingly in furtherance thereof the executors continued the banking business until the panic, when they suspended and did not resume the business, failing to pay their depositors and other liabilities as bankers. It was alleged that they made preferred payments to different individuals.

12. Id. at 1000.

". . . does not, in general, embrace trustees, such as executors, administrators and guardians, and others acting strictly in a fiduciary capacity . . . ."

but that:

"Under the English law there are instances in which executors who were directed by the will of the testator to carry on trade in partnership with others [and also under other specified limited circumstances] . . . but in all such cases the business was conducted, not for the purpose of winding up the business, but for the purpose of employing the capital for the acquisition of profits, and benefit of the beneficiaries under the will. . . ."

and *held* that:

"[T]his is not one of the class of executorships designed to be administered under the bankrupt act, and therefore feel constrained to sustain the motion, and dismiss the petition. . . ."[13]

In answer to the complaint of creditors that they had no other sufficient remedy, the court suggested that they file suit in the chancery court under a creditors' bill.

The next time that a bankruptcy court felt called upon to consider its jurisdictional status over decedents' estates was in the case of *Adams v. Terrell*,[14] which basically involved an involuntary petition filed against a partnership (but not against the individual members thereof) under the then applicable provisions of the Bankruptcy Act of 1867. Pointing out that "the plaintiffs are entitled to a finding and judgment in their favor, unless their title has been divested by the proceedings in bankruptcy,"[15] the court concluded that the bankruptcy court acquired no jurisdiction[16] "over the individual property of Jones" by this proceeding in bankruptcy, emphasizing that the adjudication was of the firm and not of the individual members thereof, and that title to partnership assets only, and not to the individual property of an unadjudicated partner,[17] automatically

13. Ibid.

14. 4 Fed. 796 (C.C.W.D. Tex. 1880). This was an action of trespass to try title, the plaintiffs as heirs of the deceased partner, Enoch Jones, and the defendant as the purchaser at a sale of the property in controversy (at all times the individual property of Enoch Jones) made by order of the bankruptcy court that had adjudicated the partnership (and only the partnership) of J. Ulrich & Co. The partnership originally consisted of Enoch Jones and Joseph Ulrich, and had been dissolved by mutual consent of the partners about five years prior to the filing of these involuntary bankruptcy proceedings. The business had been carried on by Jones himself as sole owner until his death a year or so after its dissolution.

15. Id. at 799.

16. Id. at 803.

17. 11 U.S.C.A. § 23(a) (1927). ". . . after its dissolution and before final settlement thereof. . . ." It must be noted that since the Act of 1867, the present act clearly permits the bankruptcy court to assume jurisdiction over both the partnership assets and the individual estates of the surviving partners, and the law seems well established that where an officer

passed to the trustee. In spite of this seemingly simple solution to a problem involving a trespass of title, the court felt called upon to discourse on its jurisdiction over the individual estate of a decedent. It was held, in dictum, that no such jurisdiction existed. The rationale of this discourse is open to serious doubt.

It was noted that there is no express provision in the Bankruptcy Act conferring such jurisdiction upon the courts. This is admitted. But does the absence of an *express* provision in a statute preclude any reasonably *implied prohibition* against such jurisdictional power, and, in the words of Mr. Justice Holmes, given in answer to the contention that under the act as then in effect there was no such express authorization: "If, as in the present case, the partnership and individual estates together are not enough to pay the partnership debts, the rational thing to do, and one certainly not forbidden by the act, is to administer both in bankruptcy."[18] Furthermore, the Bankruptcy Act is likewise silent as to infants and other persons of "abnormal status" and yet no court has attempted to read in any implications of law or lack of express authority because the act is silent as to such classes.[19]

Equally indefensible is the proposition of the court that the twofold purpose which the Bankruptcy Act has in view, (i.e. equitable distribution and discharge) ". . . does not require the application of the law to the estate of the deceased person. The laws of the states provide for an equitable and just distribution of the decedent's estate, and death has already discharged him of all personal liability."[20] Admittedly, all this is true when applied to a decedent's estate that is solvent. But where the decedent's estate is insolvent, most state jurisdictions do not have laws that result in the same just and equitable distribution of assets among creditors as is provided for in the Bankruptcy Act. As to the matter of discharge, while it is true that the individual decedent is discharged by his death, his property is certainly not discharged from all personal liability. That such a discharge, or the similar effect of a confirmed composition, may prove beneficial to the decedent's estate is beyond the realm of mere surmise.[21]

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of another tribunal has assumed possession and control of the partnership assets, he will be ordered to surrender them to the bankruptcy court. See In re Lumont, 9 F.2d 407 (D. Ind. 1925); In re Wells, 298 Fed. 109 (S.D. Ohio 1924); Hewitt v. Hayes, 204 Mass. 586, 90 N.E. 985 (1910).

18. Francis v. McNeal, 228 U.S. 695, 701 (1913).

19. See In re Eisenberg, 117 Fed. 786 (S.D.N.Y. 1902), where the court admitted that a "person" within the meaning of the Bankruptcy Act would seemingly include an insane person.

20. 4 Fed. at 801.

21. See, e.g., In re Agnew, 225 Fed. 650 (S.D.N.Y. 1915). Note also Professor MacLachlan's supposition: "Suppose a partner dies, the firm gets into difficulties, but the sur-

Finally, the fact that the Bankruptcy Act contains the nonabatement-in-case-of-death provision[22] does not necessarily exclude "the idea that such jurisdiction is conferred unless it is acquired during the life-time of the bankrupt."[23] Why, on the contrary, does not this provision expressly demonstrate that the procedures and provisions of the Bankruptcy Act are as available and operative for a decedent as for all other forms of bankrupt estates? Nor does it seem that this nonabatement provision would be inconsistent were there an express provision in the act encompassing decedents within the jurisdiction of the courts of bankruptcy.

The third "direct" reported case, *In re Fackelman*,[24] is one of the most frequently cited precedents for the proposition that, ". . . on the death of an insolvent, creditors cannot resort to proceedings in bankruptcy, but are under the necessity of submitting to the jurisdiction and judgment of the Probate Court."[25] It seems difficult to understand why

viving partners work out a Chapter XI arrangement with creditors. Since a discharge of a firm does not discharge the members (section 5j) and the estate is ineligible for bankruptcy, how can the interest of the deceased partner get the benefit of the arrangement?" MacLachlan, Bankruptcy 29, n. 4 (1956).

22. See 11 U.S.C.A. § 26 (Supp. 1956).

23. 4 Fed. at 801. As authority for this contention, the court claimed that the abatement proceeedings are analogous to actions at law for torts which abate on the death of the party. It is submitted that this is not the case. Note, however, that the court cited In re Hicks, supra note 1, at 911, which involved the construction of this nonabatement provision of the act and wherein the court pointed out that "involuntary proceedings in bankruptcy are not mere suits against the bankrupt for the collection of debts, but are broader, for the equal distribution of his property among his creditors."

24. 248 Fed. 565 (S.D. Cal. 1918). It appeared that a partner sold out his interest in said partnership to his copartner and a bill of sale evidencing the transaction was given. Notice of the sale was recorded and the bank account of the firm was changed to the copartner who assumed full control. A few weeks later the copartner died and his father was appointed administrator of his estate in probate proceedings and continued to carry on the business and administer the estate. In consequence, apparently, of certain steps taken in the probate proceedings whereby a family allowance was granted to the widow, etc., and because of nonpayment of certain partnership debts, an involuntary petition in bankruptcy was filed alleging that the surviving partner of the partnership had neglected to close up its affairs and that it was still unsettled. An adjudication as to the partnership and as to surviving partner individually was asked.

25. Tate v. Hoover, 345 Pa. 19, 36, 26 A.2d 665, 674 (1942). This was an action in equity by the trustee in bankruptcy of a partnership to set aside and cancel a conveyance of property owned individually by deceased, an alleged partner, and granted to the defendant during her lifetime, on the ground that the conveyance was fraudulent as to creditors. The involuntary petition in bankruptcy was against the partnership only. Although named in the bankruptcy petition as one of the copartners, there was no service of the petition and subpoena or any other process upon the deceased in the partnership proceedings and there were no bankruptcy proceedings instituted against her as an individual and no adjudication of bankruptcy against her was then or at any other time made. Pointing

this case has been singled out and so often quoted as a precedent when actually the problem therein involved had nothing to do with decedents' estates but rather pertained to an involuntary petition filed against a surviving partner individually. Since the court found that the partnership had been terminated long before the filing of the bankruptcy petition through the surviving partner's sale of his interest and that he was no longer a partner, nor, because of his moving into another state, subject to the jurisdiction of the court, there was nothing more than unrelated dictum, and certainly not of precedent value, for the court to have volunteered that:

". . . the only remedy of the creditors was to proceed . . . [against the partners] as individuals, or, perhaps, within the four months period provided by the Bankruptcy Act to have proceeded against the partnership setting up the transfer of Fackelman's [surviving partner] interest as being a fraud of their rights, etc. This they failed to do. Pomeroy, [deceased partner] who retained ownership and control of the business, died some weeks thereafter. After his decease, as to his estate, no proceedings in bankruptcy could be had, and the creditors labored under the necessity of submitting to the jurisdiction and judgments of the probate court."[26]

Furthermore, it seems hard to comprehend why, other than in the case of *In re Mulero's Estate*,[27] discussed below, the dictum of the instant case should be followed in other dicta in the cases of *Tate v. Hoover*,[28] *Lyon Realty Co. v. Milburn Realty Co.*[29] and *White v. Cormier*,[30] none of which involved the jurisdictional question here under consideration.

The fourth "direct" reported case, *In re Morgan*,[31] vies with the

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out that the trustee has the right to administer the partner's property but does not acquire title thereto, the court held for the defendant. Obviously, where the court quoted In re Fackelman, it must be deemed dictum because the administration of an individual decedent's estate was not involved.

26. 248 Fed. at 567, 568.

27. 143 F. Supp. 504, 506 (D. Puerto Rico 1956).

28. See note 25 supra.

29. 56 F.2d 187 (D. Md. 1932). See note 38 infra.

30. 311 Mass. 537, 540, 42 N.E.2d 256, 258 (1942). This was a suit in a state court for wrongful death damages, where the sole question was: "whether plaintiff was deemed a 'creditor' within the meaning of the State Statute which made special provision where an action is brought for the recovery of a demand that would not be affected by any insolvency of the estate of the defendant's intestate." To support this contention, plaintiff argued that this type of debt was not provable in bankruptcy and not released by a discharge therefrom. Whence came the dictum of the court on the general question of bankruptcy jurisdiction over individual decedent's estates.

31. 26 F.2d 90 (D. Mass. 1928). Here a motion to dismiss for lack of jurisdiction was made upon the ground that at the time when the petition was filed Morgan was dead. The date of the filing was March, 1928; service was by leaving a subpoena at the last and usual place of abode. The court found as fact that Morgan committed suicide sometime in February.

Fackelman case in the frequency with which it has been cited as precedent for the proposition that bankruptcy jurisdiction cannot reach decedents' estates. Actually *In re Morgan* is one of only two cases which involves the jurisdictional question directly. Surprising, therefore, is the fact that the court gives no reason and cites not a single authority for tersely holding that: "It follows that the bankruptcy petition must be dismissed, and the receivers directed to turn the property over to Morgan's administrator."[32] The implication, obviously, is that the probate court has exclusive jurisdiction.

The fifth and final case, *In re Mulero's Estate,*[33] is the other case which involves the jurisdictional question directly. Although the court quotes extensively from *Adams v. Terrell,* and from *In re Fackelman,* and cites *In re Morgan,* the rationale for dismissing the voluntary petition for lack of jurisdiction is stated, for the first time, to be founded on the bankruptcy meaning of the word "person."[34] Stating that under Puerto Rican law, "the Estate of a deceased individual is not an artificial or juridical person," the court concluded that: ". . . petitioner . . . who has appeared in these proceedings, purporting to be an artificial or juridical person, has no standing . . . to become a voluntary bankrupt . . . as a person entitled to the benefits of the act. . . ."[35] The facts as reported seem to be sparse if not ambiguous. Nowhere does the petition allege any decedent debtor, but regards the "Estate of" as being composed of:

". . . four natural persons [who] sign and are named in the petition, [but who] have not appeared individually, as such, nor are asking anything for them, in their own personal behalf, but have exclusively appeared in a collective form, as components of the petitioning estate and in behalf thereof, on the erroneous assumption that it has the status of an artificial or juridical person."[36]

It is submitted that where four natural persons appear in a collective form as components of the petitioning estate, the assumption would be justified that they have the status of an artificial or juridical person under the Bankruptcy Act. Why is not the petitioner, on its face, nothing else than a partnership, one member of which is deceased, and therefore subject to the act as a partnership petition filed by the surviving partners? Furthermore, the act, it must be remembered, does not spell out a definitive meaning of the word "person," but merely states that "persons shall *include* . . . ." (Emphasis added.) Generally, in

32. Id. at 91.
33. See note 27 supra.
34. 11 U.S.C.A. § 1 (23) (Supp. 1956) defines persons.
35. 143 F. Supp. at 505.
36. Ibid.

other areas of the law, the meaning of "person" includes "the estate of a decedent in legal contemplation."[37]

Before leaving the discussion of cases that have been used as precedents, it may be well to again mention one of the "indirect" cases whose dictum has rated citation in support of the indefensible position taken by the bankruptcy courts with reference to decedents' estates. Actually this case, *Lyons Realty Co. v. Milburn Realty Co.*,[38] involved the question of whether the bankruptcy court had jurisdiction to adjudicate in bankruptcy a corporation that had been dissolved by a state court decree prior to the filing of the involuntary petition. Although the acceptance of jurisdiction by the district court was affirmed by the circuit court on what would seem more justifiable grounds (as more fully discussed later), the district court saw fit to inject the dictum that: "The quite clear implication from this statutory provision[39] [relating to the nonabatement proceedings of a dead or insane bankrupt] is that the estate of a deceased individual, although he committed acts of bankruptcy prior to his decease, is not subject to administration in bankruptcy, but is left for the probate procedure of the several states."[40] Noting that, "obviously the exact question here [the case of a dissolved corporation] must depend for its solution upon the provisions of the bankruptcy law and the judicial decisions construing and applying it. . . ."[41] and admitting that logically the same rule relating to de-

37. "The word 'person,' . . . in its legal signification, is a generic term, and includes artificial as well as natural persons. . . . persons are of two kinds: natural and artificial. A natural person is a human being. Artificial persons include (1) a collection or succession of natural persons forming a corporation; (2) a collection of property to which the law attributes the capacity of having rights and duties. . . . [T]he artificial creature is a distinct legal entity." Billings v. State, 107 Ind. 54, 55, 56, 6 N.E. 914, 915, (1886). See also Vaughan v. Sterling Nat'l Bank & Trust Co., 124 S.W.2d 440, 444 (Tex. Civ. App. 1938); People v. Waitches, 290 Ill. App. 402, 8 N.E.2d 687 (1937).

38. 56 F.2d 187 (D. Md. 1932), aff'd sub nom. Hammond v. Lyon Realty Co., 59 F. 2d 592 (4th Cir. 1932). The contention of the state court receivers was that a dissolved corporation is legally dead for all purposes, and therefore may not be sued unless the statutes affecting the proceedings resulting in dissolution permit such a suit to be brought, and that the applicable Maryland statute did not permit this to be done. In support of the contention, reference was made to a then recent case in the Supreme Court of the United States, Oklahoma Gas Co. v. Oklahoma, 273 U.S. 257, 259 (1927), where it was said, but not with special reference to bankruptcy procedure: "It is well settled that at common law and in the federal jurisdiction a corporation which has been dissolved is as if it did not exist, and the result of the dissolution cannot be distinguished from the death of a natural person in its effect."

39. 11 U.S.C.A. § 26 (1927).

40. 56 F.2d at 187 citing In re Fackelman, supra note 24; Adams v. Terrell, supra note 14; Graves v. Winter, supra note 9.

41. 56 F.2d at 187.

cedents' estates should apply to a dissolved, and therefore legally dead, corporation, the court brushes aside the logical difficulty by quoting Mr. Justice Holmes in his *Legal Essays*: "the path of the law has been, not logic, but experience."[42]

A recapitulation of the basic[43] rationale employed by the courts in all of these cases that either directly or indirectly support their individual refusals to accept bankruptcy jurisdiction of insolvent decedents' estates seems to be founded upon the fact that decedents' estates must be administered by the probate courts of the several states. In other words, the reason why the bankruptcy courts will not assume jurisdiction of insolvent decedents' estates is because of the rule of comity between courts. That this position is legally as well as historically fallacious and the result of confusion and misapprehension seems definitely demonstrable.

Historically, as so ably developed by Glenn, the jurisdiction over decedents' estates is equitable in origin and nature. Under early English law, the ecclesiastical courts could and did admit a will or testament to probate but had no jurisdiction over the accounts of the executor or administrator, nor could they hear or determine the demands of creditors or legatees, nor protect the executor as to who were the creditors. On the other hand, Professor Glenn states:

"In the common law courts the situation was but little better . . . [and] theoretically the common law courts treated the executor as Roman law did the heir, holding him liable for the debts of the estate only to the extent of the estate. . . . But owing to the inadequacy of common law process, theory did not bring relief. And, the ecclesiastical courts being unable to protect him, there was only one other resort, the Court of Chancery. . . . The creditor, for his part was just as badly off."[44]

And so the chancery powers of marshalling were invoked; jurisdiction depending upon the existence of a limited fund in which creditors have an interest. In the United States, on the other hand, the policy from earliest times has been for the several states to enact statutes creating special courts and endowing such probate courts (or surrogates' courts, or orphans' courts) with either or both the power of probating wills and granting testamentary letters, and of ". . . the accounts of executors and administrators, the final settlement and distribution of the estates of deceased persons, both testate and intestate, and many other kindred subjects."[45] Since each state has its own statutory ideas on the nature

42. Id. at 188.

43. Other less frequently reiterated reasons given by the court, and hereinbefore amply rebutted are (1) the absence of an express provision of the act, and (2) the meaning of the word "person."

44. Glenn, Liquidation §§ 130, 131 (1935), to whom the writer is entirely indebted for this portion of the discussion.

45. Pomeroy, Equity § 347 (5th ed. 1941).

and extent of the jurisdiction that its special tribunal can exercise over decedents' estates the obvious result thereof is a total lack of uniformity. Glenn[46] and Woerner[47] each graphically points out how greatly these special procedures vary from state to state. Furthermore, the same statutory procedure is made applicable to a decedent's estate that is solvent enough to pay all debts and leave something for the beneficiaries and one that is insolvent, having assets insufficient to pay all debts, with nothing available to beneficiaries. As observed by Professor Nadelman,[48] the same procedure is not likely to be adequate for two such different situations, the latter, broadly speaking, being insolvency legislation adapted to the case of a deceased person that did not develop and is now antiquated and not of the quality of the present-day national bankruptcy law. Under state probate laws, generally stated, creditors are prevented from receiving equitable prorated distribution of the insolvent decedent's estate due to the comparative inadequacy of local statutes relating to preferences, priority of debts, and fraudulent conveyances.

Why then have the bankruptcy courts refused to accept jurisdiction? Perhaps the answer to the existing misapprehension stems from the relevant law applicable to the jurisdiction of federal courts, sitting as courts of equity, in the total area of decedents' estates. In spite of the fact that the federal (as distinguished from the "Bankruptcy") courts have no constitutional jurisdiction to probate a will or to grant letters of administration, it seems reasonably well established that such courts do have constitutional jurisdiction in all equity cases where diversity of citizenship exists. As expounded and developed in the leading case of *Underground Elec. Rys. v. Owsley*,[49] the federal courts are endowed with all powers "formerly exercised in the English Courts of Chancery, and are

46. Glenn, op. cit. supra note 44 at § 141.

47. 2 Woerner, American Law of Administration 1339 (3d ed. 1923), cited by Professor Nadelman in his excellent article, "Insolvent Decedents' Estates", 49 Mich. L. Rev. 1129 (1951).

48. Nadelman, op. cit. supra at 1142.

49. 176 Fed. 26 (2d Cir. 1902). This case involved the question of whether the United States courts, as courts of equity, have jurisdiction to administer estates of decedents. The court answered: "If not, it does not follow that the Federal courts, as courts of equity, have no power to grant some measure of relief to persons whose interests are injuriously affected by the maladministration or nonadministration of estates. Relief in such cases have been repeatedly granted. . . . Where the line is to be drawn between cases . . . is not clear, neither are the grounds upon which the courts will act entirely free from obscurity. Probably the doctrine that a constructive trust exists in executors and administrators . . . afforded the basis of equitable jurisdiction. . . . [N]ecessity for the protection of the property of estates is ground for the intervention of courts of equity. . . . But creditors are not remediless. A dead man's estate is primarily a fund with which to pay his debts. . . .[They] have the right . . . to look to these . . . assets to pay their demands . . . the right to protection by a court from the consequences. . . ." Supra at 32, 37.

not limited by the chancery system adopted by any State," and although they cannot entertain jurisdiction in probate matters as such because the subject does not belong to general equity jurisdiction, they may assume jurisdiction of a decedent's estate in situations where a chancery court would act, even where aspects of the administration of the estate become involved.[50] It would appear, however, that where the probate court has already assumed jurisdiction of the estate, even when diversity of citizenship exists, the federal courts seem to bow out of the picture because of the rule of comity.[51]

It is submitted, however, that the rule of comity between probate courts and federal courts as courts of bankruptcy, is definitely not applicable. The doctrine of comity between courts teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with *concurrent powers*, and already cognizant of the litigation, have had opportunity to pass upon the matter.[52] The rule of comity is not a rule of law but one of practical convenience and expediency, and is grounded in the policy of avoiding conflicts with jurisdiction, *unless upon strong grounds*, and the general principle that the court which acquires jurisdiction of the issues has precedence.[53] The point is that the rule of comity can only apply between courts of concurrent jurisdiction, and comity must yield to the positive law of the land.[54] Is there any question but that the positive law of the land relating to insolvent estates is that the federal courts of bankruptcy have *exclusive* and *paramount* jurisdiction? The Supreme Court has so stated in no uncertain terms.[55] The bankruptcy court supersedes all other courts,

50. Id. at 29-31. See also, Blacker v. Thatcher, 145 F.2d 255, 257-58 (9th Cir. 1909), quoting Waterman v. Canal-Louisiana Bank Co., 215 U.S. 33, 43-44 (1909): "The general rule to be deduced . . . is that . . . the jurisdiction [of the Federal courts, as courts of equity] may be exercised, and is not subject to limitations or restraint by state legislation establishing courts of probate and giving them jurisdiction over similar matters. This court has uniformly maintained the right of Federal courts of chancery to exercise original jurisdiction (the proper diversity of citizenship existing) in favor of creditors, legatees, and heirs to establish their claims and have a proper execution of the trust as to them." Note also Annot., 158 A.L.R. 9 (1945); Rosenberg v. Baum, 158 F.2d 10, 13 (10th Cir. 1946).

51. Farrell v. O'Brien, 199 U.S. 89 (1905); Byers v. McAuley, 149 U.S. 608 (1893).

52. Darr v. Burford, 339 U.S. 200 (1950); Schaefer v. Milner, 156 Kan. 768, 137 P.2d 156 (1943).

53. Lydick v. Fischer, 135 F.2d 983, 985 (5th Cir. 1943); O'Loughlin v. O'Loughlin, 6 N.J. 170, 179, 78 A.2d 64, 68 (1951); In re Liebl, 201 Misc. 1102, 1105, 105 N.Y.S.2d 715, 720 (1951); Moody v. Branson, 192 Okl. 327, 136 P.2d 925, 928 (1943).

54. Kellogg-Citizens Nat'l Bank v. Felton, 145 Fla. 68, 199 So. 50 (1940).

55. E.g., Straton v. New, 283 U.S. 318, 327 (1931): ". . . state insolvency laws which are tantamount to bankruptcy because they provide for an administration of the debtor's assets and a winding up of his affairs similar to that provided by the national act are suspended while the latter remains in force, and proceedings under them are utterly null

and no other court has authority to act in that field of law.[56] Fundamentally, the liquidation and administration of a decedent's estate is similar to the dissolution of a corporation where insolvency questions are presented, upon the broad principle that the national bankruptcy law is to govern the administration of all insolvent debtors.[57]

In this connection, it may be well to further note the analogous jurisdictional problem that faced the bankruptcy courts relative to dissolved corporations. The fourth circuit observed, in reviewing and affirming the district court in the *Lyons* case:

"There is no authority to support this position; and it certainly would be contrary to the spirit of the National Bankruptcy Act to hold that insolvent corporations are excluded, by dissolution, from the scope of its provisions, and that the distribution of their assets and final settlement of their affairs must be left to the state courts."[58]

It must be remembered that a dissolved corporation, as a deceased individual, becomes civiliter mortuus.[59]

Reiterating, for the purpose of clarifying emphasis, the objective of this inquiry involves only such decedents' estates as are insolvent in the bankruptcy sense, i.e., where the assets of the individual decedent, taken at their fair valuation, are less than his liabilities, so that only the interests of his creditors are involved, nothing remaining for the heirs or legatees.

It is true, as noted above, that our Bankruptcy Act is silent on this jurisdictional problem. Does such silence necessarily prove that Congress intended to except insolvent decedents' estates from its operation? Is it not a more logical statutory construction that the reverse is true when it is remembered that where Congress did want to except any "person" it expressly so provided?[60] Moreover, and as so ably developed

and void whether commenced within four months of the filing of the petition in bankruptcy or before." See also, Gardner v. New Jersey 320 U.S. 565 (1947); Isaacs v. Hobbs Tie & Timber Co., 282 U.S. 734 (1931).

56. Thompson v. Texas Mexican Ry., 328 U.S. 134 (1946); Dayton v. Standard, 241 U.S. 588 (1916); In re Lustron, 184 F.2d 789 (7th Cir. 1950); Miller v. Mangus, 125 F. 2d 507 (10th Cir. 1942).

57. In re Storck Lumber Co., 114 Fed. 360, 361 (D. Md. 1902).

58. Hammond v. Lyon Realty Co., 59 F.2d 592, 593 (4th Cir. 1932).

59. "The modern law of corporations so far differs from the ancient common law that the dissolution of a corporation is more nearly analogous in its effect upon the property of the corporation to the death of a natural person. . . . Dissolution of a corporation does not destroy its property. It effects a transfer thereof to those whom the law recognizes as the beneficial owners thereof." Pontiac Trust Co. v. Newell, 266 Mich. 490, 495, 254 N.W. 178, 181 (1934). See also, New York Title & Mgt. Co. v. Friedman, 153 Misc. 697, 276 N.Y. Supp. 72 (1934).

60. "Any person, *except* a municipal, railroad, insurance, or banking corporation or a building and loan association, shall be entitled to the benefits of this title as a voluntary

by Nadelman, most other countries of the world expressly ". . . regulate the settlement of insolvent decedents' estates by making . . . their bankruptcy law, applicable to decedents' estates."[61] Canada, on the other hand, simplifies the situation by including in the definition of "person" the words "the heirs, executors, administrators, or other legal representatives of a person."[62]

Will our courts of bankruptcy wait for and require an express amendment of our Bankruptcy Act similar to the Canadian law? Until then our bankruptcy courts can justifiably follow what seems the trend as to insane persons, who are *in pari* with decedents.[63] They may well extend to insolvent decedents' estates the same right now given to the guardian of an insane ward to file voluntary proceedings, provided he has been duly authorized to do so by the court that has appointed him.[64] So, too, where decedent during his life and within four months of death had committed an act of bankruptcy, the creditors should be able to file an involuntary petition against his estate.[65] As stated in one of the leading and most frequently quoted cases involving insane persons,[66] the assumption of jurisdiction over voluntary and involuntary insane bankrupts

bankrupt." 11 U.S.C.A. § 22 (Supp. 1956). (Emphasis added.) See also, In re Evanishyn, 107 F.2d 742, 743 (2d Cir. 1939).

61. Nadelman, op. cit. supra note 47. After listing and discussing the bankruptcy laws of many foreign countries, Nadelman points out that England qualifies the bankruptcy jurisdiction and now provides that 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 of the deceased; and where the chancery court had already assumed jurisdiction, it may in its discretion transfer the proceedings to the bankruptcy court when satisfied that the estate is insufficient to pay its debts. Id. at 1135.

62. Canadian Bankruptcy Act § 22 (1949).

63. In re Funk, 101 Fed. 244 (N.D. Iowa 1900). Note the congressional intent to classify an insane person with a decedent in expressly providing: "the death or insanity of a bankrupt shall not abate the proceedings. . . ." 11 U.S.C.A. § 26 (Supp. 1956).

64. In re Clinton, 41 F.2d 749 (S.D. Cal. 1930). See also, annot., 125 A.L.R. 1292 (1940).

65. Hilliard v. McCrory, 110 Colo. 369, 134 P.2d 1057 (1943); In re Tobin, 24 F. Supp. 825 (D. Minn. 1938). Contra, In re Eisenberg, 117 Fed. 786 (S.D. N.Y. 1902).

66. In re Evanishyn, 107 F.2d 742, 743 (2d Cir. 1939). This case held that an insane person may be adjudged an involuntary bankrupt whether the insanity occurs before or after the filing of the petition, if the act of bankruptcy could have been committed by the alleged bankrupt in her mental condition. The court pointed out that from the nonabatement provision of the act, ". . . the appellant would have us draw the inference that jurisdiction is excluded unless the petition in bankruptcy is filed before the alleged bankrupt became insane, even though he committed an act of bankruptcy while compos mentis. But any such inference is . . . refuted by section 4, 11 U.S.C.A. § 22, which provides that any person, except certain types of corporations. . . ."

". . . will produce an administration of his estate for the benefit of all creditors. The advantage of such an administration is particularly apparent in the case at bar for, we are told that under the state law the appellant will obtain a preference . . . unless the lien thereof can be avoided by bankruptcy. It is true the alleged bankrupt will not be able to perform all the duties required of a sane bankrupt; but this is equally true of one who becomes insane immediately after the filing of the petition."[67] It would clearly seem that an insane person should be deemed to be in the same category as a deceased person by express provision of section 8, of the act. Why not follow the same reasoning and the same law in both cases?

67. Id. at 743.