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Article with regard to rights, obligations and remedies applies whether *title* to collateral is in the secured party or in the debtor."[59] If title is immaterial for the purposes of article 9, the traditional ground for distinguishing the conditional sale from other security interests is abolished. Although "this Article in no way determines which line of interpretation (title theory v. lien theory or retained title v. conveyed title) should be followed in cases where the applicability of some other rule of law depends upon who has title,"[60] *Lake's Laundry* was concerned not with "some other rule of law," but with the conditional sale as security. The parties in *Lake's Laundry* did not ask the court to decide the issue of title for the purpose of assessing taxes or of determining who can vote certain stock,[61] but to decide whether a conditional vendor had the right to reclaim his security when other secured creditors were stayed. This precise problem occupied the attention of the Code's official commentators who advised that "since this Article adopts neither a 'title' nor a 'lien' theory of security interests . . . the granting or denying of, for example, petitions of reclamation in bankruptcy proceedings *should not* be influenced by speculations as to whether the secured party had 'title' to the collateral or 'merely a lien.' "[62]

Since bankruptcy courts must consult state law to determine the quality of the interests before them, those courts which blindly follow *Lake's Laundry* will find themselves in an anomalous position as proponents of a rule derived from a distinction between conditional sales and other forms of security, a distinction no longer viable in a security context. Patently, the rule cannot survive without the distinction; the distinction being dead, the rule should soon follow.

WAGE EARNER BANKRUPTCY: A NEGLECTED REMEDY?

I. INTRODUCTION

Two bills introduced in Congress[1] to amend the Bankruptcy Act reflect the belief that wider use of wage earner bankruptcy proceedings[2] may provide at least a partial solution to the problems which have accompanied the enormous

59. Uniform Commercial Code § 9-202. (Emphasis added.)

60. Uniform Commercial Code § 9-202, comment 1.

61. These are the examples given in ibid.

62. Uniform Commercial Code § 9-507, comment 1. (Emphasis added.) This section is entitled "Secured Party's Liability for Failure To Comply With This Part," and deals with the power of the court to dispose of or restrain the disposition of the secured property. The comment to § 9-202 refers to this comment for the Code's treatment of the Lake's Laundry situation.

1. S. 613, 89th Cong., 1st Sess. (1965); H.R. 292, 89th Cong., 1st Sess. (1965). The bills are discussed at notes 90-93 infra and accompanying text.

2. Bankruptcy Act §§ 601-86, 52 Stat. 930 (1938), as amended, 11 U.S.C. §§ 1001-86 (1964).

rise in consumer credit.[3] Under Chapter XIII of the Bankruptcy Act,[4] which benefits both insolvent[5] wage earners[6] and their creditors,[7] the debtor[8] devises a plan, by the terms of which a specified portion of his future wages will be set aside for payment of his creditors.[9] Such debtor, harassed by creditors, but nevertheless seeking to avoid voluntary bankruptcy proceedings,[10] may file a petition stating a desire to effect either a composition or an extension of his debts.[11] A composition plan contemplates only partial payment of debts,[12] while an exten-

3. See Bobier, Chapter XIII—Mecca or Mirage, 32 Detroit Law. 25 (1964); Driver, Proposal—To Amend the Bankruptcy Act To Require That Consideration Be Given to the Use of Chapter XIII, 18 Pers. Fin. L.Q. 41 (1964); Twinem, Reduce Unnecessary Personal Bankruptcies: Amend the Bankruptcy Act, 23 Legal Aid Brief Case 252 (1965). The rise in consumer credit, absolutely and relative to the average family's before-tax income, is noted in Driver, supra at 42. The problems attendant upon the increased use of credit facilities affect both the creditor and the debtor. The debtor often finds himself presently unable to meet his financial obligations. Creditors, especially unsecured creditors, lose millions of dollars each year when wage earners with no assets obtain a discharge in bankruptcy. Ibid.

4. Referees in Birmingham, Alabama and Chicago, Illinois had attempted to adapt the provisions of the Bankruptcy Act of 1898 to fit the needs of wage earners. National Bankruptcy Conference, Analysis of H.R. 12889, 74th Cong., 2d Sess. 102 (Comm. Print 1936).

5. Bankruptcy Act § 623, 52 Stat. 932 (1938), 11 U.S.C. § 1023 (1964), provides that the petition shall "state that the debtor is insolvent or unable to pay his debts as they mature . . . ." This section encompasses two criteria of insolvency. Benson, Wage Earner Plans in Bankruptcy Court, Mich. St. B.J., Aug. 1962, pp. 10, 11.

6. Bankruptcy Act § 606(8), 73 Stat. 24 (1959), 11 U.S.C. § 1006(8) (1964), defines a wage earner as anyone "whose principal income is derived from wages, salary or commissions." Wage earners under Chapter XIII were originally limited to persons earning $3,600 or less per year. Bankruptcy Act § 606(8), ch. 575, 52 Stat. 931 (1938). In 1950, the ceiling was raised to $5,000. Bankruptcy Act § 606(8), ch. 1193, 64 Stat. 1134 (1950). In 1959, all monetary ceiling was removed. Bankruptcy Act § 606(8), 73 Stat. 24 (1959), 11 U.S.C. § 1006(8) (1964).

7. The intent to afford relief to harassed wage earners is noted by Chandler, The Wage Earners' Plan: Its Purpose, 15 Vand. L. Rev. 169 (1961). The benefit to the unsecured creditors is the opportunity to have access to the future wages of the debtor.

8. Chapter XIII refers to a participant as a "debtor" rather than a "bankrupt" and allows wage earners to avoid the stigma attached to bankruptcy. Nadler, The Law of Bankruptcy § 811, at 682 (2d ed. 1965).

9. A great deal of literature has been published on the proceedings and the forms to be used in filing a Chapter XIII plan. See, e.g., Hilliard & Hurt, Wage Earner Plans Under Chapter XIII of the Bankruptcy Act, 19 Bus. Law. 271 (1963); Sloan, Wage Earners' Plan, 33 Ref. J. 5 (1959); Comment, 45 Marq. L. Rev. 582 (1962).

10. Bankruptcy Act § 4a, 52 Stat. 845 (1938), 11 U.S.C. § 22(a) (1964), provides that any natural person is entitled to the benefits of a voluntary bankruptcy proceeding. Section 4b includes wage earners among those who are not subject to involuntary bankruptcy proceedings, but the definition of a "wage earner" within the meaning of § 4 is limited to a person making less than $1,500 per year. Bankruptcy Act § 1(32), 52 Stat. 842 (1938), 11 U.S.C. § 1(32) (1964).

11. Bankruptcy Act § 623, 52 Stat. 932 (1938), 11 U.S.C. § 1023 (1964).

12. In the Matter of Mahaley, 187 F. Supp. 229, 232 (S.D. Cal. 1960).

sion plan has as its goal the full satisfaction of debts, albeit not within the time originally scheduled for payment.[13]

After the filing of the petition, a meeting of creditors is called, at which the debtor will submit a plan which *must* "deal with"[14] all unsecured creditors equally, and which *may* deal with any secured creditors individually.[15] A majority in number and amount of all unsecured creditors, and any secured creditors who are dealt with by the plan, must then ratify the debtor's proposal,[16] after which the court grants confirmation and appoints a trustee to receive and distribute future wages.[17]

The proposed amendments to the Bankruptcy Act constitute an attempt to generate more general and uniform acceptance of wage earner plans by compelling applicants for a voluntary discharge to consider the possibility of a Chapter XIII plan.[18] The amendments are, however, devoid of any consideration of problems which have arisen in the interpretation and application of certain statutory provisions.

II. The "Six Year Discharge" Problems

Under Section 14c(5) of the Bankruptcy Act, a discharge in bankruptcy will not be granted if, within six years of the current proceeding, the applicant has "been granted a discharge, or had . . . a wage earner's plan by way of composition confirmed . . . ."[19] While the meaning of confirmation of a composition plan

13. Ibid.

14. Problems have arisen construing the phrase "deal with." See note 60 infra.

15. Bankruptcy Act § 646, 52 Stat. 934 (1938), 11 U.S.C. § 1046 (1964). "Claims" under Chapter XIII do not include "claims secured by estates in real property." Bankruptcy Act § 606(1), 52 Stat. 930 (1938), 11 U.S.C. § 1006(1) (1964). Judicial interpretation of this section is discussed in note 67 infra.

16. Bankruptcy Act § 652(1), 52 Stat. 934 (1938), 11 U.S.C. § 1052(1) (1964).

17. Upon confirmation, the court is vested with broad powers to aid the wage earner in effectively executing the provisions of the plan. The court has jurisdiction over all property of the debtor and control of all wage assignments. Bankruptcy Act § 658(1), 52 Stat. 935 (1938), 11 U.S.C. § 1058(1) (1964). The court may permit rejection of executory contracts. Bankruptcy Act § 646(6), 52 Stat. 934 (1938), 11 U.S.C. § 1046(6) (1964). The court, with reasonable cause, may also stay enforcement of liens on property of the debtor. Bankruptcy Act § 614, 52 Stat. 931 (1938), 11 U.S.C. § 1014 (1964).

18. The amendments are discussed at notes 90-93 infra and accompanying text. The use of wage earner bankruptcy has been increasing. See U.S. Bureau of Census, Statistical Abstract 508 (1965). Advocates of the plan believe that the number of Chapter XIII plans is low compared to the number of wage earners who invoke straight bankruptcy proceedings. E.g., Twinem, supra note 3, at 256. Mr. Twinem found that only 18% of total personal bankrupts filed Chapter XIII petitions in 1964, and that the relative use of that chapter has not increased since 1957. Ibid. But many bankruptcy statistics may be misleading. See Brunner, Personal Bankruptcies: Trends and Characteristics 17-24 (1965). The degree of acceptance of Chapter XIII has not been uniform among the different sections of the country. Driver, supra note 3, at 44. See generally McDuffee, The Wage Earner's Plan in Practice, 15 Vand. L. Rev. 173 (1961).

19. Bankruptcy Act § 14c(5), 66 Stat. 422 (1952), as amended, 11 U.S.C. § 32(c)(5) (1964). Section 14c lists seven specific offenses, any one of which will act as a bar to dis-

is clear enough, the meaning of "discharge" is not. The definition of discharge appearing in the act is "the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this Act . . . ."[20] This is, obviously, the intended result of a straight bankruptcy proceeding.[21] In the case of a Chapter XIII proceeding, however, a distinction must be made between composition and extension plans. The former is similar to a straight bankruptcy proceeding insofar as it contemplates a discharge; the latter contemplates merely an extension of time, within which full payment can be made. Therefore, where the debtor has completed payments under an extension plan, the use of the word "discharge" is improper since there is no release from indebtedness.[22]

Because this distinction, simple as it is, has not alway been recognized, courts have not been consistent in determining when prior bankruptcy relief bars subsequent confirmation of an extension plan,[23] or when a prior extension plan acts as a bar to subsequent relief. The problem could be resolved by refusing to classify every completed extension as the equivalent of a discharge.[24] A further distinction would then have to be made between completed and terminated extensions. A completed extension is one which ends when all payments required under the plan have been made. A terminated extension is one which ends with a release of indebtedness prior to the completion of all payments and, therefore,

charge. However, this section is applicable to Chapter XIII only where "not inconsistent or in conflict" with the provisions of that chapter. Bankruptcy Act § 602, 52 Stat. 930 (1938), 11 U.S.C. § 1002 (1964). For example, in one case concerning a wage earner plan, the court found that the United States was not entitled to priority on its claim for overpayment of wages as provided under Bankruptcy Act § 64a(5), 52 Stat. 874 (1938), 11 U.S.C. § 104(a)(5) (1964), since this would be in conflict with the avowed intent of treating all unsecured creditors as a class under Chapter XIII. In the Matter of Bailey, 188 F. Supp. 47 (N.D. Ala. 1960).

20. Bankruptcy Act § 1(15), 52 Stat. 841 (1938), 11 U.S.C. § 1(15) (1964).

21. "The adjudication of any person . . . shall operate as an application for a discharge . . . ." Bankruptcy Act § 14a, 52 Stat. 850 (1938), 11 U.S.C. § 32(a) (1964).

22. A debtor may apply, after the expiration of three years, for a discharge from all debts provided for under the plan but not yet liquidated. Bankruptcy Act § 661, 66 Stat. 437 (1952), as amended, 11 U.S.C. § 1061 (1964). Thus, the court has the power to grant an actual discharge, even where the proposed plan originally contemplated merely an extension of time in which to make payments. The court has discretionary power to determine under what circumstances a debtor will be discharged. 10 Collier, Bankruptcy ¶ 29.11, at 355 (14th ed. 1965) [hereinafter cited as Collier]. While there is no specific provision limiting wage earner plans to three years, for practical reasons most plans do not exceed this limit. See Nadler, op. cit. supra note 8, § 836, at 693.

23. A court will not confirm a plan unless satisfied that "the debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge . . . ." Bankruptcy Act § 656a(3), 66 Stat. 437 (1952), 11 U.S.C. § 1056(a)(3) (1964).

24. See In the Matter of Sharp, 205 F. Supp. 786 (W.D. Mo. 1962). Noting the conflicting decisions, the court found that § 14c(5) was "not applicable to those provisions of Chapter XIII which authorize the approval of an extension plan for the debtor." Id. at 789. Accord, In the Matter of Mahaley, 187 F. Supp. 229 (S.D. Cal. 1960). Here, the court found that the purpose of § 14c(5) was to prevent habitual recourse by persons seeking release of their obligations, while the purpose of Chapter XIII was to assist honest wage earners in paying their debts. Id. at 231.

is similar to a discharge.[25] Completed extensions, therefore, should not bar subsequent relief; nor should confirmation of an extension plan be barred by a prior discharge of indebtedness. Congress, in specifying that composition, but not extension, plans were to bar subsequent discharge, clearly intended to distinguish between the two types of plans, the distinguishing feature being the full payment of debts under an extension.[26]

A. *Prior Discharge in Bankruptcy*

Two court of appeals' decisions, however, have refused to consider extensions a distinct form of bankruptcy relief. *In the Matter of Perry*[27] found that the "plain language of the Act" precluded confirmation of a plan where there had been a discharge within six years, and the fact that the proposed plan merely sought an extension of time in which to pay debts was deemed immaterial.[28] The court did not discuss the possibility that section 14c(5) is "inconsistent or in conflict"[29] with the extension provisions of Chapter XIII, nor did it concede any distinction between composition and extension plans.[30] *In the Matter of Schlageter*,[31] reaching the same conclusion as *Perry*, reasoned that both types of wage earner plans create at least the possibility of a discharge of unpaid debts and, for this reason, an "extension" is sufficiently analogous to a subsequent "discharge" to come within the limitation of section 14c(5).[32] The *Schlageter* rationale is relevant where a debtor is actually seeking "termination" of an extension plan. It is not relevant, however, where a debtor is merely seeking confirmation of an extension plan, which plan, at the *outset*, contemplates full payment.[33]

In the Matter of Bingham,[34] a district court case, also ignored the distinction,

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25. See note 22 supra.

26. National Bankruptcy Conference, Analysis of H.R. 12889, supra note 4, at 121.

27. 340 F.2d 588 (6th Cir. 1965) (per curiam), rev'd sub nom. Perry v. Commerce Loan Co., 34 U.S.L. Week 4190 (U.S. March 7, 1966).

28. 340 F.2d at 589.

29. See note 19 supra.

30. The court stated that, if extension plans are to be exempted from the provisions of the Bankruptcy Act, Congress, and not the courts, should so provide. 340 F.2d at 589. The court noted a proposal by the National Bankruptcy Conference which would amend the act to allow extension plans to be treated distinctly. Ibid.

31. 319 F.2d 821 (3d Cir. 1963).

32. 319 F.2d at 823; accord, In the Matter of Fontan, 227 F. Supp. 973 (S.D. Miss. 1964); In the Matter of Nicholson, 224 F. Supp. 773 (D. Ore. 1963). For a discussion of extension plans which may result in a discharge of indebtedness, see note 22 supra.

33. See text accompanying notes 25 & 26 supra. Therefore, completed extensions should not preclude subsequent Chapter XIII relief of either form, composition or extension, since the debtor would not have been guilty of any acts which would be a bar to discharge. Nor would a composition be a bar to confirmation of a subsequent extension since § 14c(5) is inapplicable to extensions. A composition would bar a subsequent composition since this would be the equivalent of two discharges within six years.

34. 190 F. Supp. 219 (D. Kan. 1960), appeal dismissed on other grounds sub nom. Bingham v. Yingling Chevrolet Co., 297 F.2d 341 (10th Cir. 1961), 47 Iowa L. Rev. 155.

and concluded that the confirmation of one wage earner plan was a bar to a subsequent extension plan within six years. Another case, *In the Matter of Autry*,[35] allowing two extensions within six years, attempted to reconcile *Bingham* by assuming that the first plan in that case "was by way of composition."[36] *Autry*, however, failed to consider the possibility that section 14c(5) is totally inapplicable to the confirmation of an extension plan and that, therefore, the nature of the prior plan should in all cases be irrelevant.[37]

In its attempt to reconcile the *Bingham* decision, *Autry* misinterpreted that court's holding, for *Bingham* did not consider extension plans unique, and implied that, since both compositions and extensions are equivalent to discharge, they would bar subsequent remedies.[38] The court, in *Bingham*, found that creditors' interests merited protection, not only from incomplete payments, but also from conversion of "credit risks desirable for one year to extensions of credit over three or four years, with resultant loss."[39] The "loss" considered by the court resulted from secured creditors being required to delay collection while their security depreciated. With respect to the application of section 14c(5) to Chapter XIII, *Bingham* therefore indicated that an extension plan is sufficiently adverse to the interests of certain creditors to be equivalent to a discharge. Regardless of the merit of the court's argument, the specific congressional intent to treat extensions as sui generis[40] cannot be overlooked and, if any additional protection is to be afforded to creditors, it should be provided by statutory revision and not by the courts.

B. *Subsequent Discharge in Bankruptcy*

Confirmation of a Chapter XIII extension plan should not bar a subsequent discharge in voluntary bankruptcy. Furthermore, it should be immaterial whether the subsequent voluntary petition is filed either after completion of the extension plan or, where necessary, during its pendency. *In re Thompson*[41] held that the completion of an extension did not bar a subsequent discharge in straight bankruptcy. The court, applying the *expressio unius* maxim,[42] noted that section 14c(5) specifically mentioned the confirmation of a wage earner composition plan, but omitted any reference to an extension plan.[43] The statutory language is certainly strong support for the court's position.

35. 204 F. Supp. 820 (D. Kan. 1962). Accord, In the Matter of Holmes, 309 F.2d 748 (10th Cir. 1962).

36. 204 F. Supp. at 821. Actually, it is inferable that Bingham concerned a prior extension plan. The first wage earner plan covered a period of only 17 months. 190 F. Supp. at 220. A court would probably require a debtor to attempt an extension plan of at least three years before allowing a composition and a resulting release of indebtedness in a lesser period.

37. See text accompanying notes 20-26 supra.

38. 190 F. Supp. at 220-21.

39. Id. at 221.

40. See text accompanying note 26 supra.

41. 51 F. Supp. 12 (W.D. Va. 1943).

42. Id. at 14. As a rule of statutory construction, the expression of one thing is the exclusion of another. In re Wilkins, 49 Cal. App. 2d 709, 712, 122 P.2d 361, 362 (1942).

43. 51 F. Supp. at 14.

The court noted, additionally, the payment-in-full distinction between extension and composition plans.[44] While this distinction is certainly relevant, the court must first look to the manner in which the extension plan was terminated. If the plan were successfully completed, there would be no bar to a subsequent discharge within six years. However, if the extension plan were not completed, but, rather, ended in discharge,[45] a subsequent application for discharge, made within six years, should be denied.

As a result of two decisions, it appears that the right to a discharge in straight bankruptcy, while in the midst of a Chapter XIII plan, is contingent upon the point in time during the plan when the application is filed.[46] One court has held that, if the application is filed prior to default under the plan, the referee has the discretionary power to grant a discharge.[47] In another case, it was held that, if the debtor has already defaulted in payments under the plan, the debtor has a statutory right to convert to voluntary bankruptcy.[48] The court in the latter case reasoned that, once a debtor had been encouraged to undertake an extension plan rather than to invoke voluntary bankruptcy proceedings, it would be "repugnant to the philosophy" of the court and "would substantially destroy the attraction" of Chapter XIII to compel a defaulting wage earner to maintain payments against his will.[49]

These two decisions indicate that a debtor, having grown weary of the burdens of Chapter XIII relief, could unilaterally discard his wage earner plan by defaulting. However, the court has the power to prevent a debtor from defaulting and, thus, invoking his right to straight bankruptcy. The court can compel employers to cooperate in implementing a plan[50] and can adjust payments, where necessary, to meet the needs of the debtor.[51] Reasonable concern for the interests of the creditors, coupled with an understanding that the wage earner has assumed the more arduous of possible bankruptcy remedies by choosing Chapter XIII, will enable the court to reach an equitable decision as to when a debtor under a wage earner plan can invoke voluntary bankruptcy.

C. *Resolution*

Generally speaking, with respect to any problems which may arise under the six year statutory prohibition, a debtor should know with certainty, when electing his bankruptcy relief, what other remedies will be available to him. Since many debts are not discharged in straight bankruptcy,[52] a debtor, having

44. Ibid.

45. See note 22 supra and accompanying text.

46. Bankruptcy Act § 668, 52 Stat. 936 (1938), 11 U.S.C. § 1068 (1964), provides that a wage earner cannot be adjudicated a bankrupt while under a Chapter XIII plan. But this section merely exempts the debtor from involuntary proceedings. See Rice v. Mimms, 291 F.2d 823, 825-26 & n.7 (10th Cir. 1961).

47. Id. at 826.

48. In the Matter of Hendren, 240 F. Supp. 807, 808 (S.D. Ohio 1965).

49. Ibid.

50. Bankruptcy Act § 658(2), 52 Stat. 935 (1938), 11 U.S.C. § 1058(2) (1964).

51. Bankruptcy Act § 646(5), 52 Stat. 934 (1938), 11 U.S.C. § 1046(5) (1964).

52. Bankruptcy Act § 17a, 52 Stat. 851 (1938), as amended, 11 U.S.C. § 35(a) (1964),

been previously discharged, may, in some jurisdictions, find himself harassed by creditors with no avenue of relief open to him.[53] And, while no case has held that an extension plan is a bar to a subsequent discharge, the *Bingham* reasoning, indicating that a prior extension was a bar to further Chapter XIII relief within six years, could be used to support such a holding. This would lead to the undesirable result that a prior extension would also be a bar to the more drastic remedy of straight bankruptcy. A debtor should be informed of this possibility before he elects to proceed under Chapter XIII.

A former participant in an extension plan may also find himself without available bankruptcy relief where he receives an actual discharge from indebtedness after three years under section 661.[54] In such a case, the extension plan would not have resulted in full payment, and a court could justly conclude that section 14c(5) does act as a bar to subsequent relief.

Amendments have been proposed to clarify a debtor's right to an extension regardless of past remedies.[55] Such clarification, while necessary, should be accompanied by some restraints to prevent habitual users from gaining the protection of the courts under Chapter XIII and a subsequent discharge of indebtedness under section 661. Courts should treat a "discharge" of indebtedness under that section as equivalent to a discharge under section 14c(5). Such discharge would be a bar to all subsequent bankruptcy remedies except the mere *confirmation* of an extension plan. Such discharge would also be barred by any prior bankruptcy relief except a *consummated* extension plan.

III. Secured Creditors' Liens

The drafters of Chapter XIII intended that the provisions of a wage earner plan be "suited to the circumstances of the . . . parties to be affected thereby."[56] Some recent cases indicate that in certain instances it may be impossible to reconcile the needs of the insolvent wage earner with the rights of secured creditors.[57] Theoretically, a secured creditor has the option of rejecting a proposed plan and either filing a reclamation petition or commencing a foreclosure action.[58] Courts, exercising their power to enjoin the enforcement of a lien on the property of a Chapter XIII participant,[59] have, in effect, compelled secured

lists six specific debts which are not released by discharge, including taxes and unscheduled debts.

53. Some lawyers, assuming that an extension will not be a bar, recommend that their clients attempt an extension plan to avoid the possibility of being barred from needed relief after obtaining a discharge. Rodkey, A Need for More Wage Earner Plans in Non-Business Bankruptcy Cases in Illinois, 53 Ill. B.J. 324, 330 (1964).

54. Bankruptcy Act § 661, 52 Stat. 936 (1938), as amended, 11 U.S.C. § 1061 (1964).

55. In the Matter of Perry, 340 F.2d 588 (6th Cir. 1965) (per curiam), cert. granted, 382 U.S. 889 (1965); 47 Iowa L. Rev. 155, 161 (1961).

56. National Bankruptcy Conference, Analysis of H.R. 12889, 74th Cong., 2d Sess. 106 n.1 (Comm. Print 1936).

57. See notes 61-67 infra and accompanying text.

58. If the security is repossessed, the value of the chattel is applied to the debt and the creditor is treated as unsecured for any deficiency. See Hilliard & Hurt, supra note 9, at 279.

59. Generally, the lien sought to be enforced will be a purchase money security interest,

creditors to participate in wage earner plans. Where such enforcement was denied, the rights of the creditor were nevertheless protected: the trustee made payments to the creditor in an amount sufficient to protect his interest.[60]

Those courts which have denied reclamation petitions have indicated that the rights of the secured creditor must not be substantially impaired thereby.[61] What constitutes substantial impairment, however, is not certain. An early case held that a rejecting secured creditor who was denied his reclamation rights was entitled to regular payments as called for in the contract.[62] The court did not, however, require the debtor to make provision for immediate satisfaction of three payments in arrears,[63] and, thus, for all practical purposes, the creditor was made an involuntary participant in an extension for the three overdue payments. Another case indicated an intent to allow smaller payments than those provided for under the contract.[64] More recent cases speak of payment "according to the

in which case the creditor is seeking reclamation of his security rather than foreclosure. The court has the power both to deny reclamation and to stay foreclosure actions. Bankruptcy Act § 614, 52 Stat. 931 (1938), 11 U.S.C. § 1014 (1964); Hallenbeck v. Penn Mut. Life Ins. Co., 323 F.2d 566, 572-74 (4th Cir. 1963).

60. Abramson, The Wage Earner's Plan Under Chapter XIII of the Bankruptcy Act, in Creditors' Rights in Texas 607, 612 (1963). An application for confirmation may not be filed unless the proposed arrangement has been accepted "by the secured creditors whose claims are dealt with by the plan . . . ." Bankruptcy Act § 652(1), 52 Stat. 934 (1938), 11 U.S.C. § 1052(1) (1964). There are three ways in which a secured creditor may be "dealt with" under Chapter XIII. The creditor may accept the provisions of the plan and receive payment as provided thereunder. He may reject the plan but be denied his reclamation right under § 614. In this case, courts have ignored the necessity for written acceptance. See In the Matter of Clevenger, 282 F.2d 756 (7th Cir. 1960); In re Duncan, 33 F. Supp. 997 (E.D. Va. 1940). A third view is that every secured creditor is "dealt with" whenever his reclamation rights are subject to the court's injunctive powers. Based on this reasoning, a court has found that a plan cannot be confirmed over the objection of the rejecting creditor. In the Matter of O'Dell, 198 F. Supp. 389 (D. Kan. 1961). All the distinctions are purely academic since the court can, in any case, deny reclamation and, in effect, "deal with" a secured creditor without his acceptance. The more essential issue, confused by the courts in their discussion of the acceptance requirements, is the amount which must be paid to a secured creditor when foreclosure is, in fact, denied.

The National Bankruptcy Conference has suggested an amendment which would overrule O'Dell's finding that written acceptance is required in all cases. Under the amendment, the rejecting creditor would be deemed excluded from the plan, in order to avoid the necessity of going through the motions of filing a new plan excluding the rejecting creditor. Comment, 63 Mich. L. Rev. 1449, 1453 (1965).

61. In re Duncan, 33 F. Supp. 997 (E.D. Va. 1940); cf. In the Matter of Wilder, 225 F. Supp. 67 (M.D. Ga. 1963), where the issue was confirmation of a wage earner plan over the objection of a secured creditor. The ultimate result, however, would be denial of reclamation rights. See note 60 supra.

62. In re Duncan, supra note 61. The court based its decision on three factors: the creditor had acquiesced in prior defaults; the debtor had acquired substantial equity in the security; and the position of the secured creditor was not substantially impaired. Id. at 998-99.

63. Id. at 998.

64. In the Matter of Clevenger, 282 F.2d 756 (7th Cir. 1960). The court stated that a

terms of the instrument creating the debt"[65] or "contract benefits"[66] as the tests of substantial impairment. These cases would deny to the court any discretion to stay reclamation petitions unless provision is made for full current payments.[67] And, while these cases did not involve overdue payments, if the term "contract benefits" includes the right to recover security upon default in payment, not only full current payments but immediate satisfaction of all overdue installments would also be required.

The standard by which sufficient payment is to be measured will often determine whether Chapter XIII relief will be available to a particular wage earner. Prospective participants will frequently be unable to pay both overdue and full current payments on property which is necessary to a successful rehabilitation program. A solution has been suggested for those cases in which the security is exempt property.[68] There is authority that holders of exempt security are precluded from enforcing their liens and are to be treated as unsecured creditors.[69] The problem with this solution is that the debtor would have to rely on state exemption statutes to enable him to retain the necessary property.[70] In Kansas, for example, automobiles are exempt property.[71] But, in certain states, automobiles are not exempt,[72] and a debtor who requires the use of an automobile to drive to and from work would be unable to find adequate relief in a Chapter XIII proceeding. This was not the intent of the drafters, who indicated,

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trustee, having assumed the debtor's executory contracts, must make payments to a rejecting secured creditor "if possible, in an amount at least as large as was called for in the purchase contracts." Id. at 757.

65. In the Matter of O'Dell, 198 F. Supp. 389, 391 (D. Kan. 1961).

66. In the Matter of Copes, 206 F. Supp. 329, 330 (D. Kan. 1962).

67. The same test of substantial impairment has been applied, i.e., full payment, where courts have denied foreclosure of liens on real property. Although provision cannot be made in a plan for payment of debts secured by real property, courts can stay foreclosure so long as the debtor continues to make payment according to the original contract terms. Hallenbeck v. Penn Mut. Life Ins. Co., 323 F.2d 566 (4th Cir. 1963); In the Matter of Garrett, 203 F. Supp. 459 (N.D. Ala. 1962).

68. Lee, There Is Still Hope for the Wage Earners' Plans, 36 Ref. J. 125 (1962). A debtor under Chapter XIII is entitled to exemptions in a like manner as a bankrupt. Bankruptcy Act § 637, 52 Stat. 933 (1938), 11 U.S.C. § 1037 (1964). But this provision has not been utilized in denying reclamation petitions. See cases cited note 61 supra.

69. See 1 Collier ¶ 1.28, at 130.8. For a discussion of a situation where a secured creditor was denied foreclosure on exempt property, see Lee, Who Is a Secured Creditor in Wage Earner Proceedings?, 38 Ref. J. 44 (1964).

70. Federal statutes govern a limited number of exemptions. 1 Collier ¶ 6.17. The primary source of exemptions is state statutes. 1 id. ¶ 6.03, at 797.

71. Kan. Rev. Stat. § 60-3504 (1923) (now Kan. Stat. Ann. § 60-2304(6) (1964)) provides an exemption from seizure and attachment of "one wagon, cart or dray." This has been interpreted to include an automobile. Foster v. Foster, 144 Kan. 528, 61 P.2d 1350 (1936).

72. Statutes similar to the Kansas exemption have been interpreted not to include automobiles. Young v. Wright, 77 Idaho 244, 290 P.2d 1086 (1955); Prater v. Riechman, 135 Tenn. 485, 187 S.W. 305 (1916).

by stating that the relevant statutes were designed to provide equitable relief suited to the particular circumstances of the parties,[73] that wage earner relief should not be contingent upon the vagaries of state exemption laws.

To require categorically full satisfaction for secured creditors would be in keeping with the intent of Congress to afford protection to secured interests.[74] The requirement would, however, thwart the congressional intent to create a workable remedy by which an honest but overextended debtor can pay at least a substantial portion of his debts, avoid the necessity of a discharge in bankruptcy, and effect an equitable settlement among his creditors. A reasonable approach in denying enforcement of liens has been taken by courts which require substantially equivalent payments and no immediate reimbursement of overdue installments.[75]

The realities of the situation would seem to indicate that secured creditors will not be materially affected by a plan which provides for full, or nearly full, current payments, but does not require immediate satisfaction of overdue payments. Where the security is worth as much as the debt, the rights of a creditor who is compelled to participate in an extension and who ultimately receives full payment will be impaired only to the extent that he is denied interest on the overdue payments.[76] Where the debtor is unable to complete payments under the plan and obtains a discharge, the result of the denial of foreclosure on security which has declined in marketable value, such that it is worth less than the amount of the remaining debt, will be to cause a previously secured creditor to be unsecured for a part of his debt.[77] This would be substantial impairment but could be remedied by giving such creditors some priority, based on their rights when foreclosure was denied, with respect to the amount for which they are not secured. Where the security was worth less than the debt at the time that foreclosure was denied, substantial payment will place the creditor in as good if not a better position than immediate reclamation.[78] Before wider use of Chapter XIII is advocated, the appropriate status of all secured creditors should be more clearly defined and, in so doing, an attempt should be made to reconcile the rights of secured creditors with the avowed public policy of rehabilitating debtors.

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73. National Bankruptcy Conference, Analysis of H.R. 12889, supra note 56, at 106 n.1.

74. See Hearings Before the House Committee on the Judiciary on H.R. 6439, 75th Cong., 1st Sess., ser. 9, at 53 (1937).

75. In the Matter of Wilder, 225 F. Supp. 67 (M.D. Ga. 1963).

76. For computing interest payments to secured creditors, see 3 Collier ¶ 63.16[1].

77. Hilliard & Hurt, Wage Earner Plans Under Chapter XIII of the Bankruptcy Act, 19 Bus. Law. 271, 279 (1963).

78. An inequitable situation will result if full payment is required where the security is not worth as much as the debt. The proper solution would be to treat the creditor as unsecured for the debt in excess of the actual value of the security. See Brown, A Primer on Wage-Earner Plans Under Chapter XIII of the Bankruptcy Act, 17 Bus. Law. 682, 690-91 (1962).

IV. The Proposed Amendments

The two bills pending in Congress, S. 613[79] and H.R. 292,[80] would grant referees discretionary power to compel consideration of a wage earner plan before the court will adjudicate the debtor a bankrupt.

Chapter XIII plans are attempted by only a small percentage of the wage earners who encounter financial difficulties,[81] and, as indicated, the degree of acceptance varies throughout the country. In New York, for example, less than 2 per cent of the eligible debtors actually undertook a Chapter XIII plan in 1963,[82] while in Alabama, about 80 per cent of the eligible debtors actually attempted a plan.[83] Several reasons are offered for the wide variance in acceptance, including lack of knowledge by the legal profession[84] and an adverse attitude by some referees.[85] A recent study of a Michigan community indicates that a genuine lack of desire to pay debts may account for the preference for a discharge in straight bankruptcy, rather than adoption of a plan which entails hardships.[86] A fundamental reason for non-uniform acceptance of Chapter XIII appears to be the varying degree to which states will allow garnishment of wages.[87] In states such as Alabama, where creditors can avail themselves of state laws to attach substantial portions of a debtor's wages,[88] Chapter XIII proceedings are more likely to be invoked than in states such as Texas and Florida which do not allow any substantial attachment of wages.[89]

S. 613 would give the court power to compel a wage earner who has filed a petition in straight bankruptcy, and who, of course, contemplates discharge, to file a wage earner plan whenever it is "feasible and desirable, and for the

79. S. 613, 89th Cong., 1st Sess. (1965).

80. H.R. 292, 89th Cong., 1st Sess. (1965).

81. See note 18 supra.

82. Reports of the Proceedings of the Judicial Conference of the United States, at 271 (1964).

83. Id. at 274. See also Driver, Proposal To Amend the Bankruptcy Act To Require that Consideration Be Given to the Use of Chapter XIII, 18 Pers. Fin. L.Q. 41, 46 (1964).

84. Nadler, Rehabilitation of the Insolvent Wage Earner Under the Bankruptcy Act in Florida, 10 U. Fla. L. Rev. 465, 470 (1957).

85. Chandler, The Wage Earners' Plan: Its Purpose, 15 Vand. L. Rev. 169, 170 (1961); Walker, Is Chapter XIII a Milestone on the Path to the Welfare State?, 33 Ref. J. 7 (1959). Chapter XIII is not a panacea for the debtor, and it is not the proper function of referees to advise prospective bankrupts. Id. at 9.

86. Dolphin, An Analysis of Economic and Personal Factors Leading to Consumer Bankruptcy 111-12 (1963); accord, Abramson, supra note 60, at 609, where it is noted that the prospective hardships of Chapter XIII cause wage earners to reject the idea.

87. Driver, supra note 83, at 43-44.

88. Ala. Code tit. 7, § 630 (1958) provides that twenty-five per cent of a person's wages may be attached.

89. No wages can be attached in Texas. Tex. Rev. Civ. Stat. art. 4099 (1948). In Florida, the head of a family is exempt from wage attachment. Fla. Stat. § 222.11 (1961). The effect of these statutes on the use of Chapter XIII is discussed in Abramson, supra note 601, at 609; Nadler, supra note 84, at 470-72.

best interests of the creditors . . . ."[90] Under S. 613, a wage earner, having filed a voluntary petition and applied for a discharge, may not only be denied adjudication as a bankrupt, but may also be compelled to undertake a Chapter XIII plan.[91] H.R. 292 would amend that section of the act under which the court examines the debtor petitioning for adjudication, to allow the judge or referee conducting the examination to dismiss the petition where the wage earner has failed to show that "adequate relief cannot be obtained under chapter XIII . . . ."[92] While H.R. 292 avoids use of the word "mandatory" and is structured in such a way as only to deny discharge, and not to compel a wage earner plan, the effect of the bill would be to compel filing of a Chapter XIII petition, at least in states which allow substantial garnishment of wages. Upon denial of a petition for discharge, a debtor will be faced with the alternative of either allowing creditors to invoke the remedies allowed by the state, or of seeking relief through the bankruptcy court by submitting a Chapter XIII petition. Faced with substantial garnishment of his wages, a debtor will effectively be presented with no alternative to wage earner relief.[93]

Adoption of "involuntary" Chapter XIII relief would be a significant departure from accepted tenets of bankruptcy.[94] While there is no constitutional right to a discharge in bankruptcy,[95] it is well established "that the aims of all bankruptcy legislation are two, the distribution of property and the discharge of the debtor, and that of the two, the latter is of equal, and perhaps of paramount importance."[96] Although a debtor has only a privilege, and not a right, to be discharged from his debts, the qualifications which compulsory wage earner plans would place on this privilege have caused severe criticism of the proposals. The Judicial Conference has disapproved of the bills because the proposals "are discriminatory in singling out a low-income group that would be compelled under Chapter XIII to pay their debts in full."[97] The charge of discrimination fails to recognize that consumer bankrupts are, in fact, a distinct economic class and their rights and obligations cannot necessarily be compared to those of other bankrupts. Consideration should be given to the fact that straight bankruptcy denies creditors access to the future wages of consumer debtors, the very

90. S. 613, 89th Cong., 1st Sess. 1 (1965).

91. While it may appear that a reluctant debtor could defeat the purpose of the bill by deliberately defaulting and demanding his statutory right to discharge, the court has the power to prevent intentional defaulting. See notes 50 & 51 supra and accompanying text.

92. H.R. 292, 89th Cong., 1st Sess. 1 (1965).

93. The House bill provides that notice be given to all creditors upon dismissal of a petition for discharge in bankruptcy. It can be assumed that creditors, in states which allow substantial garnishment of wages, will act upon such notice.

94. The historical trend of discharges in bankruptcy is discussed in National Bankruptcy Conference, Analysis of H.R. 12889, supra note 56, at 117-18 n.1.

95. U.S. Const. art. I, § 8 provides: "Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States . . . ."

96. National Bankruptcy Conference, Analysis of H.R. 12889, supra note 56, at 118 n.1.

97. 23 Legal Aid Brief Case 263 (1965), quoting from the reports of the U.S. Judicial Conference on S. 613 & H.R. 292, 89th Cong., 1st Sess. (1965).

"security" on which they have relied.[98] The Conference further criticized the amendments as being "unfair" in compelling a debtor to accept a plan without placing equal compulsion upon secured creditors to accept it.[99] Without discussing the concept of "fairness," it would appear necessary, if Chapter XIII is to be an effective remedy for both the debtor and the creditor, to enact new statutory provisions for bringing secured creditors under the plan.

The National Legal Aid and Defender Association has opposed the amendments on the ground that they "would not serve the best interests of indigent persons . . . ."[100] This is certainly true to the extent that involuntary wage earner plans will result in more debtors paying a larger percentage of their debts. This is not valid criticism, however, if consideration is to be given to either the "best interests" of creditors or to the advantages, such as avoiding the stigma of bankruptcy, which accrue to the debtor upon successful completion of a wage earner plan.

Legal Aid has also opposed the amendments on the ground that the discretionary power given to the referees would "result in a lack of uniformity in the administration of the Bankruptcy Proceeding . . . ."[101] This is the most valid criticism of the bills. While the very basis of an involuntary Chapter XIII proceeding presupposes someone exercising discretionary power to compel acceptance, more specific standards for exercising this discretion must be evolved than have been provided for under the proposed amendments.[102] Under these provisions, uniformity in the use of Chapter XIII would no more prevail than does uniformity in various referees' calculations as to what is necessary to maintain an adequate standard of living or to what extent creditors' interests should prevail. The "feasibility and desirability" criteria appearing in the amendments are as vague as the "adequate standard of living" criterion.

Significantly, proponents of the bill, while brandishing statistics which indicate that as much as 25 to 50 per cent of voluntary bankrupts could have paid their debts,[103] offer no explanation as to why about 80 per cent of the potential voluntary bankrupts in certain areas use Chapter XIII rather than seek a straight discharge.[104] The statistics indicate that some form of "compulsory" Chapter XIII relief may already prevail in some areas of the country.[105] More precise

98. Meth, Ethical and Economic Considerations in Chapter XIII Proceedings, 36 Ref. J. 41, 42 (1962).

99. 23 Legal Aid Brief Case 263 (1965), quoting from the reports of the U.S. Judicial Conference on S. 613 & H.R. 292, 89th Cong., 1st Sess. (1965).

100. National Legal Aid & Defender Ass'n, Summary of Proceedings of the 42d Annual Conference 189 (1964).

101. Ibid.

102. See text accompanying notes 90 & 92 supra.

103. Twinem, Reduce Unnecessary Personal Bankruptcies: Amend the Bankruptcy Act, 23 Legal Aid Brief Case 252-53 (1965).

104. See note 83 supra and accompanying text.

105. Walker, supra note 85, at 9. Referee Walker, recognizing the undue influence that a referee can have on an unadvised debtor's choice of remedies, has stated: "We must remember that when we speak, we speak to a captive audience, and we often fail to realize the impact

standards are required not only in compelling the use of wage earner plans where they are avoided, but also in preventing their being used where a complete and immediate discharge in bankruptcy would be more appropriate.

V. Conclusion

Although both amendments may be justified in attempting to compel wider use of Chapter XIII, they are remarkably deficient in failing to deal with the overall problems of consumer bankruptcy. Wage earner plans offer a potential solution to this bankruptcy problem. However, no solution will come from a loosely defined program under which the rights and obligations of the creditor, the debtor, or the court are not clearly set out. It is not sufficient to incorporate the general provisions of Chapters I through VII "where not inconsistent or in conflict" with Chapter XIII. As in the case of the six year limitation on a subsequent discharge, particular provisions are needed to affect the unique purpose of wage earner plans. The status of secured creditors must be reconsidered, eventually balancing their rights with the necessity of creating a workable plan under which overextended debtors can find equitable relief. A thorough revision and perhaps a re-evaluation of wage earner bankruptcy is necessary.*

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which our persuasive tongues have upon our often not too intelligent listeners." Id. at 9. (Footnote omitted.)

* In the Matter of Perry, 340 F.2d 588 (6th Cir. 1965), discussed at notes 27-33 supra and accompanying text, was reversed by the Supreme Court immediately prior to publication. Perry v. Commerce Loan Co., 34 U.S.L. Week 4190 (U.S. March 7, 1966). The Court's opinion employed, inter alia, the reasoning suggested herein. See text accompanying notes 29 & 30 supra.