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Contributors to the May Issue/Notes

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NOTES

BANKRUPTCY—EXEMPTIONS.—EFFECT ON STATE INSOLVENCY LAWS.—The recent case of *Adrian State Bank of Adrian v. Klinkhammer*¹ brings up the interesting question of the effect of the National Bankruptcy Act (Section 4B) exempting farmers, wage earners, and small debtors from involuntary proceedings thereunder, upon state laws providing for involuntary insolvency proceedings. This case held that while the National Bankruptcy Act was in force Chapter 90 of the

¹ 233 N. W. 588 (Minn. 1930).

Minnesota Statutes is suspended and inoperative as to farmers because it attempts to act within the field appropriated by Congress under the Federal Act. The court said: To hold otherwise would circumvent the purpose of Congress to protect the farmer from involuntary proceedings. If we were to hold that this chapter (90) was inoperative merely as to release of debtors, the insolvency act would be used for the purpose of forcing farmers to take voluntary proceedings under the Federal Act, thus doing indirectly what Congress did not intend to permit." This case is supported by *Foley Bean Lumber Company v. Sawyer*,² which held that the statute of 1881 (Chapter 90 referred to above) was a bankrupt law, not one regulating common law assignments for the benefit of creditors, and was suspended by the enactment of the Federal Act, since they both had the same object,—discharge of debtors. This seems to afford a small,—in fact, very small,—projection upon which to hang the foregoing decision.

Before we go further let us examine the wording of the National Bankruptcy Act, Section 4B: "BANKRUPTS—WHO MAY BECOME.—(b) Any natural person, except a wage earner, or a person engaged chiefly in farming or tillage of the soil, any unincorporated company and any moneyed, business or commercial corporation except a municipal, railroad, insurance, or banking corporation, owing debts to the amount of one thousand dollars or over may be adjudged an involuntary bankrupt upon default or impartial trial and shall be subject to all the provisions and entitled to all the benefits of this title."

The case of *Littlefield v. Gay*³ was one where a small debtor, was petitioned into insolvency by creditors, and decreed insolvent by the state court. The particular proceeding was one to set aside a conveyance as a preference under the state insolvency law. It was held that the plaintiff, assignee in insolvency of the debtor, had no standing in court; that the state court had no jurisdiction to appoint him since the National Bankruptcy Act being in force and effect, and exempting small debtors from involuntary bankruptcy, the state law might not be invoked. The court said: "The test of jurisdiction under the state law does not rest on the volition of the debtor. If his person and property are or may be subject to the bankrupt law then as to him and his possessions the state insolvency law is in abeyance and powerless." The court cites *Ex Parte Eames*,⁴ evidently following too literally the holding therein that when Congress, pursuant to its grant of power in the Constitution (Article 1, Section 8, Subsection 4) acts to

² 78 N. W. 1038 (Minn. 1899).

³ 52 Atl. 925 (Me. 1902).

⁴ Fed. Case No. 4237 (1874).

establish a uniform rule on the subject of bankruptcy, all state laws become suspended as far as all persons and cases within the purview of the Federal laws are concerned.

The case of *Littlefield v. Gay*⁵ was decided only a few years after the passage of the National Bankruptcy Act of 1898.

The case of *Oldfield Bank of Baltimore v. McCormick*⁶ decided the following year, comes to a completely contrary result, seizing on the phrase in *Ex Parte Eames*,⁷ "as far as all persons or cases within the purview of the Federal Laws are concerned," as giving the key to the solution of the problem of how to get at the persons or classes apparently free from all coercion as to the payment of debts. Here the plaintiff Bank filed a petition in insolvency under the Maryland law, against a farmer, who pleaded lack of jurisdiction in the court because the state insolvency law had been superceded by passage of the National Bankruptcy Act. The plaintiff's demurrer to this plea, though overruled below, was sustained here. The court uses as a foundation for its decision several quotations from leading cases. Chief Justice Marshall, in *Sturges v. Crowninshield*,⁸ says: "The fact that Congress has the Constitutional power to establish uniform laws on the subject of bankruptcy does not in itself inhibit the states from passing valid insolvent laws. It is not the existence, but the exercise of the power which is incompatible with the exercise of the same power by the states." The court also uses the principle, set out in *Ex Parte Eames*⁹ and in *Ogden v. Saunders*,¹⁰ that the power of Congress to pass uniform bankruptcy laws does not exclude the right of the states to legislate on the same subject, except when the state law conflicts with those of Congress. The theory of the court is that there is no conflict here, and that the Federal Law excludes members of the three classes. The express exclusion of the defendant from the Federal Act is presumed to give the state legislature authority to cause their acts to apply to him, since it could never have been the intent of Congress to take from creditors of farmers, wage earners and small debtors their rights to secure an equal distribution of the debtor's assets. "If the remedy is not found in the Federal Act, it will not be presumed that Congress intended to take away the remedy provided by the states."¹¹

The power to enact insolvency laws is primarily in the states and may only be taken from them by the establishment of the Federal

⁵ *Op. cit. supra* note 3.

⁶ 53 Atl. 934 (Md. 1903).

⁷ *Op. cit. supra* note 4.

⁸ 4 L. Ed. 529 (Mass. 1817).

⁹ *Op. cit. supra* note 4.

¹⁰ 6 L. Ed. 606 (La. 1824).

¹¹ *Sturges v. Crowninshield*, *op. cit. supra* note 10.

system in conflict with the state law. But here the three classes are excluded from the operation of the important feature of the Federal Act. "How can it be said that an express failure to legislate, an exclusion, raises a conflict?"¹²

From Rhode Island comes another step in the development of the law. In the case of *Lace v. Smith*¹³ a farmer was held subject to the state insolvency law, because being such, he was expressly excluded from the National Bankruptcy Act, and it was held there was no conflict between the state and Federal laws, although the door to the privileges of the Federal Act was left open as to the three classes, farmers, wage earners, and small debtors, so that they might avail themselves of its advantages if they so desire.

*Pitcher v. Standish*¹⁴ progressed still further. A farmer was decreed insolvent by a state court, and he appealed on the ground that the state statute being suspended by the enactment of the National Bankruptcy Act, the state court has no jurisdiction. A demurrer by the petitioner was sustained and the appeal dismissed. The important point made in this case is that what has been done by Congress in regard to these classes does not and was never intended to amount to a complete control over that entire subject, and the court criticizes *Littlefield v. Gay*¹⁵ for holding that the legislation of the Federal Act in regard to the insolvency of farmers, wage earners, and small debtors amounts to complete control over the whole subject. "Whatever cases are expressly excepted from the operation of the National Bankruptcy Act, or lie outside the reach of its provisions are subject to state regulations which are supreme except as restricted by the National Bankruptcy Act. The field of restriction cannot be broader than the operation of the National Bankruptcy Act."¹⁶

Congress, though leaving the door of voluntary bankruptcy open to these classes, expressly excluded them from the Federal Act, intended to do so and intended not to cover the entire field but to leave it open to regulation by the states. The primary object of the Bankrupt Acts and insolvency laws is the prevention of frauds on creditors and it may not be presumed that Congress intended to deny this protection to creditors of farmers, wage earners, and small debtors.

The question resolves itself into the apparent intention of Congress, and though the case of *In Re Doroski*¹⁷ gives down the *dictum* that

¹² *Sturges v. Crowninshield*, *op. cit. supra* note 10.

¹³ 82 Atl. 268 (R. I. 1912).

¹⁴ 98 Atl. 93 (Conn. 1916).

¹⁵ *Op. cit. supra* note 3.

¹⁶ *Pitcher v. Standish*, *op. cit. supra* note 14, at p. 95.

¹⁷ 271 Fed. 8. (E. D. of N. Y. 1921).

"The intent of Congress to protect men engaged in agriculture who might fall behind from the failure of crops for one or two seasons has always been recognized as the basis for this provision" (meaning National Bankruptcy Act, Section 4B), citing no authority therefor; still the Minnesota court displays a perhaps pardonable excess of zeal in coming to the aid of the farmer.

B. R. Desenberg.

HIGHWAYS—CONFLICT BETWEEN STATUTE AND CITY ORDINANCE—POLICE POWER.—An interesting controversy arises when a state through the enactment of a statute fixes a maximum rate of speed for its highways; and a city, by virtue of its police power, prohibits a speed exceeding a lower rate than that permitted by the statute. It is frequently insisted that the city ordinance supersedes the state law. In dealing with the problem, it is necessary to first consider the grounds for such a contention.

Public highways and streets are intended for the purpose of travel.¹ The power to control the use of highways is found primarily in the state legislatures.² However, this body may delegate some of its governmental powers to municipalities, and whatever it may do in the regulation and control of streets and highways, it may delegate to municipalities.³ Judge Dillon says: "The primary fundamental idea of a municipal corporation is an agency to regulate and administer the internal concerns of a defined locality peculiar to the place incorporated, or at all events not common to the State or public at large."⁴ Being a creature of the legislature, and deriving its powers from that body, it is logical, that a municipal corporation may exercise only the powers included in its charter.⁵ But the legislative power is not lost

¹ Huddy *On Automobiles* (7th Ed.), p. 33; Tooke, *Cases On Municipal Corporations* (1931 Ed.) p. 338.

² Huddy, *op. cit. supra* note 1, p. 49; 2 Dillon, *Municipal Corporations*, § 656; 29 C. J. 646.

³ Huddy, *op. cit. supra* note 2; 29 C. J. 646.

⁴ 1 Dillon, *Municipal Corp.* (3rd Ed.), § 218; Elliott, *The Law Of Roads and Streets*, p. 326; 19 R. C. L. p. 800.

⁵ "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted

by a delegation of it to a municipality. The state may resume its absolute control, unless constitutional provisions obstruct this use of legislative power.⁶

A municipality, by virtue of its police power, may regulate the use of streets by motor vehicles.⁷ But an ordinance enacted under legislative authority comes within the scope of the Fourteenth Amendment to the Federal Constitution which prohibits any state from depriving anyone of life, liberty, or property without due process of law.⁸ Moreover, to be enforceable, a municipal ordinance must be reasonable,⁹ and cannot infringe rights guaranteed by state constitutions. Nor can it be a valid exercise of power if it conflicts with a statute and forbids what a legislature has expressly licensed or permits what the legislature has forbidden.¹⁰ "The books and reported cases seem to agree that courts may declare void an ordinance passed by a city or village by virtue of its implied powers, if, in the opinion of the court, it is unreasonable; but when the ordinance is passed by express authority conferred upon the municipality by the legislature, such power is not so clear, and there is a conflict of authority upon that proposition."¹¹

In disposing of the problem whether or not the city ordinance supercedes the statute, unquestionably the terms "highways" and "streets" have presented much confusion. The term "highway" is a very comprehensive one, and capable of many different meanings. "Highways"¹² is a generic name for all kinds of public ways and may include, public ways of every description—canals, streets, footways, ferries, bridges, and rivers.¹³

The purpose of a street is primarily the same, that of public travel. "In strictness a street is a paved, macadamized, or graveled public way, belonging to the State as one of its highways, but ordinarily the word 'street' is employed as meaning any way set apart for the public use in a city, town, or village, whether improved or not."¹⁴ Although

are void. Much less can any power be exercised, or any act done, which is forbidden by charter or statute. These principles are of transcendent importance, and lie at the foundation of the law of municipal corporations." 1 Dillon, *Mun. Corp.* (5th Ed.), § 237. See also, *St. Paul v. Robinson*, 129 Minn. 383, 152 N. W. 777 (1915); *Chicago v. Kluever*, 257 Ill. 317, 100 N. E. 917 (1913).

⁶ Huddy, *op. cit. supra* note 1, at p. 62.

⁷ *Watts v. Montgomery Tr. Co.*, 175 Ala. 102, 57 So. 471 (1912); *Chicago v. Kluever*, *op. cit. supra* note 5; *McIntosh v. Johnson*, 211 N. Y. 265, 105 N. E. 414 (1914); *City of Oshkosh v. Campbell*, 151 Wis. 567, 139 N. W. 316 (1913).

⁸ 19 R. C. L. 803.

⁹ Huddy, *op. cit. supra* note 1, at p. 69.

¹⁰ *Mendel v. Dorman*, 202 Ky. 29, 258 S. W. 936 (1924); 19 R. C. L. p. 803.

¹¹ Tooke, *op. cit. supra* note 1, at p. 212.

¹² *Bovier's Law Dictionary*, Vol. 1., p. 447.

¹³ *Highways*, 29 C. J. 364.

¹⁴ *Elliott*, *op. cit. supra* note 4, at p. 13.

the purpose for which streets and highways are established is the same, it may be said that all streets are highways, although all highways are not streets. And rules which apply to one cannot be said to apply to another.

That legislatures confer on local and municipal authorities power of control is a recognized fact. Thus when the state and cities attempt at the same time to exercise control over thoroughfares, the law would permit one to invade the jurisdiction of the other, and it is difficult in many instances to determine just what jurisdiction is intended by the legislature to be exclusive. Courts, to prevent a conflict of authority, have favored a construction of statutes permitting each jurisdiction to have exclusive control of its own highways. For instance, in Illinois,¹⁵ Tennessee,¹⁶ Texas,¹⁷ and Indiana,¹⁸ it has been held the general statutes applying to "public highways" do not apply to streets of an incorporated town or city. On the other hand, the term "highways" has been construed as including "streets" of incorporated villages and cities.¹⁹ Some *automobile* acts passed by various states define the terms.²⁰

It is regretted that the term "highways" is not more accurately used in statutes and decisions. No set rule in regard to the term can be given; "Its construction depends upon the intent as determined by the context."²¹

Weighing the rule just quoted, it is evident that much confusion and danger as already indicated exists in many jurisdictions. It is generally sustained that municipalities may enact rules to regulate the use of streets within their limits, but such ordinances are ineffective when they are in conflict with state statutes.²² However, in dealing

¹⁵ *People ex rel Scippe v. Chicago, etc., R. Co.*, 118 Ill. 520 (1886).

¹⁶ *Cowan's Case*, 1 Overt 311.

¹⁷ *State v. Jones*, 18 Tex. 874 (1857). See also, 96 Tex. Crim Rep. 3, 255 S. W. 730 (1923); *Lamar & Smith v. Stroud*, 5 S. W. (2d) 824 (Ct. of Civ. App. of Tex. 1928).

¹⁸ *Indianapolis v. Croas*, 7 Ind. 9 (1855). See also, 169 Ind. 265, 82 N. E. 459 (1907); *State v. Amos*, 76 Fla. 26, 79 So. 433 (1918).

¹⁹ *Burns v. Kendall*, 96 S. C. 385, 80 S. E. 621 (1914); *Hall v. Compton*, 108 S. W. 1122 (Mo. 1908); *West v. City of Asbury Park*, 99 Atl. 190 (N. J. 1916).

²⁰ *Huddy, op. cit. supra* note 1, at p. 17.

²¹ *Highways*, 29 C. J. 363.

²² *Alabama: Hood & Wheeler Furniture Co. v. Royal*, 76 So. 965 (1907); *Alder v. Martin*, 59 So. 597 (1912). *California: Ex Parte Daniels*, 192 Pac. 442 (1920). See also, *Ham v. Los Angeles County*, 189 Pac. 462 (1920). *Georgia: Jones v. Stokes*, 89 S. E. 1078 (1916). *Illinois: Chicago v. Kluever*, 109 N. E. 917 (1913); *Hearitt v. Downers Grove*, 115 N. E. 869 (1917). *Kentucky: Mendel v. Dorman*, 202 Ky. 29 (1924). *Massachusetts: Commonwealth v. Newhall*, 91 N. E. 206 (1910). *Minnesota: Park v. Duluth*, 159 N. W. 627 (1916). *Missouri: Roper v. Greenspon, et al.*, 129 S. W. 1107 (1917). *Nebraska: Christensen v. Tate*, 128

with the conflict between the statute and city ordinance, three divisions of construction are followed. Whether a conflict exists or not may turn, (1) on the charter powers of a municipality, (2) on the peculiar language of the statute, (3) where a statute expressly forbids municipalities from enacting ordinances on the subject.

It is insisted, in some jurisdictions, that the rights of a municipality cannot be assaulted by a legislature. The argument is advanced on the theory that the police power granted municipalities is a limitation on the power of the legislature.²³ It is further argued, that the power inherent in every municipality to protect life and insure public safety will support all reasonable ordinances adopted by the proper authorities for the regulation of public streets.²⁴ Such jurisdictions are reluctant to interfere with the authority of a municipality.

The Supreme Court of Oklahoma, in the decisions of *Owen v. Tulsa*,²⁵ and *Mitchell v. Carter*,²⁶ held that in municipal matters the charter superseded the general laws. Notwithstanding these decisions it was held in *Ex parte Shaw*,²⁷ a case decided by the same court, that the state laws regulating traffic controlled local ordinances in conflict therewith.

In *Kalick v. Knapp*²⁸ it was held that when a city was granted power to regulate its affairs, the legislature could not repeal or amend that power. However, in *Lovejoy v. Portland*,²⁹ decided about six years later, it seems that the law of the previous case was changed, and the power of the legislature to pass general laws affecting municipalities was upheld.

Under the general welfare statutes, it is contended that an ordinance is valid on the ground that it creates and defines an offense against the municipality, and the state law creates a different offense against the state, even though the act be the same.³⁰

N. W. 622 (1910). New York: *People v. Braun*, 166 N. Y. S. 708 (1917). North Carolina: *State v. Freshwater*, 111 S. E. 161 (1922). Ohio: *Goldie Schneiderman v. Barbara Sesanstein*, 167 N. E. 138 (1929). Rhode Island: *State v. Thurston*, 66 Atl. 580 (1907). West Virginia: *State ex rel. Constanzo v. Robinson*, 104 S. E. 473 (1920). Wisconsin: *Baraboo v. Dwyer*, 165 N. W. 297 (1917); *Oshkosh v. Campbell*, 139 N. W. 316 (1913).

²³ *State ex rel. Mullins v. Port of Astoria*, 154 Pac. 399 (Or. 1916).

²⁴ *Taylor v. Roberts*, 94 So. 874 (Fla. 1922).

²⁵ 111 Pac. 320 (Ok. 1910).

²⁶ 122 Pac. 691 (Ok. 1912).

²⁷ 157 Pac. 900 (1916).

²⁸ 142 Pac. 594 (Ok. 1914).

²⁹ 188 Pac. 207 (Or. 1920); *Rose v. Portland*, 162 Pac. 498 (Or. 1917).

³⁰ *Lawrenceburg v. Wuest*, 16 Ind. 337 (1861); *Town of Avoca v. Heller*, 129 Ia. 227 (1905); *DeSota v. Brown*, 44 Mo. App. 148 (1891).

Contra: *Adams v. Albany*, 29 Ga. 56 (1859); *State v. Burns*, 11 So. 878 (La. 1893); *State v. McCoy*, 21 S. E. 690 (N. C. 1895); *Canton v. Mist*, 9 Ohio St. 439 (1859); 17 L. R. A. (N. S.) 59.