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THE EVOLUTION OF MODERN BANKRUPTCY LAW*

A COMPARISON OF THE RECENT BANKRUPTCY ACTS OF ITALY AND THE UNITED STATES

By STEFAN A. RIESENFELD**

While the war suppressed any incentive and opportunity to take account of the development in the law of enemy countries, the present era of international reconstruction should give fresh impetus to a study of foreign legislation, particularly when dealing with problems akin to our own.

The year 1942 constituted an important landmark in the path of evolution of Italian law and in some respects the beginning of a new era. Up to that date one of the main sources of Italian law was the so-called "Five Codes" - the Civil Code of 1865, the Code of Commerce of 1882, the Code of Civil Procedure of 1865 and the two modernized codes, the Penal Code of 1930 and the Code of Criminal Procedure of 1930. It had long been felt that the system of the first three codes, constituting practically the entire private law of Italy, was antiquated, and efforts were made for a thorough overhauling, which dated back to various periods for the different codes. In 1942 finally a new Civil Code¹ and a new Code of Civil Procedure² went into force, while the Code of Commerce, which

*The author is deeply indebted to the Director of the Harvard Law Library for making the foreign materials accessible to him, and to Professor Bade of the University of Minnesota Law School for invaluable assistance of various kinds in the preparation of the manuscript.
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¹Codice civile, 1942. It consists of six books which were promulgated by a series of successive royal decrees pursuant to two enabling acts of 1923 and 1925. The complete text of the code as a unit was approved and promulgated by royal decree n. 262 of March 16, 1942.
²Codice di procedura civile, 1942, promulgated by royal decree n. 1443 of October 28, 1940. For a complete annotation see D'Onofrio, Commento al nuovo codice di procedura civile, 1941.
had consisted of four books, was eliminated. Its substance was partly abolished, partly absorbed by the two other codes, and partly incorporated into two new bodies of law, the Code of Navigation and the Bankruptcy Act of 1942. The principal features of the latter statute and their place in the evolution of modern bankruptcy law are the subject of the following discussion.

I.

History and general features of the Italian bankruptcy reform.

(1) The Italian bankruptcy law before the reform was contained in Book III, titles 1-6 of the Commercial Code of Oct. 31, 1882, which was patterned with some modifications after a celebrated French model. Although this law constituted an improvement over the French original and the provisions contained in the first Italian commercial code of 1865, and although it had won high praise in its early days, complaints were soon launched against its wastefulness and slowness. In connection with official studies for a reform of the whole commercial code which were begun in 1894, efforts for an improvement of the law of bankruptcy were made.

3Codice della navigazione, 1942, promulgated by royal decree n. 327 of March 30, 1942.

4Disciplina del fallimento, del concordato preventivo, dell'amministrazione controllata e della liquidazione costitutiva, promulgated by royal decree n. 267 of March 16, 1942. The text of the statute together with the important report of Minister of Justice Grandi to the King-Emperor is reproduced in Le leggi, 1942, 321 ff. For a text of the statute with a brief explanation of the individual articles, see Picella-Potenza, Disciplina del fallimento etc., illustrato con i lavori preparatori, 1942. The most modern text on the new bankruptcy law is Salvatore Satta, Istituzioni di diritto fallimentare (2d ed. 1946). Prof. Satta was one of the draftsmen of the new act.

7See Cuzzeri-Cicu, op. cit. supra note 5, pp. 4, 5, Rocco, Principii di diritto commerciale, 1928, 36. The celebrated Italian jurist Bolaffio was in charge of the bankruptcy portion of the revision.
The result was the final enactment in 1903 of a statute which provided for compositions to prevent bankruptcy and for special bankruptcy proceedings applicable to small merchants.\(^8\) However, the work on a complete overhauling of the commercial code continued until the first World War and was resumed with greater energy after peace was restored. Reform of the bankruptcy law was again pressed.\(^9\) In 1923 the efforts were extended to encompass a general reform of all codes.\(^10\) The first fruits of these labors were the two new codes of criminal law and criminal procedure of 1930, and a partial reform of the bankruptcy law of 1930 concerning principally the procedure.\(^11\) During the course of the work on the revision of the private law codes it was finally decided to make a radical departure from the classical Napoleonic scheme. In 1941 it was resolved that it was incompatible with the ideas of the corporate state to have a special private law and special rules of procedure for the merchants,\(^12\) and consequently we have separate civil and commercial codes. Therefore the new Code of Civil Procedure abrogated the last traces of special procedural rules for mercantile transactions as contained in the old code and book 4 of the Commercial Code.\(^13\) The law of the commercial enter-

\(^{8}\)Legge sul concordato preventivo e sui piccoli fallimenti, May 24, 1903. About the background of this law see infra chapter VI.

\(^{9}\)In 1919 the Minister of Justice Mortara, himself a famous lawyer, named the celebrated jurist, C. Vivante, as chairman of the committee for the reform of the commercial code, who put Professor G. Bonelli in charge of a subcommittee for the drafting of a new Bankruptcy Act. See Rocco, Principi di diritto commerciale 1928, 38, 39. The draft is reprinted in Rivista del diritto commerciale, 1921, 522.

\(^{10}\)Law of December 30, 1923, n. 2814, see Rocco, op. cit. supra note 9, 39.

\(^{11}\)Law of July 10, 1930, n. 995, Disposizioni sul fallimento, sul concordato preventivo e sui piccoli fallimenti. The text of this statute together with the detailed report by the Minister of Justice Rocco is reproduced in Le leggi, 1930, 562. The report points out that “the government did not intend to accomplish that profound and general reform of the institution of bankruptcy law which will find a more adequate place in the future revision of the commercial code,” but only to remedy the most pronounced evils. The statute consisted of 30 articles and dealt mainly with the position and selection of the trustee and with the proof and allowance of claims. The leading expositions of this phase of the Italian bankruptcy law are Brunetti, Diritto fallimentare italiano, 1932, Navarrini, Trattato di diritto fallimentare, 1934, Baldi, Fallimento e concordato preventivo, 1937

\(^{12}\)The text of this resolution by the Council of Ministers is reprinted in Picella-Potenza, op. cit. supra note 4, pp. 7, 8. See also the report by Grandi to the House of Representatives, on a law of 1941 extending the powers under the enabling act of 1923, Le leggi 1941, 553.

\(^{13}\)Until 1888 Italy possessed separate civil and commerce tribunals, as they were introduced by the Napoleonic system. However, on January 25th of that year they were abolished, and consequently book IV of the Codice di commercio entitled “Of the exercise of commercial actions and their duration” had outside the substantive provision relating to prescription only a limited scope of application. See Mortara-Azzariti, L’esercizio delle azioni
prise together with the labor law were inserted into the civil code, and the law of commercial contracts fused with the general law of contracts.\textsuperscript{14} Since the Code of Navigation was promulgated as an independent unit, the law of bankruptcy became the only remaining portion of the old commercial code to be allocated to some niche in the general scheme. It was decided that neither the civil code nor the code of civil procedure was a proper place, and that it was best to design a separate act covering the whole law pertaining to the financial crisis of an enterprise as dictated by the exigencies of the national economy.\textsuperscript{15}

(2) The principal features of the new statute, which was drawn by a committee of jurists under the chairmanship of Professor Asquini, are on the one hand the integration of bankruptcy proceedings in the strict sense with the whole body of provisions regulating the law pertaining to enterprises in a financial crisis, and on the other hand the strong emphasis on the public or official character of bankruptcy proceedings which had already been the essence of the Rocco-reform of 1930.\textsuperscript{16}

Bankruptcy proceedings are administered and controlled by the bankruptcy court (tribunale fallimentare).\textsuperscript{17} It renders the adjudication as a bankrupt of the debtor\textsuperscript{18} and is in charge of the entire procedure. But just as in the United States the referee in bankruptcy acts as the court,\textsuperscript{19} so under the Italian statute the...
Judge-Delegate (giudice delegato) is the principal judicial officer supervising the proceedings. And similarly to our law, the court may be asked for a review of the judge-delegate’s orders.

An official character is also imparted since the reform of 1930 to the position of the “curatore” who corresponds to our trustee in bankruptcy. But while in the United States the trustee now is ordinarily appointed by the creditors subject to the approval of the court, in Italy the curatore is selected by the bankruptcy court from a roster of qualified persons (called ruolo degli amministratori giudiziari) kept by the tribunal. The creditors, through the creditors’ committee, have, however, the right to request his removal. While the curatore, in distinction to our trustee, does not acquire technical legal title to the debtor’s assets, he has the exclusive administration of the assets similar to our “chancery receiver” and represents neither the individual creditor nor the bankrupt, but the insolvent estate as such for the purpose of a speedy, efficient and equal satisfaction of the creditors.

The creditors are somewhat modestly represented by a creditors’ committee. But it resembles the American committees in name only, for its three or five members are appointed by the judge-delegate and it performs no directive but merely consultative functions. Here especially the authoritarian character of the new law in comparison with the old code is evident.

(3) Naturally the Italian bankruptcy law, like all statutes of

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26 Italian Bankruptcy Act, 1942, art. 25, Satta, op. cit. supra note 4, 79.
27 Italian Bankruptcy Act, art. 26, Satta, op. cit. supra note 4, 74.
28 Italian Bankruptcy Act, 1942, art. 27 ff, particularly art. 30.
29 U. S. Bankruptcy Act, sec. 2a (17), 44. This was not always the case. Under the Bankruptcy Act of 1841 the court appointed the assignee; cf. 2 Collier, Bankruptcy (14th ed.), 1940, sec. 44.01.
30 Italian Bankruptcy Act, 1942, art. 27, Satta, op. cit. supra note 4, 85. It is interesting that a similar system has been proposed for American law by Clark, Reform in Bankruptcy Administration, (1930) 43 Harvard Law Rev. 1189, 1203, but Congress refused to adopt it.
31 Italian Bankruptcy Act, 1942, art. 37, Satta, op. cit. supra note 4, 88.
32 Compare U. S. Bankruptcy Act, sec. 70, with Italian Bankruptcy Act, 1942, art. 31 and 42. See also Brunetti, op. cit. supra note 6, 245 ff. with copious historical and comparative references on the effects of bankruptcy on the position of the bankrupt in regard to his assets, and Satta, op. cit. supra note 4, 85, 92. The bankrupt under Italian law, while still having title to the assets, loses the administration and power to dispose of them.
33 Italian Bankruptcy Act, 1942, art. 40.
34 U. S. Bankruptcy, sec. 446. Creditors’ committees got official standing in American law only since the reform of 1938.
35 Italian Bankruptcy Act, 1942, art. 41, Satta, op. cit. supra note 4, 89.
36 Cf. Satta, op. cit. supra note 4, 38, 89.
this kind,\textsuperscript{21} is fundamentally dominated by the theory that "equality is equity," at least insofar as general creditors are concerned. This "par condicio creditorum" is the leitmotif of the act.\textsuperscript{22} Similar to the American bankruptcy legislation, which is said to have passed from a "period of the creditor" through a "period of the debtor" to a "period of the national interest,"\textsuperscript{23} the new Italian act purports to have shifted the emphasis from the creditors' individualistic interests to the public interest.\textsuperscript{24} Nevertheless, in many respects the new Italian statute still bears the imprint of notions that have long been discarded by our legislation.

Proceedings under the bankruptcy act in the United States no longer have as their main aim the satisfaction of the creditors, they have increasingly centered around provisions for the discharge of the debts and later for the rehabilitation of the debtor, adopting the theory that one of the primary purposes of the bankruptcy legislation is "to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh, free from the obligations and responsibilities consequent upon business misfortunes," to "give the honest but unfortunate debtor a new opportunity in life and a clear field for future effort."\textsuperscript{25}

But it must be recalled that also in the United States the legislation had to undergo a long process of "progressive liberalization."

\textsuperscript{21}There seems to exist no adequate modern history of the general development of bankruptcy law in American legal literature. Holdsworth, A History of English Law, Vol. I (6th ed. 1938), 470, Vol. VIII (2d ed. 1937) 229, confines himself to English law. Italian and other European scholars have given the matter careful attention, see, for instance, the discussion and references in Seuffert, Deutsches Konkursprozessrecht 1899, 4 ff., Kohler, Leitfaden des Deutschen Konkursrechts, (2d ed.) 1903, 3 ff, Brunetti, op. cit. supra note 6, 51 ff. The origins of modern bankruptcy law came indubitably from the statutes of the Italian cities in the Middle Ages and the notions developed by the legal writers of that epoch.

\textsuperscript{22}Satta, op. cit. supra note 4, 22.


\textsuperscript{24}Satta, op. cit. supra note 4, 44.

tion. The first Bankruptcy Act of 1800 (in force until 1803) knew only of involuntary proceedings, applied only to merchants and traders and required the consent of two-thirds of the creditors for discharge. The second Bankruptcy Act of 1841 (repealed in 1843) provided for voluntary bankruptcy proceedings open to all persons but restricted involuntary proceedings to merchants, retailers, bankers, factors and underwriters; it granted a right to a discharge to all debtors except in case of the commission of certain specified fraudulent acts. The third Bankruptcy Act of 1867, which enjoyed a considerably longer life (until 1878), provided in its original form for voluntary and involuntary proceedings, subjecting to the latter any person, including business corporations, owing a certain amount and having committed one of ten listed acts of bankruptcy. The discharge required either the consent of a majority of creditors in number and amount or a dividend of 50 per cent. The statute also introduced a simplified form of liquidation by means of an "arrangement" accepted by creditors representing three-fourths in value of the proven debts. An amendment of 1874 introduced two important changes in the interest of the debtor. In the first place, it facilitated discharges by reducing the requirements in case of voluntary proceedings to either the consent of only one-fourth of the number of creditors owning one-third of the proven claims, or to a dividend of 30 per cent and by dispensing with them entirely in case of involuntary proceedings. Secondly, it provided for the possibility of a composition with the creditors before or after adjudication as part of the bankruptcy proceedings which, after acceptance by a speci-
fied majority, would entail a discharge of the dischargeable debts.\textsuperscript{44} The present Bankruptcy Act of 1898, in its original version, restricted the list of persons entitled to voluntary proceedings by excluding corporations\textsuperscript{45} but freed the discharge completely from any pre-requisites of consent of creditors or minimum dividend and provided for compositions.\textsuperscript{46} Subsequent amendments enlarged the group of persons amenable to bankruptcy proceedings mainly in respect to various classes of corporations\textsuperscript{47} and provided since 1933 for compositions and extensions for the prevention of bankruptcies.\textsuperscript{48} The sweeping reform of 1938\textsuperscript{40} finally introduced or streamlined a number of various rehabilitation and reorganization proceedings which now constitute a major portion of modern American bankruptcy law.\textsuperscript{50} Italian bankruptcy law, even in its newest casting, has not gone that far as yet. Bankruptcy proceedings, whether voluntary or involuntary, are still confined to merchants, be they natural or juristic persons.\textsuperscript{51} Bankruptcy proceedings in the strict sense do not even give the debtor the privilege of discharge.\textsuperscript{62} He may

\textsuperscript{44}18 U. S. Stats. 178, ch. 390, sec. 17, (1874) This provision was upheld as constitutional by the federal District Court and Circuit Court in In re Reimann (1874) Fed. Cas. 11673, (1875) Fed. Cas. 11675 and interpreted by the Supreme Court without discussion of its constitutionality in Wilmot v. Mudge (1880) 103 U. S. 217, 26 L. Ed. 36.

\textsuperscript{45}30 U. S. Stats. 544, ch. 541, sec. 4 (1898) All corporations were excluded from voluntary proceedings, business corporations, however, were subject to involuntary proceedings.

\textsuperscript{46}30 U. S. Stats. 544, ch. 541, sec. 12 and 14 (1898)

\textsuperscript{47}32 U. S. Stats. 797, ch. 487, sec. 3 (1903), including mining corporations into the list of corporations subject to involuntary proceedings. 36 U. S. Stats. 838, ch. 412, sec. 3 and 4 (1910), entitling corporations to voluntary proceedings, further amended by 47 U. S. Stats. 47, ch. 38 (1932), 49 U. S. Stats. 246, ch. 114 (1935)

\textsuperscript{48}Former sections 73 and 74 of the Bankruptcy Act, 47 U. S. Stats. ch. 201 (1933) For a discussion see infra, chapter V

\textsuperscript{49}52 U. S. Stats. 840, ch. 575 (1938), so-called Chandler Act.

\textsuperscript{50}See infra, chapts. V and VI.

\textsuperscript{51}Italian Bankruptcy Act, 1942, art. 5, Satta, op. cit. supra note 4, 27 While in practice bankruptcy was historically confined to merchants, it should be pointed out, that both the English Bankruptcy Act of 34 and 35 Henry VIII ch. 4 (1542) and the celebrated Ordinance of 1673, which was the first great codification of the law merchant in France, did not by their terms exclude insolvent non-merchants from the application of their bankruptcy provisions. Ordonnance du Commerce, March 23, 1673, title XI, art. 1. Recueil général des anciennes lois françaises (ed. by Isambert et al.) 1823, vol. 19, p. 91, 104. This limitation was only introduced by the statute of 13 Eliz. ch. 7 (1511) and the Napoleonic Code de Commerce. See 1 Thaller, Des faillites en droit Compare. 1887, 146 ff., Brunetti, op. cit. supra note 6, 59. However, the Italian tradition seems always to have looked at bankruptcy as a mercantile matter, and the drafters of the new act thought this system even today was better suited to the Italian economy. See the Report by Grandi. Le leggi, 1942, 321.

\textsuperscript{52}Brunetti, op. cit. supra note 6, 600. Satta, op. cit. supra note 4, 201. According to the latter, a duly proven debt in bankruptcy is res judicata in
secure a (partial) release only by means of a bankruptcy composition which he can obtain under court supervision upon consent of the majority of creditors. The new act has incorporated provisions for compositions for the avoidance of bankruptcy, first introduced in 1903, (and amended in 1930), and added an entirely new proceeding called “supervised administration” (l'amministrazione controllata) which is designed for the purpose of helping enterprises which are in temporary financial difficulties to overcome the embarrassment and to avoid bankruptcy. In addition, it may be mentioned that the new law provides for streamlined proceedings in case of small enterprises and exempts artisans and very small businessmen completely from the coverage of the statute.

II.

Jurisdiction of the Bankruptcy Court over Subject-Matter and Persons; Acts of Bankruptcy.

American procedural practice and theory is fairly generally committed to a sharp distinction between jurisdiction and venue. Jurisdiction (in this sense) denotes the power to hear and determine subsequent proceedings by the creditor and entitles him to a writ of execution against later acquired assets. While the idea of a discharge has been a feature of English law since 1705 (cf. supra note 37), continental bankruptcy law—apart from a few sporadic exceptions, such as the bankruptcy law of Amsterdam of Jan. 30, 1777, art. 42—generally and traditionally has not recognized a release of the debtor, outside a composition, see e.g., German Bankruptcy Law of 1877 as amended 1898, sec. 164 and Jaeger, Kommentar zur Konkursordnung, 7th ed., 1936, sec. 164, Ann. 13 (survey of foreign law). It should be understood, however, that early English and American law required the consent of a qualified majority of creditors for the discharge, similar to a composition, and that only the English Bankruptcy Act of 1883 and the American Bankruptcy Act of 1898 dispensed completely with the necessity of a consent by a majority of creditors. Italian Bankruptcy Act, 1942, art. 135, and Satta, op. cit. supra note 4, 240.

Italian Bankruptcy Act 1942, art. 160 ff. The act thus distinguishes between two types of compositions: compositions for the termination of bankruptcy proceedings or “bankruptcy compositions” (concordato fallimentare) art. 124 ff., and compositions for the avoidance of bankruptcy (concordato preventivo), art. 160 ff., see infra chapter V.

Cf. supra text to note 8.

Italian Bankruptcy Act 1942, art. 187 ff., see infra, chapter VI.


Italian Bankruptcy Act 1942, art. 1 in connection with Civil Code, 1942, art. 2083, cf.


Jurisdiction in this sense is “judicial jurisdiction”, not “legislative jurisdiction” in the terminology used by the American Law Institute’s Restatement of Conflicts. Legislative jurisdiction, i. e. the congressional power with
mine a particular type of law suit, while venue determines the proper place of trial. Jurisdiction of the court must exist both over the person and the subject matter. Continental procedural doctrine, however, frequently considers jurisdiction as the genus proximum and adopts a threefold distinction of jurisdiction over the subject matter, over the person and over the place (ratione materiae, ratione personae, ratione loci). We will deal here only with jurisdiction in the narrower sense, namely, relating to subject matter and persons.

(1) The distribution and liquidation of an insolvent estate under court supervision has a natural tendency to spawn hard questions involving jurisdiction. It has been recognized by the federal Supreme Court in receivership cases that "for the purpose of avoiding injustice which otherwise may result, a court during the continuance of its possession has, as an incident thereto and as ancillary to the suit in which possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession or the control of the property. In the courts of the United States this incidental and ancillary jurisdiction exists, although in the subordinate suit there is no jurisdiction arising out of diversity of citizenship or the nature of the controversy." "Jurisdiction to administer the estate draws to itself, when once it has attached, an incidental and ancillary jurisdiction to give protection to the estate against waste or disintegration while frauds upon its integrity are in process of discovery." This principle is recognized and in some fashion enlarged and spelled out by the American Bankruptcy Act, which regulates jurisdiction in sections 2 and 23. In the United States the problem of jurisdiction presents additional complications owing to the regard to the subject of bankruptcies, is much broader and "incapable of a final definition," Wright v. Union Central Insurance Co., (1938) 304 U. S. 502, 513, 585 S. Ct. 1025, 82 L. Ed. 1490. For the similarity of Canadian law in this respect see Attorney General for Brit. Columbia v. Attorney General for Canada, (1937) AC 391. A functional description of bankruptcy has been attempted by Radin, The Nature of Bankruptcy (1940) 89 U. Pa. L. Rev., 1.

This traditional trichotomy however has been recently severely criticized by modern European procedural theorists. Space forbids references.


Steelman v. All Continent Co., (1937) 301 U. S. 278, 279, 57 S. Ct. 705, 81 L. Ed. 1085.

fact that the jurisdiction of the federal District Courts as courts of bankruptcy must be delimited as well against the jurisdiction of the state courts as against the jurisdiction of the federal courts as "ordinary" federal courts. However, the federal Supreme Court, in a line of cases, has succeeded in working out some general principles that underlie the provisions of the bankruptcy act. This statute in its original version of 1898 constituted a substantial limitation on the sweeping jurisdiction possessed by the bankruptcy courts under the acts of 1841 and 1867. But later amendments, in conjunction with a liberal construction, have gradually again extended the jurisdiction of the bankruptcy courts, so that today only bona fide adverse claims to property not in the actual or constructive possession of the bankruptcy court and not involving fraudulent conveyances or preferential transfers are outside the sweep of the bankruptcy jurisdiction. In rehabilitation proceedings the scope of jurisdiction is still broader.

Continental practice and theory under the system of the *ius commune* arrived at similar conclusions. The writers on bankruptcy in Europe from the middle of the Seventeenth Century...
until today developed the notion of a *vis attractiva concursus*, i.e. “an attractive force of bankruptcy,” by virtue of which controversies otherwise belonging to the jurisdiction of other courts are drawn into that of the bankruptcy tribunal. This idea, which is really a label for practical considerations, has been incorporated into modern bankruptcy statutes and has led from the beginning in Italy, as elsewhere, to a great number of discussions and controversies.

Accordingly, under the system of the old Italian commercial code the existence and effects of the *vis attractiva concursus* was a much debated question and the amendments of 1930 did not clarify the situation. The decisions of the courts tended to assume an attractive force, whereas the leading commentator of the old Italian bankruptcy law, Professor Bonelli, denied it emphatically. The new statute of 1942, however, is admittedly inspired by this idea, as Professor Satta points out, although tempered by certain limitations in the interest of third parties. The tribunal is not only in charge of the bankruptcy administration, strictly speaking, but also possesses jurisdiction “to determine all actions which derive from bankruptcy regardless of the amount involved, including those relating to labor relations but excepting actions relating to real property for which the ordinary rules of jurisdiction remain unaffected.” As Professor Satta observes, the concept of “actions derived from bankruptcy” which was also used by the old code in Art. 685, is not easily defined and gave rise to interminable discussions incorporated in Justinian’s Code, III, 1, 10. Salgado’s views penetrated quickly theory and practice, particularly in Germany and Italy, see Endemann, Die Entwicklung des Konkursverfahrens in der gemeinrechtlichen Lehre, (1888) 12 Zeitschrift für Deutschen Civilprozess, 24 ff, and the early treatments of bankruptcy by Brunemann, De processu concursus creditorum (ed. by Stryk) 1697 12 Ludovici, Einleitung zum Concursprocess (ed. by Schlittee 1733) 5, Leyser, Meditations ad Pandectas, 1744, sp. 478 nr. 8. 9 Claproth, Der Concursprocess, 1777 The term “*vis attractiva*” was apparently coined by Dabelow, Lehre vom Concurs der Gläubiger, 1792, 166. The older famous treatment of involuntary bankruptcy by the Italian Stracchi with the title Tractatus de conturbatoribus sive decotoribus, 1553, did not deal with the question of jurisdiction.

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71See, for instance, Brunetti, op. cit. supra note 6, 171, 353, 2 Jaeger, Kommentar zur Konkursordnung, (1936), sec. 71, nr. 4, 24.
74Satta, op. cit. supra note 4, 75, note 90.
75Italian Bankruptcy Act, 1942, art. 23. (“The tribunal which has rendered the adjudication is in charge of the entire bankruptcy procedure.”)
76Italian Bankruptcy Act, 1942, art. 24.
putes under the previous law. But the framers of the new statute, while intentionally "after mature reflection" retaining the term, alleviated the difficulties by specifying the proper forum in many instances.\textsuperscript{77}

The jurisdiction of the bankruptcy court is exclusive, and within its orbit come all actions by the trustee for the avoidance of fraudulent and preferential transfers in the interest of the estate, but not actions by the trustee on ordinary contracts or for claims of title. In addition, the bankruptcy court is the proper forum of actions against the estate by either creditors or third parties, particularly for reclamation proceedings save those involving real property. Actions resulting from the administration of the trustee, however, are not included; neither are actions already pending in which the trustee is substituted for the debtor.\textsuperscript{78}

According to Professor Satta, the tribunal acts in these actions not as a true bankruptcy court, but as a regular court with a special obligatory territorial competence, which is a view similar to that expressed in a leading recent American case.\textsuperscript{79} Where jurisdiction follows from Art. 23 of the Italian statute, the court decides in summary proceedings (decree rendered in chambers and not subject to appeal);\textsuperscript{80} controversies "deriving from the bankruptcy" on the other hand are handled like ordinary law suits.\textsuperscript{81}

(2) Jurisdiction over the person is involved in the question "who can become a bankrupt." Both American and Italian law permit voluntary and involuntary proceedings. In the United States any person, except a municipal, railroad, banking or insurance corporation, or a building and loan association may file a petition for voluntary proceedings, while from involuntary proceedings, in addition, wage earners, farmers and non-commercial corporations are excluded.\textsuperscript{82} According to Italian law, only commercial entrepreneurs, be they natural or juristic persons, can become voluntary or involuntary bankrupts, with the exception of the very small businessmen and artisans (piccoli imprenditori).\textsuperscript{83}

\textsuperscript{77}See Report Grandi, Le leggi, 1942, 321, at 325; Satta, op. cit. supra note 4, 76.

\textsuperscript{78}Italian Bankruptcy Act, 1942, art. 23, 24, 66, 93, 103, Satta, op. cit. supra note 4, 76, 77.

\textsuperscript{79}Compare Satta, op. cit. supra note 4, 75 with the reasoning of Judge Swan in Lowenstern v. Reikes, (2d CCA 1932) 60 F. (2d) 933, see also the recent case of Austrian v. Williams, (C.C.A. 2d Cir. 1946) 159 F. (2d) 67.

\textsuperscript{80}Satta, op. cit. supra note 4, 56. The only exception is the judgment declaring the debtor a bankrupt and opening the proceedings, Italian Bankruptcy Act 1942, art. 22.

\textsuperscript{81}See Report Grandi, Le leggi, 1942, 321 at 325.

\textsuperscript{82}U. S. Bankruptcy Act, sec. 4.

\textsuperscript{83}See supra note 58 and Satta, op. cit. supra note 4, 28.
Involuntary bankruptcy proceedings in the United States presuppose the commission by the debtor of one of six types of "acts of bankruptcy." This system has been bitterly criticized as mediæval and unnecessarily clumsy by Professor Treimann. Insolvency of the debtor (in the bankruptcy sense) is required for the first three of them, whereas insolvency in the equity sense suffices for the fifth act. Voluntary proceedings do not require any allegations of insolvency.

In Italy proceedings for an adjudication as a bankrupt can be initiated either by the debtor, by a creditor, by the district attorney, or by the court's own motion. In all instances it is the necessary prerequisite that the debtor finds himself in the state of insolvency. This condition, as understood in Italian law, corresponds closely to our insolvency in the equity sense, being defined as the inability of the debtor to satisfy his debts in the regular course of business. Normally, this state manifests itself by a stoppage of payments, but it may result from other external facts. It is not material whether the default involves a civil or a commercial debt. Under the new act even a non-commercial creditor may file an involuntary petition.

It is interesting to note that, while the Italian law does not know of the concept of specific acts of bankruptcy, the statute lists expressly a number of acts which are symptomatic of insolvency and require the district attorney to initiate bankruptcy proceedings if he has learned of them in a criminal prosecution. Such adjudication takes place also when, in the course of a private law proceeding

84U. S. Bankruptcy Act, sec. 3.
86Defined in U S. Bankruptcy Act, sec. 1 (19) whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, removed, concealed, or conveyed, with the intent to defraud, hinder or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts.
87Insolvency in the equity sense is "inability to pay one's debts as they mature" see U. S. Bankruptcy Act, sec. 3a (5) and Finn v Meighan, (1944) 325 U. S. 300, 65 S. Ct. 1147, 89 L. Ed. 1624. The fourth act of bankruptcy, a general assignment, requires neither insolvency in the equity sense nor in the bankruptcy sense. West Co. v. Lea, (1899) 174 U. S. 590, 19 S. Ct. 836, 43 L. Ed. 1098, Finn v. Meighan, (1944) 324 U. S. 300, 65 S. Ct. 1147, 89 L. Ed. 1624.
88Italian Bankruptcy Act, 1942, art. 6, Satta, op. cit. supra note 4, 46.
89Italian Bankruptcy Act, 1942, art. 5.
90Italian Bankruptcy Act, 1942, art. 5, Satta, op. cit. supra note 4, 42. The qualification "in the regular course" is new.
91Satta, op. cit. supra note 4, 45.
92Italian Bankruptcy Act, 1942, art. 7, Satta, op. cit. supra note 4, pp. 43, 44.
suit; the insolvency of the party defendant is judicially ascertained, the court refers the matter simply to the proper bankruptcy court for adjudication.93

(3) International jurisdiction. The effect of bankruptcy in the field of "conflicts of law" or "private international law"94 has caused a tremendous volume of discussions and polemics since the Middle Ages. Among the most controversial points are, of course, the questions as to the results of an adjudication in bankruptcy in one country upon the status of the debtor in another country, the possibility of separate adjudication and bankruptcy proceedings in that other country, the international effects of a discharge and the relative position of foreign and national creditors.95 Two opposing schools, one advocating "unity" or "universality" of bankruptcy, the other defending "territoriality" or "multiplicity" have found their numerous apostles among the theorists96 while the actual practice of the various countries shows a blurred picture.97

93Italian Bankruptcy Act, 1942, art. 8, Satta, op. cit. supra note 4, 49.
94About the history of these terms see Riesenfeld, book review (1935) 3 U. Ch. L. Rev. 153, 155.
96The leading modern protagonist of the theory of universality was the celebrated German Jurist F. von Savigny, System des heutigen röm. Rechts (1849) vol. 7, 282 ff., translated by Guthrie under the title Savigny, The Conflict of Laws 1880, 257, his views have been exceedingly popular in Italy, see Brunetti, op. cit. supra note 6, 138. His ardent opponent was von Bar, op. cit. supra note 95, 553, followed by the modern French and German doctrine. Cf. Travers, op. cit. supra note 95, 11 ff., Meili, op. cit. supra note 95, 55 ff.; 2 Jaeger, op. cit. supra note 95, 237, Westlake, Treatise on Private International Law (7th ed. by Bentwich) 1925, 162 ff.
In the United States the recognition of foreign bankruptcies and of the succession of the trustee to the rights of the debtor is left to the conflict rules of the individual states. The same is true in regard to the question of the recognition of the discharge and the relative position of foreign and domestic creditors. However, the Bankruptcy Act provides expressly for the adjudication as bankrupts of persons who do not have their principal place of business, reside or have their domicile within the United States, but have property within their jurisdiction and of "floaters" who have assets here, provided they have been adjudged bankrupt abroad. A separate business establishment is not required. The statute is, however, silent about the details of such multiple bankruptcies, except that it provides for the principle of equalization in regard to dividends.

The new Italian statute provides similarly that "the entrepreneur, who has the principal place of business abroad, may be adjudged a bankrupt in the kingdom although he has been adjudged a bankrupt abroad." Professor Satta believes that the application of this rule presupposes the existence of assets and of national creditors in Italy, since the foreign creditors could ask for a judicial recognition (delibazione) of the foreign adjudication. He also suggests that there is a necessary interrelation of the two bankruptcies. The Italian act provides explicitly that international conventions remain unaffected.

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99 Disconto Gesellschaft v. Umbreit (1908) 208 U. S. 570, 28 S. Ct. 337, 52 L. Ed. 625. This is true, at least, as long as there is no local adjudication in bankruptcy. See the comments on this case by Nadelmann, The Nat. Bankruptcy Act and the Conflict of Laws, (1946) 59 Harvard L. Rev. 1025, 1048, note 23.

100 U. S. Bankruptcy Act, sec. 2a(1)

101 U. S. Bankruptcy Act, sec. 2a(1), construed in In re Neidecker, (C.C.A. 2d Cir. 1936) 82 F (2d) 263.


103 Italian Bankruptcy Act (1942) art. 9.

104 Satta, op. cit. supra note 4, 52. The Italian "delibazione" is discussed by Professor Lorenzen in Enforcement of American Judgments Abroad, (1920) 29 Yale L. J. 188, at 194.

105 Italian Bankruptcy Act, 1942, art. 9. With reference to the important subject of international bankruptcy conventions see Nadelmann, Bankruptcy Treaties (1944) 93 U. Pa. L. Rev. 58.
III.

The Bankrupt Estate:
Collection and liquidation of assets.

1. Assets of the bankrupt belonging to the bankrupt estate.

Generally speaking, in the United States the trustee is by operation of law vested with the title of the bankrupt to all his property as of the date of the filing of the petition, except in so far as state exemption laws provide otherwise. The "omnibus provision" of section 70 of the Bankruptcy Act lists specifically eight general categories of assets which pass to the trustee. The "line of cleavage" is today ordinarily fixed as of the date of the filing of the petition, as distinguished from the Bankruptcy Act of 1841 where the date of adjudication controlled. Assets acquired later do not belong to the bankrupt estate. However, in certain cases where the bankrupt possessed an expectancy or a contingent interest, title passes to the trustee, if the debtor acquires a vested right within six months after the filing of the petition. Conversely, the statute protects expressly persons who in good faith and for valuable consideration have dealt with the debtor after bankruptcy but before an adjudication or before a receiver took over the assets.

Under the Italian law the debtor retains title but loses the administration and the power to dispose of his assets as of the date of the adjudication. But in the Italian system, assets acquired during bankruptcy belong likewise to the bankrupt estate. In this case, however, only the net equity is a part of the assets; all burdens connected with the acquisition must be satisfied first. The statute lists specifically five categories of assets which do not form part of the bankrupt estate—among them strictly personal rights, wages necessary for the debtor's maintenance, and rights that are exempt.

106 U. S. Bankruptcy Act, sec. 70(a), sec. 6.
109 Collier, On Bankruptcy, (14th ed.) 1942, sec. 70.02.
110 U. S. Bankruptcy Act, sec. 70(a), last three clauses, cf. 4 Collier, On Bankruptcy (14th ed. 1942) sec. 70.03, footnote 14a, sec. 70.09.
111 U. S. Bankruptcy Act, sec. 70(d), see also sec. 21 g with respect to real estate. For details cf. 4 Collier, On Bankruptcy, (14th ed.) 1942, sec. 70.66-69; 2 Collier, On Bankruptcy (14th ed.) 1940, sec. 21.30.
112 Italian Bankruptcy Act, 1942, Art. 42, 1, Satta, op. cit. supra note 4, p. 95 ff, p. 104.
113 Italian Bankruptcy Act, 1942, Art. 42, 2; Satta, op. cit. supra note 4, p. 99.
from the reach of creditors.\textsuperscript{114} It is expressly provided that all dispositions and transfers by the debtor of assets belonging to the estate are void in regard to the creditors.\textsuperscript{115} This rule applies also to transfers which were not so far perfected before the adjudication that third persons could not have acquired rights superior to the grantee.\textsuperscript{116}

Special consideration must be given to the effect of bankruptcy on executory contracts. In the United States the trustee succeeds to all contractual rights of the bankrupt,\textsuperscript{117} but the law gives him the power to assume or reject any executory contract or unexpired lease.\textsuperscript{118} Damages resulting from such rejection may be proven in bankruptcy, subject to certain restrictions in the case of leases.\textsuperscript{119}

The Italian law devotes a separate chapter to the effect of bankruptcy on preexisting legal relations. The statute does not state rules of general application, but proceeds by regulating case by case the effect of bankruptcy on typical contracts such as sales, including installment and conditional sales, agency, accounts, partnerships, leases, bailments, insurance against fire and other damages, etc.\textsuperscript{120} Generally speaking, executory contracts involving a relation of trust are terminated by bankruptcy\textsuperscript{121} The others subsist, but the trustee has in some instances the right to assume or reject the executory contract, in the case of sales upon authorization by the judge-delegate.\textsuperscript{122} If he chooses a rejection, no damages can be proven, any stipulation notwithstanding.\textsuperscript{123} In case of a lease the trustee can ask for rescission at any time, but the lessor is entitled to a just compensation, if necessary fixed by the referee.\textsuperscript{124} The seller has the right of stoppage in transitu\textsuperscript{125} the same as in

\textsuperscript{114}Italian Bankruptcy Act, 1942, Art. 46, Satta, op. cit. \textit{supra} note 4, p. 102. The objects exempt from the reach of creditors are listed in the Code of Civil Procedure, 1942, art. 514, this catalogue resembles much its American counterparts in the various states.

\textsuperscript{115}Italian Bankruptcy Act, 1942, art. 44, Satta, op. cit. \textit{supra} note 4, p. 105.

\textsuperscript{116}Italian Bankruptcy Act 1942, art. 45. Satta, op. cit. \textit{supra} note 4, p. 107 108.

\textsuperscript{117}U. S. Bankruptcy Act, sec. 70 a (5) and (6)

\textsuperscript{118}U. S. Bankruptcy Act, sec. 70 b.

\textsuperscript{119}U. S. Bankruptcy Act, sec. 63 a (9) and 63 c. Sec 3 Collier \textit{On Bankruptcy} (14 ed. 1941) sec. 63.31-35.

\textsuperscript{120}Italian Bankruptcy Act, 1942, Ch. 111. sec. IV, art. 72-83, Satta, op. cit. \textit{supra} note 4, 171 ff.

\textsuperscript{121}E.g. Partnership (art. 77), Brokerage, Agency, Accounts (art. 78)

\textsuperscript{122}See Italian Bankruptcy Act, 1942, art. 72 (sales) art. 80 (leases) Satta, op. cit. \textit{supra} note 4, 173.

\textsuperscript{123}Satta, op. cit. \textit{supra} note 4, 174 Italian Bankruptcy Act 1942, art. 72.

\textsuperscript{124}Italian Bankruptcy Act, 1942, art. 80.

\textsuperscript{125}Italian Bankruptcy Act, 1942, art. 75 with respect to the development of this right, see Brunetti, op. cit. \textit{supra} note 6, p. 366.
the United States. In case of life insurance, payments which are due to the debtor or beneficiary cannot be reached by the trustee, but he can recover the premiums within certain limits.26

Related to the effects just discussed is the problem of the influence of bankruptcy on pending suits by or against the debtor. The American law is contained in section 11 of the Bankruptcy Act. As far as suits on dischargeable claims against the bankrupt are concerned, it is provided that a stay shall be granted until adjudication and may be extended until the decision on the discharge.27 The trustee can intervene, and may be ordered to do so by the court,28 in the interest of the estate. Personal judgments recovered against the debtor after filing of the petition are not binding on the trustee.29 In case of a suit by the bankrupt, the trustee may substitute himself with the approval of the court in any litigation commenced before adjudication.30 Enforcement proceedings deserve special attention. The filing of the petition, if properly on record,31 operates as a "caveat"32 and prevents the institution of any attachment, garnishment, execution, creditor's bill, or foreclosure proceedings.33 In the case that such enforcement proceedings were commenced before the petition, they may be prosecuted if they involve consensual liens;34 judicial liens require the further qualification that they must have been recovered more than four months from the filing of the petition.35

The Italian act regulates the subject in a more general fashion. In all litigations, also those pending, which concern assets belonging to the bankrupt estate, the curatore is substituted as party.36 The statute prescribes specifically that unless otherwise provided no individual execution can be either begun or prosecuted against as-

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126Civil Code, art. 1923 in connection with Bankruptcy Act, art. 46, 5. See Satta, op. cit. supra note 4, p. 97. The details are doubtful, the same as under U. S. Bankruptcy Act, sec. 70.

127U. S. Bankruptcy Act, sec. 11 a.

128U. S. Bankruptcy Act, sec. 11 b.

129Collier, On Bankruptcy (14th ed.) 1940, sec. 11.09.

130U. S. Bankruptcy Act, sec. 11 c.


132These are the often quoted words from the opinion in Mueller v. Nugent (1901) 184 U. S. 14. It must however be understood that with respect to certain consensual transactions today the rule of Sec. 70 d prevails. See supra text to note 111.


135U. S. Bankruptcy Act, sec. 67 a. For details see Mussman and Riesenfeld, Garnishment and Bankruptcy (1942) 27 Minn. L. Rev. 1.

136Italian Bankruptcy Act, 1942, art. 43, cf. Satta, op. cit. supra note 4. 108.
sets belonging to the bankrupt estate. Pledges and preferred creditors who are protected by statutory possessory liens, but no others, particularly not mortgagees, may realize on their security separately even during bankruptcy, provided their claims are allowed and the referee has authorized the sale. In addition to the latter rule, the statute makes another important exception in favor of the creditor. If an execution was levied upon real estate before the adjudication in bankruptcy, the proceedings are carried further with the trustee substituted as party defendant.

If assets which belong to the bankrupt estate were not discovered until after closing the estate, the bankruptcy proceedings may be reopened. This is recognized in American and Italian law. In the United States tardy creditors may participate in the dividends in this case, but not until the diligent creditors have been paid in full. The Italian act attempts an entirely new regulation of the subject which had been treated in a perfunctory manner in the old law. After an estate has been closed because all assets have been liquidated or further proceedings are deemed useless, the court may, within five years from the closing, order the reopening upon a petition by the debtor or any creditor, if there are new assets which make such proceedings worth while, or if the debtor guarantees a dividend of ten per cent. The sense of the latter alternative is obscure. Newly discovered assets, while not specifically mentioned, are treated like new assets. In case of a reopening the statute puts old and new creditors explicitly on the same footing, the old creditors being entitled to dividends upon the unpaid portions of their claims. The explanation of this rule appears to have created considerable perplexity.

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137 Italian Bankruptcy Act, 1942, art. 51, cf. Satta, op. cit. supra note 4, 117.
139 Italian Bankruptcy Act, 1942, art. 107
140 U. S. Bankruptcy Act, sec. 2 a (8), cf. 1 Collier, On Bankruptcy (14th ed.) 1940, 249.
141 Satta, op. cit. supra note 4, 232.
142 Hammer v. Tuffy (2d C.C.A. 1944) 145 F (2d) 447, see also 3 Collier, On Bankruptcy (14th ed.) 1941, sec. 57.33 and Suppl. 534, 4 Idem, sec. 70.07, 70.11.
143 See report by Minister of Justice Grandi, 1942 Le leggi, 321 at 333.
144 Italian Bankruptcy Act, 1942, art. 121.
145 Satta, op. cit. supra note 4, 232 calls it absurd.
146 Satta, op. cit. supra note 4, 232.
147 Italian Bankruptcy Act, 1942, art. 122.
148 See Picella-Potenza, op. cit. supra note 4, 129, Satta, op. cit. supra note 4, 232.
2. Assets transferred by the bankrupt belonging to the bankrupt estate.

As early as in the days of Roman law execution creditors could not only seek satisfaction out of the assets which the debtor actually possessed, but also out of assets which had been transferred in fraud of the creditors. The details are very controversial and obscure, particularly for the period of the classical Roman law. But it seems now to be recognized that Justinian's Codification fused two previously existing remedies into a single one, the so-called actio Pauliana. (Dig. 22, 1, 38, 4.) This action permitted a creditor to recover assets fraudulently transferred, apparently in the interest of all creditors.

While the actio Pauliana became the model for similar remedies in all modern continental codes, it is a well known fact that English law also followed suit and protected creditors against fraudulent debtors. After a number of older statutes on the matter, which were of penal character, the famous statute of Elizabeth on fraudulent conveyances, which the courts construed as giving relief to the creditors was enacted. It was applicable or the model for similar legislation in the different states of the Union from the beginning.

But whereas outside of bankruptcy, creditors are protected only against fraudulent conveyances, bankruptcy requires an additional protection, that against preferences. Since this type of relief is inspired by the maxim that "equality is equity" or by its European

\[\text{149} \text{Of the enormous amount of literature on the question we cite Buckland, A Textbook of Roman Law from Augustus to Justinian (2nd ed.) 1932, 596, Wenger, Institutes of the Roman Law of Civil Procedure (transl. by Fisk) 1940, 240; Solazzi, La revoca degli atti fraudolenti nel diritto Romano, 1934, Radin, Fraudulent Conveyances at Roman Law (1931) 18 Virg. L. Rev. 109.}
\[\text{150} \text{One was called Interdictum fraudatorium, the other was a Restitutio in integrum.}
\[\text{151} \text{We follow the views of Solazzi, op. cit. supra note 149, 210 and Wenger, op. cit. supra note 149, p. 240; contra, Buckland, op. cit. supra note 149, 596, who thinks that only a receiver could exercise the action. The modern actio Pauliana, however, is exercised by the creditor solely in his own interest.}
\[\text{152} \text{Cf. Palumbo, L'actio Pauliana nel diritto Romano e nei diritti vigenti, 1935.}
\[\text{154} \text{Eliz. ch. 5 (1571).}
\[\text{155} \text{See 1 Glenn, op. cit. supra note 153, p. 96.}
\[\text{156} \text{Id. 78, 79.}
equivalent the “par condicio creditorum,” it is necessary to vitiate, in so far as practical, all transactions of the debtor in favor of particular creditors violative of this principle. It is generally recognized that ordinarily a “critical period” precedes the actual business failure during which the danger of such fraudulent or preferential transfers is particularly acute. Therefore modern bankruptcy law accords special protection against fraudulent conveyances and preferences during that interval. But it must be realized that we have here the product of a slow evolution, in which American law has probably advanced farther than other systems.

Already the first true English bankruptcy act, the law of 1542, dealt with the problem of fraudulent recoveries suffered or caused by the bankrupt. Its practical significance was, however, slight, and it is the statute of Elizabeth which can be considered as the starting point of the development of our system. It dealt with the situation in a twofold manner, at least according to the judicial interpretation placed upon it. All transactions executed by the bankrupt after the perpetration of the act of bankruptcy had no validity against the commissioners regardless of the time elapsed, —the so-called “relation” theory. In addition thereto the statute provided for a special remedy, a double forfeiture, against any fraudulent or collusive acquisition by others of the bankrupt’s assets, even before the act of bankruptcy. By amendment of 1604 fraudulent deeds were explicitly declared to be acts of bankruptcy, and thereby automatically voidable, in addition thereto assets gratuitously conveyed by a bankrupt were made available to his creditors. The further revision of 1623 recognized by implication

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158 34 and 35 Henry VIII, ch. 4, sec. 4 (1542)
159 The statute and its scanty application are discussed by Levinthal, The Early History of English Bankruptcy (1919) 67 U Pa. L. Rev. 1, 14. By comparing this statute with that of 13 Eliz. ch. 7 (1571) it is obvious that the latter was modeled after the former. This may further explain why the passage of the statute of 13 Eliz. ch. 7 was considered “of no great moment” in addition to the reasons of Glenn, 1 Fraudulent Conveyances and Preferences, 1940, 92.
160 13 Eliz. ch. 7 (1571).
161 The “relation” theory is commonly attributed to the Case of the Bankrupts, 2 Co. Rep. 25 (1592), which was apparently the first case under the statute.
162 13 Eliz. ch. 7, sec. 7. This section—in contrast to the statute of Henry VIII—was specifically directed against any fraudulent or collusive demand, recovery or detention before or after the act of bankruptcy. Glenn in his op. cit. supra note 159, 97 has apparently overlooked this provision.
163 1 Jac. I, ch. 15, sec. 2 and 5 (1604) The reader should remember that 13 Eliz. ch. 5 protecting creditors against fraudulent conveyances, in contrast to 27 Eliz. ch. 4 protecting purchasers, was originally understood
that the whole law of fraudulent conveyances was made available to the commissioners for the benefit of the creditors.164

The course of English law took two important directions. On the one hand the broad sweep of the relation back theory which shot far beyond the mark was constantly cut down in favor of bona fide transactions which had taken place in the interval between the act of bankruptcy and the appointment of the commissioners.165 On the other hand, the avoidance of preferences which originally had prompted the adoption of the relation back theory166 became governed by specific rules, although under the guise of a particular law of fraudulent conveyances adapted to bankruptcy. The lion's share in this evolution was taken by Lord Mansfield.167 Even today English law speaks of preferences as "fraudulent and void."168

American law is, as usual, based on these English foundations, but has gradually proceeded along its own way. While the bankruptcy acts of 1841170 and 1867171 still considered preferences as "a fraud on" respectively, "in fraud of" the act, the present statute distinguishes sharply between "preferential transfers" and "fraudulent conveyances." However, the present provisions of the act in their details and interrelation are far from being simple or easily understood. This is due to the fact that the federal system leads to

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164The "relation to the acts of bankruptcy" theory became increasingly unpopular with legislators and commentators, cf. 1 Cooke, Bankrupt Laws (8th ed. 1823) 585, Eden, Practical Treatise on Bankruptcy Law (2d ed. 1826), reprinted in 18 and 19 Law Library, 1841, p. 32, 258, and the Scotch writer Bell 2, Commentaries on the Laws of Scotland, 1826, 177 It was relaxed considerably by a number of statutes listed by Cooke, loc. cit., but nevertheless it was maintained to a limited degree in all subsequent revisions of the English bankruptcy law, viz. of 1825, 1849, 1861, 1869, 1883, 1914) and is still the law; see 2 Halsbury, Laws of England (2nd ed.) 1931, 241 ff, 376 ff.
165Lord Mansfield elaborated the idea of "fraudulent preferences in contemplation of bankruptcy", see 2 Glenn, op. cit. supra note 159, 654, Roberts, op. cit. supra note 163, 491 note b. In doing so he might have been influenced by the law of preferences under the Scotch acts of 1621, ch. 18 and 1696, ch. 5, see Bell, op. cit. supra note 165, 205 ff.
16616 & 5 Geo. V, ch. 59, sec. 44 (1914).
167About the history of American law see 2 Glenn, op. cit. supra, 657, 3 Collier, On Bankruptcy, (14th ed.) 1941, sec. 66.05.
16815 U. S. Stats. 440, ch. 9, sec. 2 (1841).
1714 U. S. Stats. 517, ch. 176, sec. 35 (1867).
the consequence that in the regulation of available assets due regard must be given to the laws of the individual states. Thus where
English law bankruptcy law could proceed with the simple idea of a
"reputed ownership,"172 in our law the various state rules against
secret security devices, such as chattel mortgages, conditional sales,
trust receipts, etc., with their bewildering array of recording statutes have to be correlated with the bankruptcy act. Ideas of pro-
tection against fraud and estoppel are there frequently intermixed and come into play in a manner not always very logical and reason-
able.173

The present Bankruptcy Act approaches the solution of the
problem by setting forth a detailed system of federal rules govern-
ing the avoidance of fraudulent conveyances and preferential trans-
fers by the trustee. In addition thereto it complements this regulation by incorporating the pertinent state law by reference. The
essential provisions of the statute are the following: (a) Section
67 d of the Bankruptcy Act reproduces the provisions of the Uni-
form Fraudulent Conveyance Act, which is now in force in many
states, with very slight alterations. The trustee may set aside any
transfer which falls under one of the four categories listed in sub-
sections 67 d, 2, a-d, and was made within one year from the filing
of the petition, except in so far as the defendant has given value
and the transfer was bona fide.174 (b) Section 60 a of the Act de-
defines preferential transfers by listing their elements and provides
that the trustee may set them aside, if the transfer was perfected
within four months from the filing of the petition, and the recipient
had reasonable cause to believe that the debtor was insolvent.175 (c)
Section 67 a, which we mentioned before, provides that judicial
liens acquired within four months from the bankruptcy may be
avoided or used for the benefit of the estate.176 State law is incor-
porated referentially by means of sections 70 c and e. The
former provision attributes the position of a "creditor armed with
process" to the trustee, and enables him thus to exercise all the
powers which state law confers upon such creditor, and this regard-
less of the actual existence of a creditor of this type in the particu-
lar bankruptcy.177 Section 70 e empowers the trustee to set aside

172 On the "reputed ownership clause" see 1 Glenn, op. cit. supra note 159, 591 ff.
173 Cf. Radin, Fraudulent Conveyances in California and the Uniform
Fraudulent Conveyance Act (1938) 27 Calif. L. Rev. 1.
174 For details see 4 Collier, On Bankruptcy (14th ed.) 1942, sec. 67.29 ff.
175 For details see 3 Collier, On Bankruptcy (14th ed.) 1941, sec. 60.07 ff.
176 The history and application of this section is discussed by Mussman
and Riesenfeld, Garnishment and Bankruptcy, (1942) 27 Minn. L. Rev. 1.
177 For details see 4 Collier, On Bankruptcy (14th ed.) 1942, sec. 70.45 ff.
any conveyance which is fraudulent against, or voidable for any other reason by, any creditor having a provable claim. This may extend the protection of the estate beyond that accorded by section 67 d by outlawing transactions not listed in that section, but above all it may add to the assets by avoiding conveyances which were made before the one year period of the federal rule, yet within the period of the state statute of limitations.

The new Italian law, the same as American law, still shows the imprint of its long history. The Roman actio Pauliana, mentioned before,77 required difficult proofs of "consilium fraudis" and "eventus damnii."78 Therefore the medieval jurists felt that the restoration of assets to the estate should be facilitated by assimilating the period before the actual manifestation of bankruptcy to the state of bankruptcy, and by considering all acts executed on the eve of bankruptcy as tainted with fraud as a matter of law. The period was often fixed by statute at ten or fifteen days.79 But great uncertainty existed.80 The inclusion of preferences under the law of fraudulent conveyances, which Lord Mansfield had found so easy, seemed to have been particularly troublesome.81

The idea of a "constructive" bankruptcy that preceded actual bankruptcy and vitiated all acts in that interval became quite settled in the seventeenth century82 and found statutory recognition in Scotland83 and France.84 But gradually it was felt that this system

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77See 4 Collier, On Bankruptcy, (14th ed.) 1942, sec. 70.69 ff.
78See supra text to note 151.
79The most modern discussion is Solazzi, La revoca degli atti fraudolenti nel diritto Romano (2d ed.) 1934, 110 ff, 142 ff.
80The fifteen days rule was established in Genova by statute of 1414, Statuta et Decreta Communis Genuae, 1567, ch. 80. This statute complemented the earlier regulation of bankruptcy, id. ch. 32. It was applied by the court of Genova in In re Octavianus and Nicolaus Lomellini, Rotae Genuae De Mercatura Decisiones, 1592, nr. 184. The proof of fraud was further simplified by the statement of the famous Baldus that a bankrupt is always fraudulent, "decoctor, ergo fraudator," see decisions of the court of Genova loc. cit., nr. 17 and 83.
81References by 2 Massé, Le droit commercial (3rd ed.) 1874, 383 ff. 1 Glenn, op. cit. supra note 153, 82.
82Roman law was by no means clear in the matter. Professor Solazzi, op. cit. supra note 180, p. 238 ff, tries to show that Justinian permitted the recovery of preferential payments as fraud while classical Roman law did not. Medieval writers were particularly opposed to applying the actio Pauliana to payments. If it were otherwise, observed a famous Neapolitan judge, Mattheus de Afflictis, all the world would be in litigation and merchants would close up and leave their trade; quoted by T. Grammaticus, Decisiones Sacri Regii Consilii Napolitani, 1583, 711. (quaestio 1).
83De Casaregis, Discursus legales de commercio, 1740, discursus 75.
84Act of 1696 ch. 5, see Bell, op. cit. supra note 165, 177 (60 days).
85Statute of Nov. 18th, 1702 (ten days), following an ordinance of Lyon, 1667, to the same effect; cf. 7 Lyon-Caen et Renault, Traite de droit commercial, (5th ed.) 1934, 374.
was too rigorous and did not properly balance the conflicting interests of creditors and third persons. The French Code of 1807 took a step towards a more equitable solution. It divided the “suspicious period,” as it came to be called, into two portions. One reached from the date of the stoppage of payments to the adjudication, the other comprised the preceding ten days. All acts executed during the later period were void as a matter of law while a number of distinctions were made in regard to the acts occurring in the ten day interval, according to whether they were gratuitous, preferential or fraudulent. The Code of 1838, which is still in force, introduced a further relaxation. The ten-day period preceding the stoppage of payments is retained as part of the suspicious period only in regard to voluntary transfers, payments before maturity, payments made by means other than money or commercial paper, and preferential mortgages. Any of these acts is void as a matter of law if executed during the critical period. For other transactions the critical period commences with the stoppage of payments and they are void only if the other party knew of the bankruptcy. Special rules prevail for mortgages which are recorded after, or ten days before, the stoppage of payments and more than fifteen days after their execution. A peculiar feature of this system is the power of the court to fix the time of the stoppage of payment by decree and date it back by subsequent orders as further facts become known.

The Italian commercial code of 1882 adopted substantially the French system but made some significant modifications the inclusion into the suspicious period of a ten day interval preceding the stoppage of payment was completely eliminated, the maximum length of the suspicious period was restricted to three and later to two years, all acts executed by the bankrupt within ten days prior to the adjudication were presumed to be fraudulent.

The new statute of 1942 treats the subject matter—which the official report accompanying the law calls the “central problem of

187 Code de commerce, 1807 art. 442-447, see 7 Lyon-Caen et Renault, op. cit. supra note 180, 376.
188 Code de commerce, 1838, art. 446, 447, 448. In addition the administrators can resort to the ordinary remedy of the Civil Code against fraudulent conveyances. For details see 7 Lyon-Caen et Renault, op. cit. supra note 180, 381-526.
189 There is no limit as to how far back the court may set this date. But the Code provides that the creditors cannot demand a modification of the date fixed after the time for the proof and allowance of their debts has expired, or a month has elapsed since the publication of the adjudication, whichever is more advantageous to them. Code de commerce, 1838, art. 580, 581, see 7 Lyon-Caen et Renault, op. cit. supra note 180, 148 ff., 187 ff.
190 Codice di commercio, 1882, art. 704, art. 709, last clause. For details of the Italian law prior to 1942 see Brunetti, op. cit. supra note 6, 398 ff., 446 ff.
bankruptcy” in a separate chapter composed of eight articles. The new regulation constitutes a further improvement. The suspicious period is no longer fixed by judicial pronouncement. Like the American law the statute sets definite periods which vary according to the different void or voidable acts. Fraudulent and preferential transfers are still dealt with side by side. Voluntary conveyances and gifts, except customary presents and charity not disproportionate to the means of the donor, made within two years before the adjudication are void in respect to creditors. A similar rule applies to premature payments of debts which fall due only on or after the day of adjudication. Other preferential transfers which may be avoided by action in the bankruptcy court are listed in a catalogue of four groups contained in art. 67, dealing mostly with preferential security or payment with other than normal means. In this instance the defendant may prove his ignorance of the insolvency. The suspicious period is one or two years, according to the case. If the trustee succeeds in proving that the other party knew of the insolvency, he may avoid even ordinary payments made within one year prior to the adjudication. Special rules are given for transactions between spouses and acquisitions by the spouse of the bankrupt. Finally (in similarity to the American system) the statute grants the trustee the power to set aside any transaction which a creditor could attack by the ordinary rules of the Civil Code against fraudulent conveyances.

3. The disposal of the assets.

Naturally not only is the collection of the assets an important phase of bankruptcy, but just as much interest exists in their conversion into cash for the purpose of paying dividends.

In the United States the courts of bankruptcy are vested expressly with the power to cause the estates of bankrupts to be collected, reduced to money, and distributed. The duty of doing so “under the direction” of the court is imposed as the first obligation upon the trustee. The Bankruptcy Act deals with details only

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191 Le leggi, 1942, 321 at 328.
192 Italian Bankruptcy Act, 1942, ch. 3, sec. 3, art. 64-71.
193 Cf. the report by Minster Grandi, Le leggi, 1942, 321 at 328.
194 Italian Bankruptcy Act, 1942, art. 64.
195 Idem, art. 65.
196 Idem, art. 67 (1).
197 Idem, art. 67 (2).
198 Idem, art. 69.
199 Idem, art. 70.
200 Idem, art. 66.
201 Codice civile, 1942, art. 2901.
202 U. S. Bankruptcy Act, sec. 2 (7).
203 U. S. Bankruptcy Act, sec. 47 (a).
in two provisions. They are complemented by General Order 18, the local rules promulgated thereunder and the official forms prescribed in connection with the sale of real estate. Without dwelling on details it suffices to say that bankruptcy sales, although judicial sales in the technical sense, are freed from the ordinary technicalities of federal law pertaining to publicity, time and place. Usually the sale is by public auction, but the referee may order a private sale. It may be in any form, bulk or parcel. The only statutory limitation is to the effect that a sale for less than 75 per cent of the appraised value requires court approval. Property in the actual or constructive possession of the bankruptcy court may be sold free and clear of liens which thereby are transferred to the proceeds.

The Italian statute deals with the disposal of the assets in a separate brief chapter. After the claims of the creditors have been ascertained, the trustee must proceed with the sale of the assets under the direction of the court. The referee may authorize a prior date. The ordinary rules of civil procedure for execution sales apply with some modifications specified by the act. Personal property may be sold at private or auction sale in compliance with the conditions and at the date fixed by the referee. If necessary all personal property can be sold en bloc. Real property is ordinarily sold at a public sale, but the referee may dispense with this formality, provided that the creditors having liens assent. The remainder of the provisions are more or less of a routine character. It may be mentioned that it is permissible to authorize the trustee to carry on the business temporarily.

IV

The distribution of the estate.

The purpose of bankruptcy proceedings is the—at least partial—satisfaction of the creditors out of the insolvent estate. This has

204 U. S. Bankruptcy Act, sec. 58 a (4) and 70 f.
205 Cf. 4 Collier, On Bankruptcy (14th ed.) 1942, sec. 70.97
206 For details see Collier, On Bankruptcy (14th ed.) 1940-1942, sec. 2.44, sec. 47.04, sec. 70.96-70.99.
207 U. S. Bankruptcy Act, sec. 70 f.
209 Italian Bankruptcy Act, 1942, ch. 6, art. 104-109.
210 Idem, art. 104.
211 Idem, art. 105.
212 Idem, art. 106.
213 Idem, art. 108.
214 Idem, art. 104 (1)
to be done in an orderly fashion, since the avoidance of the mad scramble caused by the race of diligence is one of the main reasons for the existence of bankruptcy proceedings. There are two aspects to the problem. The first is one of substantive law. It must be established what persons are entitled to share in the proceeds of the insolvent estate and in what order. While the idea that equality is equity is undoubtedly the underlying principle of all bankruptcy law, it cannot be overlooked that there will be some valid grounds for preferences in certain cases which must be defined by statute. In the United States a further limitation on a too radical or arbitrary application of the maxim that “equality is equity” results naturally from the fact that the bankruptcy power is subject to the fifth amendment to the Constitution. The other side of the problem is one of procedural law. A system must be fashioned by which the rights entitled to share are ascertained and the proper amounts allocated. These are the questions which we now have to discuss.

1. **Claims entitled to share in the proceeds and their relative rank.**

American law distinguishes sharply between creditors who assert monetary claims (which are such either originally or in consequence of a breach of contract) and other persons who claim title to an asset in the actual or constructive possession of the bankruptcy court. The latter group may assert their rights in the bankruptcy court in "reclamation" proceedings instituted by intervention; but technically they do not share in the estate.

Among the creditors in the technical sense the first distinction is made between secured and unsecured creditors.

Secured creditors are specifically defined by the Act. The security envisaged by the statute must be constituted by specific property of the bankrupt, according to the majority view, regardless of whether it is exempt or not. The American bankruptcy law is dominated by three general rules applying to secured creditors.

(a) A secured creditor can share in the proceeds of the bankrupt estate only if he surrenders his security, or to the amount to which his claim is not covered by the security.

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216U. S. Bankruptcy Act, sec. 1 (11), see 1 Collier, On Bankruptcy (14th ed.) 1940, sec. 1.11.
217Cf. 2 Collier, On Bankruptcy (14th ed.) 1940, sec. 24.31.
218U. S. Bankruptcy Act, sec. 1 (28) 1 Collier, On Bankruptcy (14th ed.) 1940, sec. 1.28.
2193 Collier, On Bankruptcy (14th ed.), 1941, sec. 57.07, note 4 and 5.
220U. S. Bankruptcy Act, sec. 57 h. This is the so-called bankruptcy rule in contrast to the "equity rule;" see American Surety Co. of New
(b) The institution of bankruptcy proceedings does not affect the validity or rank of the security, regardless of whether it is created by agreement, statute or judicial proceedings. The only general substantive limitation to this rule results from the requirement that the acquisition of the security must not be due to a preferential transfer or a judicial proceeding within four months prior to bankruptcy. Bankruptcy prevents the institution of enforcement proceedings where the property involved is in the actual or constructive possession of the bankruptcy court. In this case the court may sell the property free and clear of the lien and transfer the same to the proceeds.\textsuperscript{221} In case of non-possessor statutory liens on personal property, however, the above principle is violated in favor of the administrative costs and expenses of the bankruptcy proceedings and wage claims to the amount of $600 per claimant. In addition thereto liens for wages and rents can be asserted only to a limited amount against unsecured creditors.\textsuperscript{222}

(c) A secured creditor may rely on his security regardless of the discharge of the secured debt.

Unsecured creditors are divided into two classes—general creditors and preferred creditors. The American Bankruptcy Act gives in section 63 a list of nine types of claims provable in bankruptcy. The statute thus proceeds unlike the English law which provides generally that "all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order" are provable, unless they are "demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust."\textsuperscript{223} However, since the revision of 1938, in substance all economically valuable claims, except actions for wilful tort, if not reduced to judgment before the filing of the petition, and actions for negligence which are not pending at the time of the filing of the petition, are also provable in the United States.\textsuperscript{224} Contingent and unliquidated claims of such

\textsuperscript{221}Compare our statements to this effect in the previous chapter, text to note 208.

\textsuperscript{222}Bankruptcy Acts 1914 and 1926 (4 & 5 Geo. V, c. 29 and 16 & 17 Geo. V, c. 7) sec. 30. The exception relating to claims for unliquidated damages sounding in tort was qualified in favor of claims for wrongful death by 24 & 25 Geo. V, ch. 41, sec. 1 (6) (1934) See Williams, Law and Practice in Bankruptcy (15th ed.) 1937, 154, 155.

\textsuperscript{223}U. S. Bankruptcy Act, sec. 63 a (1-9)

[Note: The text above contains a page number, 430, which is not relevant to the content of the text and should be ignored.]
nature. That liquidation or reasonable estimation is impossible or would cause undue delay can be excluded by the court.^{225}

Preferred claims and their order of preference are set forth in section 64. The law arranges them in five groups. They are briefly (a) costs and expenses resulting from the bankruptcy administration, (b) wages, not to exceed $600 for each claimant, earned within the last three months, (c) certain expenses of creditors, (d) taxes, and finally (e) debts the preference of which is recognized by federal statute (i.e., generally debts owed to the federal government) and a limited amount for rent, if so preferred by state law.^{226}

The rights of the creditors against co-obligors and sureties are not affected by the bankruptcy proceedings.^{227} However, their right to set-offs is subject to certain limitations.^{228} It is recognized by implication from various provisions of the act and its history that a petition in bankruptcy stops the running of interest.^{229} In case of non-interest bearing fixed liabilities, not due at the time of the filing, a "rebate of interest" is required.^{230}

Italian law, naturally, has to confront the same economic problems. But it approaches them from a slightly different angle. The reason for this fact is largely of historical nature. It is not so much that the Italian legislator is prompted by different economic evaluations as that his private law concepts are largely molded by the Roman law and therefore deviates slightly from the Anglo-American notions.

Roman law, in its form under the Codification by Justinian, developed a security device of very general nature, the hypothec.^{231} It was an encumbrance or lien on specific property or all assets of the debtor in the modern American sense. It swallowed up the more ancient security device of pledge, which originally possessed similar characteristics in Roman law as it has in English law.^{232} The hypothec could be created either by virtue of an agreement

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^{225} U. S. Bankruptcy Act, sec. 63 d, sec. 57 d.
^{226} For details see 4 Collier, On Bankruptcy (14th ed.) 1942, sec. 64.
^{227} U. S. Bankruptcy Act, sec. 16.
^{228} U. S. Bankruptcy Act, sec. 68.
^{231} For references see Buckland, A Textbook of Roman Law from Augustus to Justinian (2nd ed.) 1932, 474, 1 Windscheid-Kipp, Lehrbuch des Pandektenrechts (9th ed.) 1906, 1125.
^{232} Cf. Buckland and McNair, Roman Law and Common Law, 1936, 240.
between the parties, by operation of law or by judicial process. It vested a creditor so secured with the right to seek satisfaction out of the assets hypothecated. Along side with this security device the Roman law developed preferential treatment for certain claims, which were called privileged claims, or privileges.233 Roman law already had dealt with the relative rank of secured creditors, privileged creditors, and general creditors on the occasion of the execution process, particularly when the debtor was insolvent.234

Medieval writers, especially at the later days when commerce made such great advances, went into endless discussions about the character and the rank of the various privileged creditors among themselves and their relative position in respect to the secured creditors, with constant legislative interference accentuating the difficulties.235

Modern Italian law is fashioned along these traditional lines. The Civil Code of 1865 treated privileges and hypothecs together in one and the same chapter.236 However, hypothecs were restricted to real property, while the pledge was restored as personal property security. The new Code of 1942, in line with modern Italian theory,237 has further clarified and systematized its treatment. Privileged rank is accorded to certain claims because of reasons of

233 Cf. Buckland, op. cit. supra note 231, 644, note 2, Windscheid-Kipp, op. cit. supra note 231, 117
234 The most important passages were probably Justian's Digest, 42, 5. It may be mentioned that 1. 16 ff of this title were printed as a separate title 6 under the caption "de privilegiis creditorum" in medieval editions of the Digests. For the Roman treatment of creditors in case of insolvency, see Solazzi, Studi sul concorso dei creditori nel diritto romano, 1925, 36 ff.
235 German writers and statutes during the 17th century divided creditors into five classes (1) absolute privileges, (2) preferred encumbrances, (3) mere encumbrances, (4) personal privileges, (5) general creditors. The details cause innumerable controversies. See Joachim Chemnitius, De nure praelationis (diss. Frankf.) 1625, Carpzow, Jurisprudentia forensis roman-o-saxonica, 1644, pars 1, const. 28, def. 11 ff, Richter, Tractatus de nure et privilegiis creditorum (2nd ed.) 1687, 92 ff, Mevus, Commentarli ad usus lubicencse, 1664, book 3, tit. 1, art. 11 ff, Brunnemann, op. cit. supra note 70, 68 ff, Ludovici, op. cit. supra note 70, 70 ff, Gmelin, Die Ordnung der Gläubiger bei dem Gantprocesse, 1810, 30. The system of five classes was first adopted by the Civil Procedure Act of 1623 tit. 41 of the Electorate of Saxona and imitated by other statutes, listed by Ludovici, op. cit. 70. For the early Italian law of priorities see Paulus Castrens, Consilia, 1580, part 1, consilium 1285.
237 Codice civile, 1942, book 6, title 3, art. 2740 ff. See also the official report to the King in Le leggi, 1941, 1036 ff, and, for modern Italian theory relating to privileges and securities, De Ruggiero-Maroi, Istituzioni di diritto privato (4th ed.) 1940, 517 ff, 424 ff, Barassi Istituzioni di diritto civile (2nd ed.) 1945, 534 ff.
public policy relating to their nature. Pledges and hypothecs are security devices in the nature of rights in property, acquired by the creditor because of his particular vigilance or diligence. The privileges may be either general or special, according to whether they entitle to preferential satisfaction out of all or only specific assets. The new Civil Code attempts to give a catalogue of the more important privileges and a detailed solution of the relative order among the various privileged claims themselves and their relative priority in respect to pledge and hypothec. This regulation applies to individual executions as well as to bankruptcy.

The Italian Bankruptcy Act distinguishes between creditors and persons claiming title to, or possession of, movables under the administration of the bankruptcy court. Technically only the former share in the proceeds of the bankrupt estate, but the new law prescribes that the general rules for the proof and allowance of claims apply also with respect to actions for restitution of movables. This signifies in the first place that reclamation proceedings must be prosecuted in the bankruptcy court, which is thus a special instance of the "vis attractiva concursus" mentioned in Chapter I. In the second place it has the effect that dates, etc., for the proof of claims must be observed. All such claims are allowed or rejected in a single judicial decree.

Creditors are divided into two groups: general creditors and preferred creditors. Preferred creditors in their turn are either privileged creditors or creditors secured by pledge or hypothec. All creditors must file and prove their claims. After such allowance the creditors holding pledges or possessory liens (which are privi-
leges in Italian terminology) may enforce their security. Creditors protected by hypothecs on realty have no such power. Of course, when the land is sold in the course of the liquidation, proper account will be taken of their rights. As mentioned before, executions on, and foreclosures of, real estate which were pending prior to the adjudication may be prosecuted unless they involve contractual or judicial mortgages which are void as fraudulent preferences.

In the treatment of the secured or privileged creditors, Italian law follows a course similar to the American "bankruptcy rule," but with an interesting modification before the security is converted into cash the secured creditors may share with the general creditors in the dividends, allocated to them on the face value of the debt. But if later the security brings less than that amount (including the interest), then the secured creditor does not receive the whole unpaid balance, but he receives only the proceeds minus an amount equal to the difference between the dividend already paid out and a dividend calculated upon the uncovered balance.

The order of preferences is determined by the bankruptcy act in conjunction with the detailed regulation of the Civil Code. The first place is taken by the costs and expenses of the administration, then come the preferred claims in the order established by the Civil Code, and finally the general creditors.

The Italian Bankruptcy Act implies that all creditors of any kind may share in the assets. Thus all monetary claims are provable even if they are unmatured or contingent. Unmatured debts fall due at the day of the adjudication. If they are non-interest bearing the face value is provable, but at each payment of a dividend the capitalized amount corresponding to an interest rate of five per cent for the period between maturity and distribution.

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244 Idem, art. 53.
249 Idem, art. 108.
250 Idem, art. 107.
251 Idem, art. 67.
252 See supra text to note 220.
253 Italian Bankruptcy Act, 1942, art. 53. A simple illustration may be helpful. A owns a debt of 10,000 lire secured by a chattel worth 8,000 lire. He received a dividend of 20%. Then of the 8,000 lire obtained at the sale he is entitled to 8,000 minus (2,000 less 400) which equals 6,400. Cf. Satta, op. cit. supra note 4, 121.
254 Italian Bankruptcy Act, 1942, art. 111, Codice civile, 1942, art. 2751 ff, 2770 ff.
255 Cf. Satta, op. cit. supra note 4, 122.
256 Italian Bankruptcy Act, 1942, art. 55.
must be deducted. Conditional claims are likewise provable, including those against a guarantor for collection only. The amounts thus allocated, however, are not paid out but must be deposited.

Non-monetary claims are evaluated as of the date of the adjudication. Bankruptcy stops the running of interest on claims not protected by security or privilege.

The Italian law gives fairly specific provisions for the bankruptcy of a co-obligor and set-off. The rule that subrogation cannot be exercised to the disadvantage of an unpaid creditor is much more carefully spelled out than the scanty rule of the American act. A set-off is generally permitted, but prohibited if a non-matured debt was acquired by a creditor within one year prior to the adjudication.

2. Proof and allowance of claims.

The procedural aspect of the ascertainment of claims is extremely informal under American law. The act distinguishes between proof, filing and allowance. Ordinarily the proof consists of a “statement under oath, in writing and signed by the creditor, setting forth the claim and its particulars, such as consideration, security, amount paid thereon, etc.” The proofs are filed with the bankruptcy court, the referee, or even the trustee. Claims must be filed within six months after the date set for the first creditors' meeting. The trustee must examine all proofs. The referee thereupon allows or disallows the claims. No formal procedure is prescribed. The decision is usually made by separate order. Parties in interest, ordinarily the trustee, may object. Claims which have been allowed may be reconsidered. In allowing or disallowing a claim the referee exercises vast equity powers according to which he may interfere even with the ordinary rank of the claim.

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255 Idem, art. 57.
256 Idem, art. 55 (3).
257 Idem, art. 113.
258 Idem, art. 59.
259 Idem, art. 55 (1).  
260 Idem, art. 61-63 dealing with co-obligations either totally unpaid before bankruptcy or partially paid before bankruptcy by the non-bankrupt co-obligor and co-obligations where the solvent co-obligor has security from the bankrupt.
261 Cf. 3 Collier, On Bankruptcy (14th ed.) 1941, sec. 57.21.
262 Italian Bankruptcy Act, 1942, art. 56.
263 The procedure is regulated by U. S. Bankruptcy Act, sec. 57 For details see 3 Collier, On Bankruptcy (14th ed.) 1941, sec. 57
264 U. S. Bankruptcy Act, sec. 47 (8).
265 Idem, sec. 57 d.
allowance is a judicial act. It is "res judicata," but its effect is only in rem, i.e., in regard to the bankrupt estate, not against the debtor.\textsuperscript{269} Tardy creditors may only share in the surplus after the diligent creditors are paid.\textsuperscript{270}

The Italian law is slightly more formalized, which is not surprising in the light of its history. During the seventeenth century bankruptcy was regarded not only as a suit between the debtor and his creditors, but at the same time also as a litigation among the different creditors, concerning mostly their relative rank. Therefore the proceedings were divided into two phases running side by side, one dealing with the proof, the other with the ranking of the various rights. They were terminated by a formal judgment consisting of two parts corresponding to the two phases. These portions were called "sententia de liquidatione sive recognitione" and "sententia de graduatone." Only after the judgment had thus been completed in these two formal parts concerning all claims and all assets, it would become "res judicata" and executable.\textsuperscript{271}

The procedure for the proof and allowance of claims under the Italian Commercial Code of 1882, owing primarily to the exaggerated deference which the legislator had paid to the notion of a creditor's autonomy,\textsuperscript{272} was sluggish and cumbersome. One of the main aims of the partial reform of 1930\textsuperscript{273} was therefore a streamlining of this phase of the proceedings. It was mainly accomplished by strengthening the powers and functions of the referee in regard to the allowance of claims.\textsuperscript{274} The present statute of 1942 has advanced still farther in this direction.

The subject matter is regulated by the new statute in a separate chapter entitled "Of the ascertainment of the indebtedness and the property rights in personality of third persons."\textsuperscript{275} The amount of


\textsuperscript{270}About the two aspects of the procedure and their termination see Carpzow, Jurisprudentia forensis romanog-saxonica, (1644), part 1, const. 28, Salgado de Somoza, op. cit. supra note 70, book 3, ch. 1, Richter, Tractatus de jure et privilegiis creditorum, 1657, 32 ff., Brunnenmann, op. cit. supra note 70, 54, 64, G. Leyser, Disputatio de concursu et graduatiune creditorum, 1670, Ludovici, op. cit. supra note 70, 56 ff., 65 ff. About the execution of the judgment, see Brunneman, op. cit. 141, Ludovici, op. cit., 139 ff. Similar was the law in Scotland, 2 Bell, op. cit. supra note 284, 288.

\textsuperscript{271}The law as regulated by the Commercial Code, 1882, art. 758-771 is summarized by Brunetti, Diritto fallimentare italiano, 1932, 460, 478.

\textsuperscript{272}Cf. supra text to note 11.

\textsuperscript{273}The law as in force under the revision of 1930 is discussed by Brunetti, op. cit. supra note 272, 460-502.

\textsuperscript{274}Italian Bankruptcy Act, 1942, ch. 5, art. 92-103, cf. Satta, op. cit. supra note 4, 189 ff.
the total liability of the estate is established by a proceeding which consists of a necessary and an optional phase. The obligatory stage is constituted by three steps (a) the filing of the claims and their proofs; (b) a tentative determination by the referee, and (c) a final verification. The optional stage is entered upon a protest against the final ruling. Briefly the whole process evolves as follows.

The trustee notifies the creditors and other interested parties, whom he has ascertained from the books of the bankrupt and other information, to file their claims and proofs with the clerk of the bankruptcy court within a period fixed by the decree of adjudication.\textsuperscript{276} The presentation of a claim has the same effect on the statute of limitations as the commencement of an action.\textsuperscript{277} It must indicate the name of the creditor, the amount owed, the nature of the claim, the reasons for any preference and all evidentiary documents.\textsuperscript{278} The clerk forms a chronological list of these claims and submits it to the referee. The latter consults with the trustee, hears the debtor and makes a tentative determination called “status of indebtedness.” This order specifies the items which the referee deems allowable and those which he thinks ought to be wholly or partially rejected.\textsuperscript{279} It is filed with the clerk before a hearing, the date of which is fixed by the original order of adjudication.\textsuperscript{280} At that hearing the tentative determination by the referee is re-examined in the presence of the interested parties. This phase is called “verification of the status of indebtedness.”\textsuperscript{281} The referee enters any modifications which he deems necessary and may allow late claims. The “status of indebtedness” as it results from the verification is rendered executable by order of the referee.\textsuperscript{282} It is now binding upon the bankrupt.\textsuperscript{283} Creditors, whose claims have been rejected or allowed under reservation, may contest the determination within fifteen days. All these contestations are decided together in a single judgment by the court in banco.\textsuperscript{284} The allowance of claims may likewise be contested. Proper parties are other creditors.

\begin{itemize}
\item[\textsuperscript{276}]Italian Bankruptcy Act, 1942, art. 92 in conjunction with art. 16, n. 4 and 89.
\item[\textsuperscript{277}]Idem, art. 94.
\item[\textsuperscript{278}]Idem, art. 93.
\item[\textsuperscript{279}]Idem, art. 95 entitled “formazione dello stato passivo.”
\item[\textsuperscript{280}]Idem, art. 95 in conjunction with art. 16, n. 5.
\item[\textsuperscript{281}]Idem, art. 96.
\item[\textsuperscript{282}]Idem, art. 97.
\item[\textsuperscript{283}]While the practice seems to accord both to the allowance and the rejection only an “im rem” effect in so far as the scope of res judicata is concerned, Professor Satta believes that the positive or negative determination is binding under the new act even outside bankruptcy, op. cit. supra note 4, 199.
\item[\textsuperscript{284}]Italian Bankruptcy Act, art. 98, 99.
\end{itemize}
whose claims have been allowed or who have filed a protest. These litigations are handled in the same way and together with protested rejection cases.\textsuperscript{285}

Tardy creditors are not completely out of luck. The law protects them by a special procedure.\textsuperscript{286} But they lose the dividends already distributed and must reduce their claims correspondingly\textsuperscript{287}

Claims for restitution of movables in the possession of the bankrupt are treated in an analogous procedure.\textsuperscript{288} In case of tardiness the claimant can only obtain such portion of the proceeds as is still undistributed.\textsuperscript{289}

While the final form of the status of indebtedness and property claims is the basis for the amount and relative rank and security of all persons entitled to share in the proceeds, the actual distribution requires one further step, the judicial approval of a plan of distribution submitted by the trustee.\textsuperscript{290}

\vspace{12pt}

\textbf{V}

\textit{Compositions}

Compositions or arrangements are an important device to arrive at a quick and economical adjustment of an insolvent estate either for the purpose of liquidation or—more recently—rehabilitation.\textsuperscript{291} In modern bankruptcy theory it is customary to distinguish between two classes of compositions\textsuperscript{292} (1) amicable or extra-judicial compositions, also called "creditors' agreements," which bind only the parties to the stipulation, and (2) judicially supervised or majority compositions which bind also the dissenting minority by virtue of a special rule of law ordinarily in consequence of a judicial confirmation. The latter group is frequently subdivided into two further classes (a) bankruptcy compositions in the technical sense which terminate pending bankruptcy proceedings, and (b) preventive accords or compositions which are designed to save the debtor from the disqualifications, the stigma and the wasteful interference incident to ordinary bankruptcy proceedings.

\begin{footnotes}
\footnotetext[285]{Idem, art. 100.}
\footnotetext[286]{Idem, art. 101.}
\footnotetext[287]{Idem, art. 112.}
\footnotetext[288]{Idem, art. 103.}
\footnotetext[289]{Idem, art. 103, 5.}
\footnotetext[290]{Idem, art. 110.}
\footnotetext[291]{Garner, On Comparing "Friendly Adjustment" and Bankruptcy (1931) 16 Corn. L. Qu. 35.}
\footnotetext[292]{Compositions must be distinguished from assignments for the benefit of creditors in the common law sense which, while being a method of liquidating insolvent estates, do not involve an agreement with the creditors.}
\end{footnotes}
(1) The evolution of the law of compositions in general. The history of the compositions shows in an interesting fashion how an important private law institution gradually gains international acceptance. Its roots reach far back to the days of Roman Law. At the time of the Emperor Justinian two types of majority compositions were recognized. A debtor could generally obtain from the majority of his creditors a five-year moratorium which bound the minority. In addition thereto, in the special case of an insolvent decedent's estate, a partial release granted by a majority of creditors obligated also the minority, if the judge rendered a decree approving it (so-called pactum ut minus solvatur). During the Middle Ages great uncertainty existed whether the latter rather isolated rule could be extended to insolvent estates in general. Early Spanish law took this step by specifically providing that an honest insolvent debtor could stipulate with the majority of his creditors for a moratorium or a partial release which would be operative on dissenting unsecured creditors. The law did not even require judicial approval, although it later became customary to obtain such decree. In the statutes of the medieval cities of Italy, which are the cradle of modern bankruptcy law, we find likewise provisions for majority compositions for the purpose of either terminating or averting bankruptcy adjudications.

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294 Justinian's Code, VII, 71, 8. These moratoria by agreement with a majority of creditors must be sharply distinguished from the moratoria which could be obtained by special edict of the Emperor upon petition by the debtor, Justinian's Code I, 19, 2 and 4, cf. Elster, Moratorium in 4 Stier-Somlo and Elster, Handwörterbuch der Rechtswissenschaft, 1927, 124, and Feller, Moratory Legislation (1933) 46 Harv. L. Rev. 1061, at 1026.

295 Justinian's Digests, II, 14, 7, 19 and II, 14, 10 pr.

296 Las Siete Partidas, Part V, tit. 15, laws 5 and 6; see Scott-Robinger-Vance, Las Siete Partidas (English transl.) 1931, p. 1171. This famous law book was compiled between 1256 and 1263 and promulgated officially in 1348, see Lohinger, op. cit., Introduction. The importance of early Spanish law for the development of bankruptcy, often overlooked by legal historians, has been correctly emphasized by De Benito, Al Servicio de Nuestra Tradición Jurídica, La Doctrina Española de la Quebra, 1930, who comments (p. 82, 83) specifically on the liberal character of the law of compositions in Las Siete Partidas.

297 This is pointed out by Salgado de Somoza, Labyrinthus Creditorum Concurrentium, 1651, Book II Ch. 30 nr. 72, 73. In addition to the provisions of the Siete Partidas the author refers to subsequent acts incorporated into the Nueva Recopilación—a codification of 1567—restricting the validity of majority compositions in case of fraudulent bankruptcies, Recopilacion, book V, title 19, laws 5-7.
cial approval was usually a requisite. However, apart from special provisions, the matter remained for a long period a much debated point, although progressive authors, such as the famous Straccha, advocated a liberal adaptation of the Roman sources.

During the latter part of the sixteenth and the seventeenth century the practice of judicially approved majority compositions spread all over Europe, and, in spite of some vigorous dissents, finally became firmly established in theory and practice as the common law.

In France the practice of majority compositions was accepted and found national recognition in the famous Ordonnance du Commerce of 1673, which was the first commercial code of France. This act provided that compositions, approved in the creditors’ meeting by creditors owning three-quarters of the

\[290\] Numerous examples of medieval statutes of Italian cities regulating preventive and bankruptcy compositions are given by Rocco, Il concordato nel e prima del fallimento, 1902, 16 ff.; Rocco, Il fallimento, teoria generale ed origine storica (1917), 215 ff.

\[290\] Straccha, Tractatus de conturbatoribus sive decotoribus, 1553, part 6 nr. 21 ff.

\[300\] In the Netherlands a decree of Charles V, May 19, 1544 art. 35 prohibited expressly that a minority of creditors could be compelled by a majority to remit a portion of their debts. This was considered as law by the Dutch writers of the seventeenth century, see Van Leeuwen, Commentaries on Roman-Dutch Law 1664 (English transl. by Kotze 1921) book 4 ch. 41 nr. 7, Voet, Commentarius ad Pandectas, 1698, book 2, title 14, nr. 23. However, during the seventeenth century various particular laws provided that a majority of three-fourths of the creditors representing two-thirds of the amount of the debts or a majority of two-thirds representing three-fourths of the amount could validly grant a partial release binding all unsecured creditors, if approved by public authority. The first statute to that effect was enacted by Zeeland in 1649, see ‘oct. loc. cit. It was copied in various parts of Holland, namely by Amsterdam in 1659, Leyden in 1665, and Haarlem in 1709; see Van der Keessel, Select Theses on the Laws of Holland and Zeeland (transl. by Lorenz, 2d ed. by De Wal) 1808 book 3, ch. 41, sec. 9, and Wessels, History of the Roman-Dutch Law, 1908, p. 666 ff. A translation of the Ordinance of Amsterdam of 29 Jan. 1729, providing for compositions in art. 8, was printed in Beawes, Lex Mercatoria Rediviva, 1771, 558 ff.

\[301\] An influential opponent was Mevius, Commentarii in Ius Lubeicense 1664, book 3, title 1, art. 13.

\[302\] See the discussion and copious references by De Casaregis (1675-1737) Discursus legales de commercio (1740) disc. 172. There (in sec. 10) the author stressed the necessity of judicial confirmation. For the German common law of the 19th century see 2 Windscheid-Kipp, Lehrbuch des Pandektenrechts (9th ed.) 1906, p. 527 note 2.

\[303\] Thaller, Traite de droit commercial (8th ed. by Percoux) 1931, vol 2, p. 1251, 1 Thaller, Des faillites en droit compare (1887) 61.

\[304\] Ordonnance du commerce, March 1673, in 19 Recueil general des anciennes lois francaises (ed. by Isambert, Decrusy and Taillandier) 1829, p. 92. It has been suggested that the Dutch commercial and bankruptcy law, mentioned supra note 300, had a decisive influence on the contents of this code. Van Hamel, “Netherlands,” in 1 Continental Legal History Series, 1912, p. 473.
total debts, were binding on all unsecured creditors after being authenticated by the court.\textsuperscript{305} Compositions thus became restricted to a method of terminating bankruptcy proceedings, rather than preventing them, and this feature was even more accentuated in Napoleon’s Code de Commerce of 1807,\textsuperscript{306} which inspired so many foreign legislations. From the treatment and the position in the commercial code, which the French legislator accorded to the composition, it is evident that he considered it as a desirable and normal method to \textit{terminate} bankruptcy proceedings;\textsuperscript{307} the Code de Commerce of 1838 proceeded insofar along the same lines.\textsuperscript{308}

The practice of majority compositions was adopted by the Scotch bankruptcy law towards the end of the eighteenth century While a statute concerning alienations by bankrupts was passed as early as 1621\textsuperscript{308a} and Scotch insolvency law during the seventeenth century was greatly influenced by continental usages\textsuperscript{308b} it is a peculiar feature of the law of Scotland that the first attempt to form anything like a general code of bankruptcy law was made as late as 1772 by a statute providing for the sequestration of the entire personal estate of an insolvent debtor.\textsuperscript{309} This act did not...
recognize true compositions, but it provided that if two-thirds in value of the creditors present at a meeting voted for extra-judicial administration of the estate by one or more trustees, the court should make an appropriate order and terminate the proceedings. The subsequent bankruptcy act of 1793 introduced true bankruptcy compositions. According to this statute, debtors could propose a composition with their creditors at the meeting held after the final examination. If such proposal was approved by nine-tenths in number and value of the creditors at that and a subsequent meeting, and if a final acceptance was given by nine-tenths of all creditors who had proven their debts, the court could approve the composition, if reasonable, and it then became binding on all creditors. The debtor was thereupon discharged from all debts outside the composition.

The Scotch law relating to compositions inspired the introduction of compositions into English bankruptcy law. This was accomplished by the Bankruptcy Acts of 1824 and 1825. From the middle of the sixteenth to the middle of the seventeenth century there had existed a previous period in English law in which the Privy Council had intervened to induce creditors to come to terms with embarrassed debtors and in which the Chancery, especially Francis Bacon, through bills of conformity or injunctions, had compelled a minority of creditors to assent to a composition entered into by the debtor with the majority. But this practice had been

310 Geo. III, ch. 74, sect. 48. The composition provisions of this statute are analysed by 2 Bell, op. cit. supra note 309, p. 454 ff. It is likely that the adoption of this section was due to the French example and the influence of Pothier, Traite des obligations (English transl. 1802) vol. 1, nr. 88.
311 Geo. III, ch. 74, sect. 48.
312 This is admitted by Eden, Practical Treatise on the Bankruptcy Law (2d ed.) 1826, p. 433. This author was the draftsman of the Bankruptcy Act of 1824, see Consolidation of the Bankrupt Laws, 1 The Jurist (1827) 51, at 53, 54.
313 Geo. III (1924) ch. 98, sec. 130, 131. The statute was repealed in the middle of the day on which its principal portion became operative.
314 Geo. III (1825) ch. 16, sec. 133, 134. These sections are substantially identical with 5 Geo. III (1824) ch. 98, sec. 130, 131.
315 See the references in 8 Holdsworth, A History of English Law (2d ed.) 1937, p. 233, 234. Most of the cases cited involved primarily a moratorium. The similarity of this practice with the imperial intercession under the Roman law, supra note 294, and the French lettres de repit, supra note 305, is striking.
316 Holdsworth, A History of English Law (2d ed.) 1937 p. 244, citing Muffet v Crackplace, Bret v Shurley, Mildmay v. Wentworth, Totalhill, Transactions of the High Court of Chancery, (1872) 25, 47. Further cases of this type are printed in Ritchie, Cases Decided by Lord Bacon,
abandoned. A statute which authorized compositions of insolvent debtors with a majority of creditors, if two-thirds in number and value agreed before a master in Chancery, remained on the books only from 1697 to 1698. Beginning with Lord Mansfield even extra-judicial arrangements had come to be considered as acts of bankruptcy. The doubt regarding the value of majority compositions prevailed up until the beginning of the nineteenth century. The Bankruptcy Act of 1825 was no more than a modest start. Like the Scotch model it required the assent of nine-tenths in number and value of the creditors present at two consecutive meetings after the final examination. If such majority was obtained, the Chancellor was to declare the Bankruptcy proceedings superseded. But, unlike the second Scotch Act, the English statute failed to provide for a binding effect on, or a discharge operating against, the dissenters. Gradually, however, public opinion became favorable to compulsory majority compositions. Their introduction, in case of persons not subject to the bankruptcy law because of not being traders, was suggested by two Parliamentary Commissions in 1831 and 1841 and actually carried into effect.

1932, 161, 165, 166. In Ramsey v. Brabson (1583) Choyce Cases in Chancery, 174, the Chancery issued an injunction pursuant to a special protection granted by the Queen against creditors who had refused to content themselves with a majority, composition and sued at law.

317 The jurisdiction of the Council was abolished in 1641, the bills in Chancery were eliminated in 1621 and their filing declared to be acts of bankruptcy in 1623, see Holdsworth, op. cit. supra note 316, 244.

318 It was passed by 8 & 9 Will. III (1697) ch. 18 and repealed by 9 & 10 Will. III (1698) ch. 29, because of the many fraudulent practices to which it had given rise.


320 Cf. the Report from the Select Committee on the Bankrupt Laws, 1819, in which it was recommended that pre-bankruptcy composition deeds should remain acts of bankruptcy although amenable to attack only within a certain short period (p. 250), and in which no mention was made at all in regard to bankruptcy compositions.

321 Geo. III (1825) ch. 16, sec. 130, 131. No discretion was vested in the Chancellor.

322 See the language in Allen v. Coster (R.C. 1838) 1 Beaver 274. Eden, A Practical Treatise of the Bankrupt Law, (2d ed.) 1826, p. 443, did not mention this difference between Scotch and English law. While no case directly in point could be found, the case mentioned and a reading of the statute leads to the result of the text.

by a statute of 1844.\textsuperscript{324} Bankruptcy law soon followed suit. The Bankrupt Law Consolidation Act of 1849\textsuperscript{325} introduced three different types of composition proceedings "Compositions after Adjudication of Bankruptcy,"\textsuperscript{326} "Arrangements under the Supervendence and Control of the Court,"\textsuperscript{327} and "Arrangements by Deed."\textsuperscript{328} The new regulation of the bankruptcy compositions did not alter substantially the previously existing law,\textsuperscript{329} except that it now specifically provided that the dissenters were bound by the composition after the order for supersedeas or dismissal of the petition. The so-called "arrangement clauses," on the other hand, constituted in many respects an innovation and caused numerous doubts. The first mentioned type of arrangements could be initiated by an insolvent trader and afforded him a chance to avoid subsequent bankruptcy if three-fifths in number and value of his creditors accepted his proposal and the court gave its approval. Evidently it could amount to a true composition, leaving the debtor in possession of his assets and entitling him to a discharge.\textsuperscript{330} Arrangements by deed dispensed to a large degree with court supervision and were binding upon all existing creditors if signed by six-sevenths of them in number and value.\textsuperscript{331} After some initial disagreement the act was construed so as to exclude true composition deeds and to require that the debtor's whole assets be

\textsuperscript{324} & 8 Vict. ch. 70 (1844), "Act for facilitating Arrangements between Debtors and Creditors," which was in force until 1869. A proposal for arrangement or composition was binding on all creditors, if it was accepted by a majority in number and value, or nine-tenths in number or value of the creditors at the first meeting, again assented to by a majority of three-fifths in number and value, or nine-tenths in number or value and subsequently confirmed by the Court Commissioner (secs. 4, 5 and 6) If the composition was carried out it operated as discharge of all debts (sec. 13).

\textsuperscript{325} The Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict., ch. 106.

\textsuperscript{326} & 13 Vict. (1849) ch. 106, sec. 230, 231.

\textsuperscript{327} & 12 & 13 Vict. (1849) ch. 106, sec. 211-223.

\textsuperscript{328} & 12 & 13 Vict. (1849) ch. 106, sec. 224-229.

\textsuperscript{329} It still required that a majority of nine-tenths in number and value of the creditors assembled at two meetings gave their assent. The courts tended to construe the provisions rather strictly, see Taylor v. Pearse (Ex. 1857) 2 Hurlst. & Norm. 37, 157 E. R. 15.

\textsuperscript{330} See the interpretation placed upon these sections by the Lord Chancellor in Ex parte Vero (Ch. 1858) 3 DeG. & J. 379, 44 E. R. 1314, and the facts of the case Ex parte Arnold (Ch. 1859) 2 DeG. & J. 473, 44 E. R. 1351, the decision of the latter case involving the effect of pending arrangement proceedings upon a subsequent petition for an adjudication was explained in Ex parte Treherne (Ch. 1862) 2 DeG. F & J. 656, 45 E. R. 775, permitting such adjudication as long as the arrangement was not confirmed.

\textsuperscript{331} The binding effect did not operate on the dissenters for three months unless the court certified the proper acceptance. Until that time the deed constituted an act of bankruptcy Ex parte Alsop (Ch. 1859) 1 DeG., F & J. 289, 45 E. R. 370.
devoted to the creditors. In 1861 a radical amendment which made non-traders amenable to the bankruptcy law and eliminated some of the narrow constructions which the court had given the old statute took place. It provided for termination of bankruptcy proceedings by means of “a deed of arrangement, composition or otherwise” and for the prevention of bankruptcy by means of trust deeds for the benefit of creditors or composition. In the first case, the acceptance by three-fourths in number and value of the creditors was required and, in addition, the court had to approve the arrangement as reasonable and beneficial to all creditors. In the second case, the composition had to be accepted by a majority of creditors representing three-fourths in value of the debts. A transfer of all or some of the estate was no longer held to be required in this instance. A few years later a new revision, known as Bankruptcy Act, 1869, was passed. This statute provided again not only for compositions and general schemes of arrangement for the purpose of terminating expeditiously pending bankruptcy proceedings, but in addition gave fairly detailed regulations of two types of proceedings for the purpose of averting bankruptcy: one, called “Liquidation by Arrangement,” constituted an extra-bankruptcy winding-up of the insolvent estate, the other called “Composition with Creditors,” amounted to a rehabilitation of the estate, permitting the debtor to remain in possession.

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32 Tetley v. Taylor (Ex. Ch. 1852) 1 Ell. & Bl. 521, 118 E. R. 530.
34 Ex parte Rawlings (Ch. 1862) 1 DeG. J. & S. 225, 253, 46 E. R. 89; Ex parte Cockburn (Ch. 1863) 3 DeG. J. & S. 175, 46 E. R. 604; Ex parte Morgan (Ch. 1863) 1 DeG. J. & S. 288, 46 E. R. 116; Chapman v. Atkinson (Ex. 1864) 4 B. & S. 729, 122 E. R. 634, but contra Walter v. Adecock (Ex. 1862) 7 H. & N. 541, 158 E. R. 586.
35 & 33 Vict. ch. 71.
36 & 33 Vict. ch. 71, sec. 192 ff. “As to Change from Bankruptcy to Arrangement.”
37 Bankruptcy Act, 1861, sec. 185 ff. “As to Trust Deeds for Benefit of Creditors, Composition and Inspectorship Deeds.”
38 Ex parte Rawlings (Ch. 1862) 1 DeG. J. & S. 225, 253, 46 E. R. 89; Ex parte Cockburn (Ch. 1863) 3 DeG. J. & S. 175, 46 E. R. 604; Ex parte Morgan (Ch. 1863) 1 DeG. J. & S. 288, 46 E. R. 116; Chapman v. Atkinson (Ex. 1864) 4 B. & S. 729, 122 E. R. 634, but contra Walter v. Adecock (Ex. 1862) 7 H. & N. 541, 158 E. R. 586.
39 & 33 Vict. ch. 71, sec. 28. The composition had to be sanctioned by a special resolution of the creditors and accepted by the trustee, subject to the approval of the court. The composition could incorporate as a condition that the adjudication in bankruptcy be annulled.
40 & 33 Vict. ch. 71, sec. 125. Only a majority in number and value of the creditors was required for such liquidation. “Liquidations by Arrangement” did not have a good record and were abolished by the subsequent bankruptcy act of 1883.
41 & 33 Vict. ch. 71, sec. 126.
Such composition had to be concluded with a majority in number and three-fourths in value of the creditors assembled at a general meeting and ratified by a majority in number and value of the creditors assembled at a subsequent meeting. After registration all creditors were bound. But, while in the case of compositions for the termination of bankruptcy under sec. 28 an approval of the court upon an independent exercise of its discretion was required, the act did not provide for such approval in the case of preventive compromises. The court could, however, intervene in cases of fraud or render an adjudication in bankruptcy if it deemed the proceedings to be dilatory, unjust or unfeasible.

(2) Evolution of the American law of compositions.

The development of the English law of compositions had its repercussions on the North American continent. The U S. Bankruptcy Act of 1867 copied substantially the sections of the English Act of 1861 entitled “Change from Bankruptcy to Arrangement.” Consequently upon a resolution of three-fourths in value of the creditors whose claim had been proven and a confirmation by the court, the estate could be liquidated by trustees under the direction of a committee of creditors. True bankruptcy compositions or preventive compositions were, nevertheless, not permitted at that time. In 1874, however, a far-reaching amendment of the statute of 1867 was enacted. Under the caption “Composition with Creditors” it engrafted upon the previous law of liquidation by arrangement the possibility of real bankruptcy compositions. While the English act of 1869 in its section dealing with preventive compositions influenced the wording of the American statute noticeably, there were, however, some important differences.

344 The power of the individual dissenting creditor to question the validity of such compositions was cut down severely in comparison with the condition under the act of 1861. In re Thorpe (Ch. App. 1873) 8 Ch. App. 266.
346 Ex parte Linsley (C.A. 1874) 9 Ch. App. 290.
347 Ex parte Charlton (C.A. 1877) 6 Ch. D. 45. In re Shiers (C.B. 1877) 7 Ch. D. 416. In re Kearley (V-C.M. 1878) 7 Ch. D. 615.
348 U. S. Stats. 517 ff. at 538 (1867), ch. 176, sec. 43.
349 See supra text to note 334.
351 The U. S. Statute of 1867, sec. 43 omitted the words “Deed of Arrangement, Composition or otherwise” contained in the English Act of 1861, sec. 185.
352 U. S. Stats. vol. 3 (1874) Ch. 390, p. 178.
353 U. S. Stats. vol. 3 (1874) Ch. 390, sec. 17, p. 182.
The compositions were permitted only subsequent to a voluntary or involuntary petition in bankruptcy. The acceptance by the creditors required a majority of two-thirds in number and one-half in value of the creditors without the necessity of a ratification at a second meeting. The confirmation of the resolution required a court order predicated upon a showing that the composition was for the best interest of all concerned. This portion of the statute was declared to be constitutional.

The present Bankruptcy Act of 1898 in its original form likewise provided only for compositions in bankruptcy. For their validity the statute required that bankruptcy proceedings be pending and that the examination of the debtor had taken place, that the proposal had been accepted by a majority in number and value of all creditors whose claims had been allowed, and that the court, being satisfied that the composition was for the best of the creditors, had granted a confirmation. In 1910 the bankruptcy act was amended so as to permit expressly compositions before the adjudication, provided the debtor had been properly examined. In 1926 a further amendment eliminated the automatic stay of the petition for adjudication which such proposal produced under the previous law.

In 1933 a new era began for the law of compositions. Sec. 12 of the act required that bankruptcy proceedings be pending and affected secured creditors only in respect to the unsecured portions of their claims. A new section was therefore added to the bankruptcy act (as Sec. 74). It went much further and introduced new provisions for compositions and extensions. Through these procedures, which could be and frequently were, combined, a financially embarrassed non-corporate "debtor" could obtain an extension of time for the payment of his unsecured and secured debts, the

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352 30 U. S. Stats. 1898 ch. 541, sec. 12, p. 544, 549.
353 30 U. S. Stats. 1898 ch. 541, p. 544.
354 36 U. S. Stats. 1910 839 ch. 412, sec. 5.
355 44 U. S. Stats. 1925-1927, 662, 663; ch. 406, sec. 5, see McLaughlin, Amendment of the Bankruptcy Act (1927) 40 Harv. L. R. 340, 349.
356 For details respecting the construction of sec. 12, see 1 Collier, The Law and Practice in Bankruptcy (13th ed.) 1923, p. 430 ff, particularly 441 ff.
security for which was in the actual or constructive possession of the debtor or a receiver, and also a reduction of the amount of the unsecured debts, without necessarily losing the administration of the estate. The proceedings were streamlined and no longer required a voluntary or involuntary petition in bankruptcy. The proposal of the debtor had to be accepted by a majority in number and amount of the unsecured creditors whose claims were allowed and secured creditors whose claims were proposed to be affected. It became binding after confirmation by the referee.358 In case of failure to obtain acceptance of the proposal or confirmation of the agreement or performance thereof, the court could order either a liquidation or render an adjudication in bankruptcy. Special provisions were enacted for compositions and extensions by farmers.359

In addition thereto the amendment of 1933360 codified the far reaching and intricate law of corporate reorganization which the federal courts had developed under their equity practice as applicable to railroads. It became section 77 of the Bankruptcy Act. An amendment of 1934361 added similar provisions for private corporations, which, as section 77 B, was soon the best known section of the statute.

The revision of the Bankruptcy Act in 1938362 included a total revamping of the law of compositions. Both sections 12 and 74 were repealed. In their place chapters XI and XII, entitled "Arrangements"363 and "Real Property Arrangements by Persons other than Corporations,"364 were added to the statutes.

Arrangements under chapter XI were defined as "any plan of a 358 Confirmation was predicated upon a number of conditions, listed in sec. 74 g, referring to the equity and feasibility of the plan, the best interests of the creditors and the good faith and meritorious character of the debtor.
359 Section 75 of the Bankruptcy Act, added in 1933 by 47 U. S. Stats. (1933) ch. 204, p. 1470, amended in 1934 by 48 U. S. Stats. ch. 424, sec. 8 and 9, p. 925, and ch. 869, p. 1289. The latter amendment known as the Frazier-Lemke Act, was declared unconstitutional by the Supreme Court in Louisville Joint Stock Land Bank v. Radford (1935) 295 U. S. 555, 79 L. Ed. 1593, 55 S. Ct. 854. It was re-enacted with certain modifications and other amendments to sec. 75 by 49 U. S. Stats. (1935) ch. 792, p. 942. The new form of the Frazier-Lemke Act was held to be constitutional in Wright v. Vinton Branch of the Mountain Trust Bank, (1937) 300 U. S. 440, 81 L. Ed. 736, 57 S. Ct. 556.
360 Act of March 3rd, 1933, 47 Stats. 1474, ch. 204.
362 Act of June 22, 1938, 52 Stats. 840, ch. 575, known as "Chandler Act."
363 U. S. Bankruptcy Act, as amended in 1938, sec. 301 ff. For an exhaustive and scholarly discussion of this chapter see 8 Collier, On Bankruptcy, (14th ed.) 1941.
364 U. S. Bankruptcy Act, sec. 401 ff. For details see 9 Collier, On Bankruptcy (14th ed.) 1942, 1-408.
debtor for the settlement, satisfaction or extension of the time of payment of his unsecured debts upon any terms. While only unsecured creditors can and must be affected in their rights, the terms of the arrangement may have an almost unlimited variety, including the rejection of executory contracts. The different debts may either be treated alike or divided into classes with separate treatment. The aim of the whole procedure is decidedly not liquidation but rehabilitation of the enterprise with the least possible interference with regular business procedure. Corporations as well as natural persons may resort to the proceedings under this chapter. It can be done either by original petition by the debtor or at any stage during bankruptcy. An arrangement binds all creditors of the debtor if it is accepted by a majority in number and amount of the creditors in each class, specified in the arrangement and confirmed by the court. Such order presumes that the court is satisfied that the plan is fair, equitable and feasible, that it is for the best interests of the creditors and not in violation of certain statutory obligations.

The arrangements under chapter XII are open only to noncorporate debtors. They are designed to facilitate a rehabilitation of the distressed enterprise where an alteration or modification of debts secured by real estate is necessary and the "primary" purpose of the arrangement. Debts secured by other means cannot be included unless they would be otherwise affected by the arrangement. Unsecured debts, however, may be treated in a similar fashion as in the other type of arrangements. Chapter XII requires the acceptance by a larger majority, namely by at least two-
thirds in amount of the creditors in each class affected, unless provisions for adequate protection of their interests are made in the event that the required majority is not obtained. The court's confirmation, predicated upon similar conditions as under chapter XI, is again necessary before the dissenting creditors are bound. In addition to these two groups of arrangements the Bankruptcy Act has a separate regulation of "Agricultural Compositions and Extensions" and "Wage Earner's plans." 3

3 Development of the Italian Law. The Italian law has likewise undergone pronounced changes in the course of time. The Commercial Code of 1882 followed the French scheme. Consequently it provided for compositions only as a means for the termination of bankruptcy In connection with the efforts tending to a reform of the bankruptcy law which led to the appointment of a royal commission in 1894, the celebrated Italian jurist Bolaffio urged, in a careful report, the introduction of compulsory majority compositions for the prevention of bankruptcy and the destruction of the enterprise usually flowing therefrom. His proposal gained international attention and finally in 1903 the aforementioned statute regulating compositions for the avoidance of bankruptcy, which has stimulated similar legislation all over the world, was passed.

The reform of 1930 made only minor changes. Bankruptcy compositions could be proposed by the debtor at any time subsequent to the final hearing for the allowance of claims. The ac-

376Idem, sec. 468 (1).
379Idem, sec. 75.
380Idem, ch. XIII.
381See supra text to note 130.
382See supra text to note 7.
383The report made a thorough study of foreign legislation, pioneering in this field, such as the English Bankruptcy Act, 1869, a Belgian statute of June 20, 1883, extended December 23, 1885, and perpetuated and revised July 1, 1887, and a law of July 7, 1877 of the canton of Geneva.
384The value of Bolaffio's proposal was quickly realized. In Argentine and Uruguay it prompted the introduction of preventive compositions even ahead of Italy, 1 Garcia Martinez, El concordato y la quiebra en el derecho Argentino y comparado (3 vols.) 1940, 143 Scarano, El concordato preventivo judicial (Uruguay) 1937. They are now authorized in one form or the other by most European and South American nations and by Egypt, see Badr, Le concordat preventif de la faillite dans le droit egyptien (Cairo) 1945. Fredérecq, Transformation des procedures de faillite et mesures preventives sous l'influence de la crise economique, (1937) 23 Revue de l'Institut Belge de droit compare, 105, 1 Garzia Martinez, op. cit. 143 ff.
385Statute of July 10, 1930, art. 16. Before this amendment the trustee or even a fourth of the creditors could propose a composition. Codice di commercio, 1882, art. 831.
ceptance by a majority in number of creditors holding allowed claims representing three-fourths in amount of such debts had to be ob-
tained. Such compositions became binding after confirmation by the court ren-
dered upon a formal hearing if the judge was convinced that the plan was feasible and merited official approval.

The preventive compositions were originally authorized by the legislator with the idea that they would salvage the enterprise in the hands of the "honest, but unfortunate" insolvent. The proceedings were open only to merchants, and presupposed that the petitioner was not guilty of certain criminal infractions, and was offering the payment of at least forty per cent of his unsecured debts, and satisfactory security. The proposal required the acceptance by a majority in number of the unsecured creditors representing three-fourths in amount of the debts. Confirmation by the court was again necessary, predicated upon the deserving character of the debtor, acceptance by the prescribed majority, satisfactory security and the presence of the other legal requirements.

The new statute continues to deal with the two types of com-
positions separately. Apart from still further strengthening the powers of the referee, no major alteration was made in regard to true bankruptcy compositions, since the revision of 1930 was considered to be satisfactory. The proposal is submitted by the bankrupt to the judge delegate after the issue of a decree which renders the verification of the total indebtedness executable. It must contain an offer of a percentage to the general creditors, a determination of the time of payment, and a description of the security for the execution. If the judge admits the proposal after hearing the advice of the trustee and the creditors' committee, he calls for the vote. All unsecured creditors with allowed claims are entitled to participate. Assent of a majority in number of the qualified creditors representing two-thirds in amount of such claims is required. The court confirms the composition if he finds

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388 Codice di commercio, 1882, art. 833.
389 Idem, art. 834.
390 Statute of July 10, 1930, art. 17 (4).
391 Statute of May 24, 1903, art. 1, 2, 3, 14, 20, 21.
392 Official report by Minister Grandi, cit. supra note 4, 336. The details of the new law are discussed by Satta, op. cit. supra note 4, 235-239.
393 Italian Bankruptcy Act 1942, art. 124.
394 Idem, art. 125.
395 Idem, art. 127.
396 Idem, art. 128.
that all formalities are complied with and that the plan is sound and properly secured.  

Preventive compositions on the other hand have acquired a new complexion by virtue of the recent statute. The legislator recognized that in practice the preventive compositions had lost their original function and purpose of conserving the enterprise in the hands of its deserving old owner. They had rather degenerated into a process of liquidation by which the embarrassed debtor obtained a discharge and avoided the stigma of bankruptcy at the price of sacrificing the business. Therefore the new statute instead of adhering to a fiction—or trying to remedy the situation—takes account of the facts and adjusts the provisions accordingly. A proposal for a preventive composition must therefore now contain an offer of one of these alternatives either the payment of forty per cent of all unsecured debts coupled with sufficient security, or the assignment of all non-exempt assets to the creditors, provided that their valuation arrives at a figure equal to these forty per cent. The petition must indicate the reasons for the insolvency. If the court deems the proposal to be admissible, he appoints a referee and also a commissioner as supervisor of the debtor. A hearing is set for the proof of the claims and the vote on the proposal. An approval by the majority of the creditors voting which represent two-thirds in amount of all debts admitted to vote constitutes the acceptance. Judicial confirmation is conditioned upon compliance with all formalities and the court’s judgment that the debtor is meritorious and that the composition will benefit the creditors “considering the existing activities and efficiency of the enterprise.”

VI.

Other rehabilitation and liquidation procedures.

Conclusions.

1 Other rehabilitation proceedings.

In the foregoing section it was shown how in the course of history in the United States, as well as in Italy, judicially supervised
compulsory majority compositions were developed as a means of salvaging the embarrassed enterprise and, if possible, preserving it in the hands of the old owner without the stigma of bankruptcy. In the case of corporations these proceedings can only be successful if the rehabilitation can be accomplished without interference with the corporate structure as such or the secured debts. In the case in which the capitalization of the corporate enterprise is such that the business can be rehabilitated only by a complete overhauling of its whole capital structure, American law offers the far reaching and intricate process of corporate reorganization regulated separately for railroads405 and other private corporations.406

The Italian law, even under the new statute, has not felt it possible or advisable to provide for such radical and far reaching procedure. It has contented itself with the rather feeble device of preventive compositions, which in Italy, as we mentioned, has degenerated practically into a method for the debtor to obtain an honorable discharge for the price of sacrificing the enterprise. However, the new law has added an additional rehabilitation procedure which goes by the name of “supervised management.”407

It is hard to say whether this should be considered as a new experiment or a legal anachronism. Germany, for instance, during the first World War introduced a similar procedure.408 Two years later preventive compositions were added.409 Finally only a strengthened law of preventive compositions was maintained.410 Similarly Belgian law started out by having only a statute authorizing preventive compositions.411 During the crisis preceding the second World War, two experimental decrees permitting “supervised management” (gestion contrôlée) were enacted but because of un-

405U. S. Bankruptcy Act, sec. 77, added by amendment of 1933, cf. supra text to note 360.
406U. S. Bankruptcy Act, chapter X, first introduced into the bankruptcy legislation by amendment of 1934, see supra note 361. The law under this amendment is discussed in the treatises of Gerdes, Corporate Reorganizations Under Section 77 B, 3 vols. 1936, and Finletter, Principles of Corporate Reorganization, 1937.
407Italian Bankruptcy Act, 1942, title IV “Dell’ amministrazione controllata.” The law is discussed by Satta, op. cit. supra note 4, 317 ff, and Giustiniani, Dell’ amministrazione controllata, (1944) 20 L. diritto fallimentare, 111. See also the official report, Le leggi, 1942, 337
408Ordinance of August 8, 1914.
409Ordinance of December 14, 1916, see Cahn, Geschäftsaufsicht and Zwangsvergleich, 1917
411Statute of June 20, 1883, perpetuated and revised June 29, 1887, see supra note 385.
satisfactory results, were not made permanent. Instead the present statute has strengthened the scope and efficacy of preventive compositions.

The reasons which the official Italian report gives for the introduction of the supervised management are very interesting. It points out that sometimes general events beyond the enterprise’s control may produce a crisis which makes the normal fulfillment of the obligations impossible. Nevertheless the enterprise might be solvent and intrinsically capable of regaining its normal balance. In such contingency a preventive composition would not be the proper remedy because it requires a scaling down of the debts, which the creditors would normally refuse under the indicated conditions, and because it acts from outside without stimulating the intrinsic forces of the enterprise to restoration. The new procedure, which is related to compositions like a medicine to an operation, is designed to fill this gap.

The statute refrains purposely from giving detailed provisions. It intends to leave the largest possible scope to the initiative of the interested parties and to a prudent evaluation of the circumstances by the judge. The proceedings are instituted by the head of an enterprise that finds itself in temporary difficulties. If the court considers the petition meritorious the procedure is opened. The creditors are summoned and a referee and a commissioner appointed. The creditors vote on the proposal. If a majority in number and value of the unsecured creditors consent, it is approved. A creditors’ committee assists the commissioner, who takes over part or all of the management, according to the court’s ruling. If the proceedings become useless, the debtor will be adjudicated a bankrupt, unless he avails himself of the procedure for compositions. The maximum duration of the supervised administration is one year. After that time the alternative is either bankruptcy or composition.

It follows that the whole proceedings amount to a supervised moratorium. Whether they will serve a useful purpose remains to

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412 Decree of October 15, 1934 and December 7, 1934, see Fredéricq, op. cit. supra note 386.
413 Decree of September 9, 1910 relating to the “concordat judiciaire.” Servais et Mechelynck, Les codes belges, 1944, 618. A draft for real reorganization was not passed, see (1937) 23 Revue de l’institut Belge de droit compare, 112.
415 Italian Bankruptcy Act, 1942, art. 187
416 Idem, art. 188.
417 Idem, art. 189.
418 Idem, art. 193.
be seen. The Italian commentators have pointed to the inherent
defects, such as possible loss of trade and manufacturing secrets
and lack of suitable psychological incentive to resort to the proce-
dure in time. Thus a success can neither be predicted nor expected.

2. Other liquidation proceedings.

Neither in the United States nor in Italy is bankruptcy con-
sidered a suitable liquidation procedure for all insolvent enter-
prises. Special statutes specifying their own procedures take
care of these excepted cases. In Italy compulsory administrative
liquidation is the usual course under such conditions. While the
Italian bankruptcy act does not attempt to enumerate these cases
or to regulate these procedures, it does intend to provide for a
general scheme in case the other acts have failed to give a suffi-
cient regulation and to abolish antiquated or unsatisfactory provi-
sions. The cardinal principle is to maintain at least a minimum
of judicial control in the interest of the rights of the debtor or third
persons. Therefore the judge must assist in the ascertainment of
the insolvency and the indebtedness, in the assessment of contribu-
tions, the closing of the liquidation, and a possible composition.
Since these provisions are only of a subsidiary character, a discus-
sion of further details seems unnecessary

3. Conclusions.

By now the reader has probably realized for himself that in
spite of all the differences in history and background the modern
American and Italian bankruptcy acts are impressively similar.
Nor should this fact be surprising. It is quite obvious that identi-
cal economic problems lead to similar solutions, despite the dif-
fERENCE, often so highly exaggerated, between the common law and
civil law systems. Generally speaking, the new Italian statute is
the result of careful and almost elegant draftsmanship. The new
act still trails behind its American brother in that it fails to pro-
vide for efficient reorganization of corporations. But the probable
reason for this apparent lack is that the Italian economy is evi-
dently of such structure that an embarrassed corporation of real
size could not be reorganized and recapitalized by private interests
alone without active financial state intervention.

419In the United States railroads, banks, insurance corporations and
building and loan associations are expressly exempt from the Bankruptcy
Act by sec. 4 (a) and (b). In Italy these exceptions follow from the Civil
Code or special statutes.
420Italian Bankruptcy Act, 1942, title 5 “Della liquidazione coatta
421Satta, op. cit. supra note 4.
422Italian Bankruptcy Act, 1942, art. 195, 209, 211, 213, 214.