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The Florida Law of Assignments for Benefit of Creditors

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The Supreme Court has been cognizant of this fact and has upon occasion attempted to clarify the issue. But a scattering of divergent cases still leaves much doubt. The problem is an immediate one, for the Florida courts, which have handled contempt so adequately without legislative interference in the past, have failed to perfect the machinery of appeal.

It is therefore submitted that the normal course of appeal be open to those held in contempt of the lower courts of the state where there has been a final judgment. The necessity of resorting to the extraordinary writ of habeas corpus should clearly be removed, whether the contempt adjudication has resulted in detention or a fine.

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THE FLORIDA LAW OF ASSIGNMENTS FOR BENEFIT OF CREDITORS

INTRODUCTION

The notion of an "assignment for benefit of creditors"[1] is not a new one. Actually the doctrine existed at common law[2]—although the common law procedure itself left much to be desired. Thus, the common law approach represented a simple procedure whereby a debtor conveyed property to a trustee, so that the latter distributed the sales proceeds to the creditors.[3] The entire proceeding was therefore a mere adaptation of the traditional law of trusts.[4] The unsatisfactory nature of these proceedings was evident from the fact that partial assignments were permitted, creditors could be preferred, and the debtor could even demand releases from consenting creditors.[5] Definitely, the creditors were placed in an undesirable position. A more satisfactory system was required,[6] and

1. The term "assignment for benefit of creditors" is a popular one, and it carries the connotation of a general assignment (in trust) for the benefit of one's creditors. Thus, this is the term that appears in volume 6 of Corpus Juris Secondum at page 1211, and other reference text books. Statutes, however, vary in their terminology. For example, FLA. STAT. c. 727 (1953) uses the title "General Assignments," although the language of the statute repeatedly contains the phrase, "assignment for benefit of creditors." Regardless of these differences in phraseology in Florida and elsewhere, the theory and purpose remains the same.

2. 6 C.J.S., *Assignment for Benefit of Creditors* § 3.

3. McMullin v. Keogh-Doyle Meat Co, 96 Colo. 298, 42 P.2d 463 (1935).

4. Thus, this trust notion is mentioned in the early Florida case of Bellamy v. Bellamy's Adm'r., 6 Fla. 62 (1855).

5. For a more complete discussion, see Weintraub, Levin and Sosonoff, *Assignments for the Benefit of Creditors and Competitive Systems for Liquidation of Insolvent Estates*, 39 CORNELL L.Q. 3 (1953); and BURRILL, ASSIGNMENTS, 23-24, 171 (6th Ed. 1894).

6. The earliest apparent Florida case involving such assignments is Holbrook v. Allen, 4 Fla. 87 (1851). During the ensuing century, only about three dozen cases were adjudicated. It is therefore apparent that situations involving an assignment for benefit of creditors rarely found themselves in the courts. This is as it should be, since the entire arrangement is for the purpose of achieving an amicable, unlitigated settlement.

in Florida and elsewhere, a process of constant statutory evolution has produced the present fabric of law.[7]

Statutes vary in their degree of comprehensiveness, although the same general objective appears everywhere. This goal is an informal, yet equitable, system of liquidation of a debtor's estate. Thus, also, only about a half-dozen states have no statutes on the subject;[8] and apparently, these jurisdictions continue to rely upon the common law.

Florida has made such statutory provision.[9] The chapter itself is brief enough. It only involves a single page in the compiled statutes. However, its brevity should not detract from either its intricateness or usefulness. Both are apparent upon a careful reading of the statute, and both will be explored in the succeeding sections.

Formalities

It always has been clear that a writing is required by the Statute of Frauds for realty situations, but it was never too clear, at common law, whether a writing was required for personal property transfers. The Florida statute has now effectively settled this question.[10] A writing is required for all transfers. It is, of course, necessary that proper conveyances be executed for realty;[11] and in general, the same formalities should be followed that would be used in a trust situation.[12] In one case, the court held that delivery may precede the execution of a formal deed, and that contemporeaneousness of (1) execution, and (2) delivery was therefore not essential.[13] This was an early case, but it would appear that the legal doctrine still prevails.

The Florida statute prohibits partial transfers. Thus, the statutory language provides for "an equal distribution of all of the assignor's real and personal property."[14] No mention is made of partnership situations. However, the Florida cases require members of a partnership to transfer both their partnership and personal properties to the assignee.[15] Thus, in one case, the court pointedly said:

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7. An excellent tabulation of enacted statutes appears in Weintraub, Levin and Sosonoff, *Assignments for the Benefit of Creditors and Competitive Systems for Liquidation of Insolvent Estates, op. cit. supra,* note 5.

8. *Ibid.*

9. Fla. Stat. c. 727 (1953).

10. Fla. Stat. § 727.01 (1953).

11. Greely v. Hull, 23 Fla. 361, 2 So. 618 (1887); Walters v. Whitlock, 9 Fla. 86, 76 Am. Dec. 607 (1860).

12. Greely v. Hull, 23 Fla. 361, 2 So. 618 (1887); Bradley Fertilizer Co. v. Pace, 80 Fed. 862 (5th Cir. 1897).

13. Greely v. Hull, *supra* note 12.

14. Fla. Stat. § 727.01 (1953). The earlier Florida cases expressly sanctioned preferential transfers. See Holbrook v. Allen, 4 Fla. 87 (1851). But the preferential transfer provision has been revoked since that date. See also, *Common Statutory Regulation of Assignments for the Benefit of Creditors,* 47 Yale L.J. 944 (1938).

15. Sheppard v. Reeves, 39 Fla. 53, 21 So. 774 (1897); Williams v. Crocker, 36 Fla. 61, 18 So. 52 (1895).

> The individual property of members of a partnership not exempted by law is liable for the partnership debts, and the failure to include all such property in an assignment for the benefit of creditors is in violation of an essential requirement of the statute.[16]

It is desirable that the debtor submit a detailed inventory of both his assigned property and his claimed exemptions. However, the submission of a detailed inventory is not mandatory. The assignor may simply make a general assignment of all "affected property," and exempt property as "allowed by law."[17] As has been stated, the detailed inventory, although quite desirable, is not absolutely essential.[18] By dicta, though, the Supreme Court of Florida has stated that a debtor cannot take a lump-sum monetary amount as an exemption.[19] Such a lump-sum approximation is not permitted. Rather, the debtor-assignor must be able to point to a specific statutory section that grants him exemptions of particular items of property.

The statute provides for a distribution among creditors "in equal proportion to their respective demands."[20] Suppose, though, that a creditor has several claims—some of which are secured and others that are unsecured. How are these claims affected by the assignee's disbursements to the creditors?

In *Cohen v. L'Engle*,[21] the Supreme Court of Florida stated that the creditor must apply the payments, pro rata, to all the obligations held by him. Such application had to be made both to secured and unsecured claims, and without regard to the seniority of the various claims themselves. Likewise, it was immaterial whether or not the assignee gave directions as to such applications. The prorata application had to be made as a matter of law. The rule is an interesting one, and at least answers by "case law" what has been left unanswered by the statute.

Another formality consists of the assignor's oath.[22] In this connection, it has been held that the oath is mandatory and not directory.[23] A failure to execute the oath accordingly renders the proceedings void.[24]

The Florida statute prescribes a recordation of both the assignment and the oath.[25] Cases have not construed whether or not this is absolutely

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16. H. B. Claflin Co. v. Harrison, 44 Fla. 218, 31 So. 818 (1902); Sheppard v. Reeves, 39 Fla. 53, 55, 21 So. 774, 775 (1897).
17. Dorr v. Schmidt, 38 Fla. 354, 21 So. 279 (1896); Parker v. Cleaveland, 37 Fla. 39, 19 So. 344 (1896).
18. Frank v. Myers, 97 Ala. 437, 11 So. 832 (1892).
19. Thus, in King v. Ruble, 54 Ark. 418, 16 S.W. 7 (1891) the Supreme Court of Arkansas refused to allow an exemption where the assignor had merely reserved $1,000 out of the proceeds". By dicta, in Dorr v. Schmidt, 38 Fla. 354, 21 So. 279 (1896), the Supreme Court of Florida stated that it agreed with the view expressed in the Arkansas case.
20. FLA. STAT. § 727.01 (1953).
21. 29 Fla. 655, 11 So. 44 (1892).
22. FLA. STAT. § 727.02 (1953).
23. *Ibid.*
24. Williams v. Crocker, 36 Fla. 61, 18 So. 52 (1895).
25. FLA. STAT. § 727.03 (1953).

required, although the general language of the statute suggests the recordation to be mandatory.

On the whole, the formalities are simple enough. Also, the common law spirit of flexibility and procedural informality has been preserved in the Florida statute.

The Assignee

It is not too clear whether the "assignee"[26] is a trustee, representative of the creditors, assignee of the debtor, or some combination thereof.[27] Exact legal semantics, though, are not of importance since the statute prescribes both the qualifications and functions of the person designated as an "assignee."[28]

A great latitude of discretion is permitted in the selection of an assignee. Apparently, all that is required is the ability to give a bond of "double the value of the property assigned."[29] Beyond that, apparently any person or organization is eligible for appointment. For example, this might include natural persons, corporations or credit bureaus. One is accordingly reminded of the liberality permitted in the appointment of an agent or trustee.

This latitude of discretion actually works out quite well in practice. Thus, an assignment for benefit of creditors is postulated on the proposition that the procedure is mutually acceptable to the affected parties.[30] Dissenting creditors will usually have the prerogative of replacing the "assignment" with remedies under the Federal Bankruptcy Act.[31] Even where the Federal Act cannot be invoked, a creditor may petition a court for equitable relief.[32] It would therefore appear that an assignor should be careful in selecting his assignee. It is important that the assignee be acceptable to the creditors. Any other situation invites the possibility of the creditors replacing the "assignment for benefit of creditors" proceedings with some other legal remedy. This replacement potential has apparently had a salutory effect, and no noticeable difficulty has been experienced because of the discretion permitted in naming the assignee. It might be added that most states, including Florida, permit a wide discretion in the naming of an assignee—with this discretion being vested in the debtor-assignor.[33]

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26. Fla. Stat. § 727.04 (1953) uses the term "assignee." Likewise, the term "assignee" is used in the discussion in 6 C.J.S. 1211-1434.
27. Bertensham v. Klag. 117 Kan. 176, 231 Pac. 73 (1924); 6 C.J.S. *Assignment for Benefit of Creditors* § 181(a).
28. Fla. Stat. §§ 727.04, 727.05, 727.06, 727.07, 727.08 (1953).
29. Fla. Stat. § 727.04 (1953).
30. Comment, 36 Calif. L. Rev. 586 (1948).
31. 30 Stat. 546 (1898), as amended, 11 U.S.C. § 21 (1952).
32. Armstrong v. Holland, 35 Fla. 160, 17 So. 366 (1895).
33. *Common Statutory Regulation of Assignments for the Benefit of Creditors*, *op. cit. supra* note 5.

As a point of comparative interest, it should be noted that a previous Nebraska statute[34] formed an exception to this general rule of "wide discretion." Thus, in Nebraska, the debtor made his assignment to the sheriff. The sheriff then summoned a conference of creditors, and they elected a trustee.[35] It appears that the Nebraska statute attempted to superimpose some of the Federal Bankruptcy Act[36] procedures. The Nebraska approach was interesting—although one might question the desirability of imposing such formalities upon what has traditionally been an informal proceeding. There would appear to be little advantage in adopting this procedure in Florida.

The bond requirement in Florida is worthy of note. Thus, the assignee must give a bond of double the value of the property assigned.[37] The requirement is analogously imposed by statutes in other jurisdictions. It would appear that the necessity of a bond does much to engender a feeling of confidence among the creditors. Also, since the assignee is functioning under the surveillance of the court, it would appear completely proper that there be a bond.[38] Bonds are customarily required where there is such a judicial supervision.

It is not clear, however, what would happen if the assignee failed to give a bond.[39] It would seem that any affected creditor could demand compliance with the bonding statute. Since the statute is designed to protect the creditors, a creditor should be able to insist upon its safeguards.

The assignee is required to give notice to the affected creditors. The statute is quite inflexible in its details.[40] In this connection, the statute is also broad enough to provide a means of notifying non-resident creditors. One Florida case[41] has stated that such non-residents are bound by the statute when they voluntarily submit their claims, and thereby share in pro rata proceeds from the debtor's estate. By dicta, the same decision stated that non-residents could claim immunity from the law if they refused to participate in the liquidation. It would appear that further litigation, either in Florida or elsewhere, must settle the extraterritorial effect of an assignment for the benefit of creditors. At this point, the law of such extraterritorial effect has not been crystallized.[42]

34. NEB. COMP. § 6-105, 110 (1929).
35. § 6-105 (repealed, 1945), of NEB. COMP. STAT. (1929).
36. 30 STAT. 559 (1898), as amended, 11 U.S.C. 91 (1952).
37. FLA. STAT. § 727.04 (1953).
38. FLA. STAT. §§ 727.07, 727.08 (1953) pertain to financial statements submitted to the court and the discharge of the assignor. This would appear to indicate a court surveillance.
39. 6 C.J.S. *Assignments for Benefit of Creditors* § 174 (1937), for citations to divergent viewpoints on problems that have arisen elsewhere.
40. FLA. STAT. § 727.05 (1953).
41. Rosenheim v. Morrow, 37 Fla. 183, 20 So. 243 (1896).
42. 6 C.J.S. *Assignments for Benefit of Creditors* § 169 (1937).

ADMINISTRATION

The administration of an assignment is described by the statute in simple, general terms. Thus, the section provides:

> The said assignee shall as soon as the foregoing provision have been complied with, proceed to dispose of all the property mentioned in the deed of assignment to him, to the best interest of all parties concerned, either at public or private sale, as to him may seem best, and to collect and to recover by law, or otherwise, all debts due the assignor in the same manner as said assignor might or could do in his own right if such assignment had not been made, and for this purpose said assignee may employ an attorney to prosecute such claim.[43]

It should be noted that the broadest sort of discretion is vested in the assignee. This applies both as to the sale of properties and the payment of claims. No mandate of creditor priorities is recited in the statute. Indeed, there is avoided the complex system of priorities that appears in the Federal Bankruptcy Act.[44] As far as a Florida assignment for benefit of creditors is concerned, the assignee need only divide the proceeds "among the creditors in proportion to their respective demands."[45]

The Florida statute expressly authorizes the employment of an attorney if necessary.[46] It would seem that the employment of other assistants would likewise be permissible, although no cases have raised this problem. It is axiomatic that an express power carries with it the implied powers to effectuate it. The employment of assistants might accordingly be regarded as such an implied power.

The Florida statute provides for the filing of semi-annual financial statements.[47] No particular form is prescribed, except that such statements must be executed under oath. The adequacy of the financial statement is therefore left to the discretion of the supervising court. As a point of interest, it should be noted that very detailed financial statement requirements are specified in the Trust Accounting Law,[48] although it would seem that no greater fiduciary responsibility prevails in these trust accounting situations.

The final section of the Florida statute[49] provides for a discharge of the assignee—upon proper petition to the court. The discharge procedure is reasonable enough. It emphasizes the fiduciary nature of the assignee's duties and his responsibilities to the court. As a corollary, a court that administers a liquidation should eventually finish the job by discharging (or "surcharging") the person responsible for the administration. The

43. FLA. STAT. § 727.06 (1953).
44. 30 STAT. 563 (1898), as amended, 11 U.S.C. 104 (1952).
45. FLA. STAT. § 727.02 (1953).
46. FLA. STAT. § 727.06 (1953).
47. FLA. STAT. § 727.07 (1953).
48. FLA. STAT. § 737.12 (1953).
49. FLA. STAT. § 727.08 (1953).

discharge procedure (followed in Florida) is a desirable practice—although one that is not generally used in other jurisdictions.[50]

Conclusion

As noted earlier, the Florida statute is brief. That is desirable. Verbosity does not always assure effectiveness; often, as here, a selective use of a few words represents the best approach.

Experience has indicated that the common law procedure is unsatisfactory. The Florida statute has cured these common law shortcomings. A question arises, though, as to whether the common law procedure is available in addition to the statutory provisions of Chapter 727. Actually, this question was raised in a leading New York case.[51] In that instance, the New York court held that the statutory system had completely supplanted the common law procedure. The court pointedly stated that the common law procedure could not be used after the enactment of a statute governing an assignment for benefit of creditors.[52] It would appear that a similar result should prevail if the question is raised in Florida. The rationale advanced by the New York court would seem to apply with equal force in Florida.

The assignment for benefit of creditors offers the attraction of liquidation without stigma. Rehabilitation of the debtor can be accomplished informally and expeditiously; and certainly, much of the harshness of a bankruptcy proceeding is avoided.[53] Administration expenses can also be minimized,[54] and this too is an attraction of an assignment proceeding Like compromises and out-of-court settlements, the assignment for benefit of creditors should be encouraged.

An analysis of the Florida statute governing such assignments[55] indicates an adequate framework of laws. However, as a practical concern, a legislative remedy, as to the amount of the bond required, is of obvious necessity

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50. Comment, 36 Calif. L. Rev. 586 (1948).

51. Lupensky v. Hoffman, 158 Misc. 261, 284 N.Y.S. 549 (Sup. Ct., special term Bronx County, 1934), *aff'd* 246 App. Div. 803, 285 N.Y.S. 1074 (1st Dep't, 1936).

52. The following quotation appears in 158 Misc. 261, at 262, 284 N.Y.S. 549, at 580:

> The only manner in which the property of a debtor may be assigned and distributed for the benefit of creditors is in accordance with the provisions of the Debtor and Creditor law; otherwise this law would just be a fancy collection of words to be observed or not observed according to the whims and follies of the debtor and his select group of creditors. The Debtor and Creditor law contains minute specifications of each step in an assignment for the benefit of creditors. The Appellate Division of this department has simplified the statute law by a code of rules which must be observed in the handling of debtor's estates.

53. For a factual study of the disadvantages of bankruptcy, see Billig, *What Price Bankruptcy: A Plea for Friendly Adjustment*, 14 Cornell L.Q. 413 (1929).

54. Some states allow a fixed percentage of liquidated asset values as a fee. E.g., 5-10% is allowed in Arkansas (Ark. Stat., 1947, § 36-308); and ½-5% is allowed in West Virginia (W. Va. Code, 1949, § 3946(16). The Florida statute does not mention a percentage for a liquidation fee.

55. Fla. Stat. c. 727 (1953).

to make the statute *fully* beneficial.[56] Certainly, also, this assignment possibility should be explored by creditors before resorting to the harshness of a Federal Bankruptcy liquidation. It should likewise be remembered that the Federal Bankruptcy Act[57] can be used to prod more informal arrangements under state laws. This prodding function is one of the purposes of the Federal Bankruptcy Act. Therefore, the mere presence of the Federal Act does not mean that it should be used at the first indication of financial illness. Rather, the Federal statute should represent a course of last resort to be followed only after an assignment (or other informal proceeding) has been considered. The rehabilitation of debtors, like lawsuits, should follow a methodical course. The harshest remedies (such as bankruptcy) should accordingly be reserved as a final alternative.

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LIQUIDATED DAMAGE PROVISIONS IN LEASE CONTRACTS

INTRODUCTION

With the increasing urbanization of American life and the tendency for population to center in large metropolitan areas, the instrumentality of the lease has gained greatly in economic importance. This is in large part due to the phenomenal rise in land values, requiring a large cash investment on the part of the purchaser. Another important factor is the ease and convenience of leasing rather than purchasing, since the term can be adjusted to meet the needs of the parties; thus it becomes unnecessary for an individual to obligate himself far into the future. These are important considerations in a dynamic and ever-changing economy.

Since the investment by the lessee is small and the lessor's only recourse in case of default is a personal action, with the resultant inconveniences and difficulties in terms of time and money, various devices have been used by lessors to secure against loss due to non-performance by the

56. The author believes two recommendations suggest themselves:

1—That a greater use be made of this feature of the law to aid the debtor seeking relief.

2—That the legislature be made aware of the obstacle to the use of this statute, namely, the requirement for the assignee to post a bond twice the amount of the assets involved, making it costly, inequitable and difficult to get a responsible person who would be willing to act as assignee at such great personal risk and expense. It is the author's firm belief that if enough attorneys, or the Florida Bar through appropriate means, call this to the attention of the legislature, our legislators will, as they should, amend this ancient statute in one simple but important phase—to permit bonds in a reasonable amount.

This will be more in line with bonds as required of Federal Receivers or Trustees, *i.e.*, $25,000 bond in an estate having assets in excess of $1,000,000. At any rate, it is suggested that bonds be required on a more realistic basis, perhaps, 25% or even as little as 10% of the amount of the assets involved in the assignment proceedings.

57. 52 STAT. 905-907 (1938), 11 U.S.C. 701-28 (1952).