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A PROPOSED STATE COLLECTION ACT

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THE Collection Act set forth below has been drafted for submission to the legislatures of the several states. In several cases, due to variations of local law and procedure, special adaptation in certain details will be necessary. The principal provisions of the Act, however, are thought to require no substantial revision.

Purposes of the Act

The general purposes of the Act may be summarized as follows: The Act seeks to provide a legal instrumentality by which lenders and sellers on credit may more effectively promote fair practices in credit administration. The Act seeks to stabilize and protect credit extensions by requiring lenders and sellers on credit to recognize a duty to the existing creditors of a prospective borrower or buyer on credit not to burden the debtor beyond his ability to pay. When *A* already owes *B* and others, *X* should not commit *A* to an additional debt without due regard for *A*'s ability, as determined by his assets, earnings and expenses, to carry all of his obligations and to pay or refund them as they mature.

Of course it is arguable that *B*, the earliest creditor, "takes his chances" when he extends credit to *A* without full and adequate security, "takes his chances" that subsequent lenders or sellers on credit will advance additional credit to *A*, "takes his chances" that *A*, in the exercise of his rights as a citizen, will incur additional obligations. And, of course, it is similarly arguable that *X* "takes his chances" when he extends the additional credit to *A* without full and adequate security, and that *A* "takes his chances" whenever he goes into debt. This is the situation at present in most of the states. In other words, if credi-

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tors allow credit to a debtor beyond his ability to pay, all of the creditors are thrown into a "race of diligence" to be the first to reach the debtor's assets in collection proceedings. That creditor is rewarded first who procures the first attachment, garnishment or other levy upon the debtor's estate in such proceeding. The reward is not according to any comparative diligence of the creditors as of the time they extended credit; no consideration is made of the relative risks taken by the several creditors when they extended credit. No regard is had for relative merits of the purposes of the various extensions; claims for necessities of life are accorded no preference over other claims. Such "equality," it is submitted, is not "equity."

If the debtor is the first to find that he has over-extended himself in "taking his chances," he may escape becoming the victim of the uncontrolled exploitation of his effects under the foregoing rule of collections only by offering a composition with a general assignment of his estate, or by invoking bankruptcy and forfeiting his estate.

The most pertinent question upon this situation seems to be this: Is it socially and economically desirable that creditors and debtors take their chances on this basis? It seems reasonable to answer this question in the negative. It is submitted that our ever rising record of bankruptcies and other "failures" can claim little credit for human, social or economic values. Indeed, it is submitted that that record warrants any legal measure which may aid in reducing the chance-taking of present day credit administration. And, certainly, little is accomplished by blaming debtors for their extravagance or for their incompetence; the problem is not one of fixing the "blame" of things, but rather one of effecting reform on the part of those who control the practices of credit administration. Legal instrumentalities which may be of assistance to this end should be provided. Hence the proposed Act.

It is also arguable, of course, that no legislation should be enacted which may restrict the volume of credit, for there is special demand at the moment for greater expansion and diffusion of credit. One can not deny the merit of this general proposition. But just what is the element of merit in this general demand? It is submitted that it is this: *Sources of cheaper credit* should be made available, especially to consumers in the lower brackets of earnings and to smaller enterprisers. There is something wrong when the "little fellow" must pay more for a dollar of credit than the "rich man." But this is a problem of banking, or, more fully stated, it is a problem, probably for the government, to provide additional and more available sources of cheaper credit. And it is no worthy substitute for newly created sources of cheaper credit, to ignore the existing situation whereby creditors and debtors "take their chances." Even as respects the

debtor is this true. While I may actually gain the fruits of credit under the existing situation and escape my obligations by bankruptcy, little indeed is the net satisfaction of this accomplishment. My discharge in bankruptcy leaves me with no happy recollections of the credit extensions which I was able to induce; family affairs were not made more delightful by the process; and, of course, my bankruptcy record has neither rehabilitated my credit rating nor reduced the price of my credit accommodations nor otherwise made promising my future.¹ In short, the meritorious demand for cheaper credit constitutes no persuasive point against a proposal for the stabilization and control of credit administration by reducing the chance-taking element of the present-day practices.

It seems regrettable that the quality and nature of the various classes of credit accommodations have not received more discriminating consideration at law. The rule of collections of "first-there-first-served" has been easy for legal administration, but scarcely deserving judicial approval when measured by its indifference toward many social and economic values.

It is the purpose of the proposed Act not only to eliminate the opportunity to gain advantage by racing to collection, but also, to prefer, subject to a priority accorded certain claims which for the most part are of a necessitous character [see § 8 (1), (2) and (3)], general creditors according to the time they respectively extend credit. In other words, the proposed Act contemplates that a general creditor shall be preferred over subsequent general creditors and shall be subject to the claims of earlier general creditors, and that enforced collections and distributions in bankruptcy proceedings, insolvency proceedings, receivership proceedings, general assignments for the benefit of creditors and administrations of decedent estates or like estates, shall be shared accordingly. The provisions of the Act relating to these proposed priorities are reviewed later in further detail.

It may be urged that fixation of such priorities would be unfair to creditors, especially if no aids are provided credit-grantors for ascertaining existing obligations of a prospective borrower or buyer on credit. Concededly the Act has no such aids, except that it provides criminal responsibility for a person making "any materially false statement in writing concerning his property, liabilities, earnings or expenses with the intent of obtaining money, property or services on credit, or any extension or renewal of a debt." (§ 10). But fine or sentence to jail for a debtor repays no loan. In final analysis, credit-grantors should always

1. Douglas, *Wage Earner Bankruptcies—State vs. Federal Control* (1933) 42 YALE L. J. 591, 627; HEARING Before Subcommittee of Committee on the Judiciary (72d Cong. 1st Sess.) on Senate Bill No. 3886; STURGES, *ADMINISTRATION OF DEBTORS' ESTATES* (1933) 939.

rely upon their own diligence in ascertaining the status of the debtor—and this before credit is extended. If this is a reasonable conclusion, it seems reasonable to conclude further that, as between two or more creditors of a common debtor, fairness to each other requires the one who granted credit at the later time should be held *to have accepted the status of the debtor as that creditor might have found it, depending upon his diligence*, rather than being accorded the reward of first-there-first-served under the rule of enforced collections or the pro rata distribution of bankruptcy and other proceedings to liquidate or reorganize a debtor's estate.

Again, it may be urged that the proposed fixation of priorities of claims of general creditors according to the time they extend credit may operate harshly against the debtor, at least when the debtor is in need of a loan to tide over an emergency. If *A* owes *B* and *A* needs a loan for an emergency, will *B*'s priority according to the Act be unduly harsh upon *A*? If *A*'s emergency is of limited duration so that it can be overcome and the new loan paid off by *A* before maturity of *B*'s claim, it is not clear how *A* will be hurt by *B*'s priority. If there are prospects that *A*'s emergency may continue either indefinitely or for a period beyond the maturity of *B*'s claim, it seems reasonable that *B*'s maturing claim should entitle him to recognition according to his priority. Especially manifest is this when it is understood that, as is hereinafter pointed out more specifically, the proposed Act places no restraints upon the debtor's use of his property or earnings by way of security or otherwise for *new* credit.

It may be added that it is not the purpose of the Act to provide that debtors shall not be legally compellable to pay their debts. Quite the contrary is true. The proposed law, moreover, facilitates the detection of prejudicial transfers or concealments by rewarding the creditor who is genuinely diligent in collecting assets from an absconding or fraudulent debtor. Thus, before paying anything to general creditors, the court is required under Section 7 (4) of the proposed Act to pay as follows: "Reasonable costs incurred by a creditor in recovering in a collection proceeding property which the debtor was about to remove from the state in fraud of his creditors, or which the debtor concealed or transferred in fraud of his creditors, to be determined by the court, together with fifty per cent of the net value of the property so recovered; *provided*, however, that no creditor shall be so paid more than the amount of his claim as determined by the final judgment or decree entered thereon in the collection proceeding."

Mechanics of the Act—Underfiling

In order to accomplish the foregoing purposes of the Act, provision is made whereby in a collection proceeding, as defined in the Act [see § 1

(2)], creditors may underfile in the main proceeding and prove their claims and share in the proceeds of the debtor's estate according to the priorities fixed by the Act.

Creditors shall be notified to underfile by notice published in the newspapers and such further notice as the court may require, as provided in Section 3.

A time limitation of thirty days from the date of the first publication of the notice is allowed for such underfiling. The court may extend that time for cause shown. (See § 4). Certain formal requisites for filing claims are also provided in the same Section (§ 4).

Within such time as the court shall allow, any party to the proceeding, including any underfiling creditor, may "deny or otherwise put in issue the date when any debt, or any item thereof, was incurred, or the validity thereof, including any award, judgment, or decree which shall have been entered by consent or default of the debtor." [§ 4 (2)]. A hearing shall be had upon the claims filed, and any party, including any underfiling creditor, may subpoena witnesses and evidence. Any party to the proceeding, including any underfiling creditor, may examine witnesses under oath "including the debtor, any garnishee and any creditor, concerning the estate and effects of the debtor, any transfer thereof, and the claim of any creditor, or any payment thereof." [§ 4 (3)]. The court is also expressly authorized to require the debtor, upon reasonable notice, to file under oath for record in the proceeding a schedule of his property showing its location and value, a list of his creditors, the amount due each, the date each item of each debt was incurred, the consideration therefor, and other matters which will aid in carrying out the purposes of the Act. [§ 4 (4)]. After hearing, the court shall enter judgment or decree upon the several claims, and if the judgment or decree is in favor of the creditor for any amount, "a finding shall be included as to the nature of the claim and the date when each item of the debt was incurred sufficient to determine the priority of the claim" as provided in the Act. [§ 4 (5)].

A creditor may underfile his claim provided it is due and payable within the time fixed in the Act for underfiling. Furthermore, unmatured claims may be underfiled in any collection proceeding "if the court shall find that sufficient claims have been allowed to render the debtor insolvent." And if the collection proceeding is one defined by Section 1, paragraph (2), sub-paragraph (c), hereinafter discussed, unmatured claims may be underfiled although the debtor is not insolvent. Such claims may be underfiled "within such time as the court, after notice, shall direct." [§ 5 (2)].

Not only may creditors underfile and prove their claims in a collection proceeding, but it is also provided that "any attachment, garnishment,

judgment lien or levy of execution in any action, suit or proceeding constituting a collection proceeding . . . shall be held for the benefit of underfiling creditors," and the proceeds thereof shall be paid into court upon order. (See § 2). Property subject to any such levy shall be sold as is now provided by law, except that the court may "determine and postpone the time of any such sale, and may order a sale as upon execution in behalf of all of the judgments and decrees entered in the proceedings." (See § 6).

Scope of the Act

The Act applies for the most part to "collection proceedings," as therein defined. [See § 1 (2)]. In order to effectuate the purposes of the Act, however, the section providing for priority of claims (§ 8) is made applicable not only to "collection proceedings," but also, to quote Section 8, to "all proceedings to liquidate or to reorganize a debtor's estate, including bankruptcy proceedings, insolvency proceedings, receivership proceedings, general assignments for the benefit of creditors, administration of decedent estates and like estates administered by fiduciaries." In other words, it is sought to make the priorities provided in the Act operative in all enforced collections and in bankruptcy and other distributions of debtors' estates.

"Collection proceedings," as defined in the Act, are of three general classes, as follows: (1) Action, suits or proceedings to collect money upon a claim arising out of a contract express or implied. Under this definition, actions upon other claims, notably tort claims, are excluded. It is considered that, for purposes of the Act, tort claimants and other non-contractual claimants are properly distinguished from creditors who acquire claims against the debtor by contract. In other words, it is considered that, generally, creditors with contractual credit extensions to the debtor should take the risk of their debtor committing torts, or incurring other non-contractual obligations, as follows: (a) in actions upon such non-contractual claims, underfiling should be denied; (b) underfiling being denied, opportunity to claim any priority provided in the Act is, of course, also denied. This risk, so placed upon contracting creditors may well induce them to require the debtor to obtain insurance protection so far as practicable. This seems desirable. On the other hand, tort claimants and other non-contractual claimants may underfile in a creditor's action constituting a "collection proceeding," and such claimants, who underfile their claims, shall rank, subject to the provisions for priority of claims, "as of the date the cause of action arose." [See § 8 (5) (c)].

In short, an action, suit or proceeding shall constitute a "collection proceeding" to which the Act is applicable, if (1) the action is brought

to recover money and if (2) it is based upon a claim arising out of a contract express or implied. [See § 1 (2)].

(2) Certain *transactions* are also constituted "collection proceedings" and made subject to the Act. One of these transactions is where a person "owing a debt, theretofore incurred and arising out of a contract, express or implied, shall transfer any earned or future wages, salary or other compensation for his personal service, which are not exempt from execution, to pay or to secure the payment of said debt, or any extension or renewal thereof, or to pay or to secure the payment of any debt of another person, or any extension or renewal thereof, or as any consideration or security for any undertaking of another person." [§ 1 (2) (b)].

When a creditor takes an assignment of wages, salary or commissions from an employee to pay or to secure the payment of the debt of the debtor or of another person, the transaction is not different in its important functional aspects from an attempt at collection by garnishment, except that the assignment may be more devastating to the debtor's credit position depending upon the extent in the future that his earnings are captured by the assignment. While, in legal contemplation, these assignments are generally lumped under doctrines relating to assignments of rights, or are viewed as financing and security media, nevertheless, when they are given for debts previously incurred, their dominant function becomes that of collection and of preferring the assignee-creditor in the collection process.² Hence are these assignments constituted "collection proceedings" under the proposed Act. It will be observed that the debtor is free in the use of his exempt wages, and may, in so far as this Act is concerned, assign wages for new credit accommodations to himself, other than the extension or renewal of a contract debt previously incurred. In states³ where wage assignments are more completely, if not fully, invalidated, this second "collection proceeding" may well be stricken from the Act. It may be repeated that the Act applies to a debtor's wage assignment only when the assignment is made to pay or to secure the payment of a previously contracted debt of the debtor arising out of a contract, express or implied, or any debt or undertaking of another person.

(3) Another transaction which constitutes a "collection proceeding" under the proposed Act is one whereby a person "owing a debt, theretofore incurred and arising out of a contract, express or implied, shall transfer substantially the whole of his property which is not exempt from

2. Fortas, *Wage Assignments in Chicago* (1933) 42 YALE L. J. 526, 532-538, 558 *et seq.*

3. MO. REV. STAT. (1929) § 2969; PA. STAT. ANN. (Purdon, 1930) tit. 43, § 271; IND. ANN. STAT. (Burns, 1926) § 9352; OHIO GEN. CODE (Supp. 1931) § 6346-12; MONT. REV. CODE (Choate, 1921) § 4176; GA. CODE ANN. (Michie, 1926) § 3465; see for wage assignment provisions of other states, Fortas, *supra* note 2, at 551.

execution to pay or to secure the payment of said debt, or any extension or renewal thereof, or to pay or to secure the payment of any debt of another person, or any extension or renewal thereof, or as any consideration or security for any undertaking of another person." [§ 1 (2) (c)]. This transfer is considered similar to the wage assignment discussed above. Such transfer is as much in the process of collection as a general attachment or other general levy upon the debtor's assets by the creditor. Like the wage assignment, this transfer is constituted a "collection proceeding" only when the transfer is made to pay or to secure the payment of a previously contracted debt of the debtor arising out of a contract, express or implied, or any debt or undertaking of another person.

The general effect given to this transfer under the proposed Act is similar to the present law of some states which constitutes this and similar transfers a general assignment for the benefit of creditors and requires the transfer to be administered as such.⁴

In case of a wage assignment or transfer of substantially the whole of a debtor's assets so as to constitute a "collection proceeding," the transfer, in the form prescribed in the Act [see § 3, (2) and (3)], must be filed with the court of the state to be named by the legislature. It seems that, in view of the variety and size of the claims which may be underfiled, the court so designated should be one of general jurisdiction. Upon so filing the transfer, it is constituted a pending collection proceeding in the court with the creditor as plaintiff and the debtor as defendant. The debtor, having executed the prescribed transfer, is deemed thereby to have given the court jurisdiction, without further process, to allow underfiling of claims of other creditors and to authorize the hearing and determination of all claims brought into the proceeding pursuant to the Act, provided only, that upon expiration of the time for underfiling the clerk of court shall give notice in writing to the debtor of the claims filed.⁵ Notice to underfile is given to creditors as in case of an action, suit or proceeding constituting a collection proceeding. [§ 3, (2) and (3)]. The underfiling proceedings are, except as hereinafter noted, the same as those in an action, suit or proceeding constituting a collection proceeding; claims are payable according to the priorities provided in the Act.

Control over the debtor's property subject to one of these transfers, pending proceedings, is given to the court as follows: "Any person, except a bona fide purchaser, having or receiving any property subject to

4. ALA. CODE (Michie, 1928) § 8040; *Danner v. Brewer*, 69 Ala. 191 (1881); *Baxley v. Simmons*, Durham & Co., 132 Ala. 117, 31 So. 76 (1901).

5. See *Schmidt v. Colley*, 29 Ind. 120, 121 (1867); see also *Jones v. Mould*, 151 Iowa 599, 603, 132 N. W. 45, 47 (1911); *Bonney v. McClelland*, 235 Ill. 259, 261, 85 N. E. 242, 243 (1908). But *cf.* *Trinidad Bank v. Jamieson Co.*, 60 Colo. 356, 153 Pac. 441 (1915).

such transfer shall hold and care for the property and the proceeds and income thereof subject to the orders of the court." [§ 3 (3)]. Wages payable under a wage assignment constituting a collection proceeding shall be paid into court by the employer. [§ 3 (2)].

Priority of Claims

The court shall order payment of costs, fees and expenses before paying any claims of creditors. (§ 7).

The provision for the priority of creditors' claims, as heretofore pointed out, is applicable not only to "collection proceedings," but also to all proceedings to liquidate or to reorganize a debtor's estate. The priorities in the proposed Act would be effective in bankruptcy proceedings under section 64 b (7) of the Bankruptcy Act, which allows the priority of "debts owing to any person who by the laws of the states or the United States is entitled to priority."

It will be noticed that the proposed Act does not displace the priority or preference of any claim already provided by law. And, of course, it would not defeat the security or lien of any claim. It expressly provides for payment first of "claims owned by any person, including the United States, the State and any subdivision thereof, according to such priority or preference as is now, or may be hereafter, provided by law." [§ 8 (1)].

Claims next to be paid are those for "wages, salary or other compensation for personal services of the creditor, which were earned within three months prior to the commencement of the proceeding, not to exceed \$600 to each claimant." [§ 8 (2)]. Any amount paid upon such claims under a priority provided by existing law shall be deducted from the \$600 amount. If the assets are insufficient to pay these claims in full, they shall be paid pro rata. This priority, it may be noted, is like that provided in section 64 b (5) of the Bankruptcy Act.

Next in order for payment are claims for "food, clothing, shelter, fuel, medicine and dental and medical attendance furnished for the personal use of the debtor or of his dependents of an aggregate amount not to exceed \$300." [§ 8 (3)]. Any amount paid upon one or more such claims under a priority of existing law shall be deducted from the \$300 amount allotted to this class of claims. If these claims exceed the total amount of \$300, they shall be paid pro rata.

This priority should aid the necessitous debtor in procuring credit for the necessities of life. Whatever may be the ambiguity of the legal terms "necessaries" or "necessities of life," it is believed that the particularization, as in the proposed Act, of "food, clothing, shelter, fuel, medicine and dental and medical attendance furnished for the personal

use of the debtor or of his dependents," resolves much of the ambiguity.

Unpaid balances upon claims of creditors filed and allowed in a prior collection proceeding shall be paid next [§ 8 (4)]. These unpaid balances shall be payable according to the actual time credit was extended, as discussed below. Creditors with claims which were existing but were unmaturing and could not be filed in the prior collection proceeding, if they may be filed in the subsequent proceeding and are filed and allowed, may also be payable under this priority. This priority is intended as a contributing inducement to creditors to participate in collection proceedings by underfiling their claims.

Other creditors' claims are to be paid next. These "other creditors" are creditors whose claims have not qualified for payment in any of the foregoing classes of claims and those who have unpaid balances on wage or salary claims or on claims for food, clothing, etc., set forth above.

Creditors of this last class shall be paid according to the respective dates upon which they extended credit to the debtor, to be determined as follows: (1) Where credit was extended upon any contract, express or implied, for the direct payment of money, according to the actual date and time each item of credit was extended. [§ 8 (5)]. The actual date and time of each item shall govern notwithstanding the original time for payment may have been extended and the obligation may have been changed in form; "*provided*, however, if interest at a higher rate is paid or payable for such extension or renewal, or any security has been given therefor, such claim shall rank as of the date of such extension or renewal." [§ 8 (5) (b)]. (2) "All claims other than those arising out of a contract, express or implied, for the direct payment of money, including claims arising in tort and claims for damages for breach of contract other than a contract, express or implied, for the direct payment of money, shall rank as of the date the cause of action arose." [§ 8 (5) (c)].

The claim of any creditor which by law is transferable, and its priority, may be transferred by the creditor if the transfer shall be in writing and signed by the creditor. Any person who shall pay the claim of any creditor for the account of the debtor shall be entitled to such transfer from the creditor or holder of the claim. [See § 8 (6)]. This provision should aid a creditor, especially one with a ranking claim, to sell, or finance upon, his claim. Similarly, a debtor should be assisted, especially one hard pressed by the creditor or creditors holding ranking claims, in borrowing money to pay those creditors and to promote a composition.

Existing Laws Similar to the Proposed Act

In several states creditors are allowed to underfile under the attachment or garnishment procured by another creditor. Upon proving their claims, they may share, either pro rata with the plaintiff, or, as in New Jersey, in the surplus after the plaintiff's claim is fully satisfied. Such statutes obtain in Colorado,⁶ Delaware,⁷ Idaho,⁸ Indiana,⁹ New Jersey,¹⁰ Pennsylvania¹¹ and in British Columbia¹² and Ontario.¹³ Some of the statutory provisions of Indiana may be quoted for illustration:

"1014. Any creditor of the defendant, upon filing his affidavit and written undertaking, as hereinbefore required of the attaching creditor, may, at any time before the final judgment in the suit, make himself a party to the action, file his complaint, and prove his claim or demand against the defendant; and may have any person summoned as garnishee, or held to bail, who has not before been summoned or held to bail; and propound interrogatories to the garnishee, and enforce answers thereto, in like manner as the creditor who is plaintiff."

"1015. A dismissal of his action or proceedings in attachment by the first attaching creditor shall not operate as a dismissal of the action or proceedings of any subsequent attaching creditor."

"1020. The money realized from the attachment and the garnishees shall, under the direction of the court, after paying all costs and expenses, be paid to the several creditors in proportion to the amount of their several claims as adjusted, and the surplus, if any, shall be paid to the defendant."

Under these statutes, any creditor, as well as the debtor, may contest the claim of any other creditor.¹⁴ Even the claim of the original attaching creditor may be challenged and eliminated without destroying the attachment and proceedings thereunder as respects the underfiling creditors. Thus, it has been held that payment in full of the attaching creditor's claim does not dissolve the attachment as against the underfiling creditors.¹⁵

6. COLO. COMP. LAWS (1921) §§ 99-102.

7. DEL. REV. STAT. (1915) §§ 4132-4133.

8. IDAHO CODE ANN. (1932) §§ 6-501-6-503.

9. IND. ANN. STAT. (Burns, 1926) 1010-1020.

10. N. J. COMP. STAT. (1911) § 6, p. 136 *et seq*; *id.* (Supp. 1924) § 21, p. 101.

11. PA. STAT. ANN. (Purdon, 1930) tit. 12, § 2791 *et seq*.

12. BRITISH COLUMBIA REV. STAT. (1924) c. 59 ("Creditors Relief Act") §§ 4 (1), 21; c. 2 ("Absconding Debtors Act") § 38; c. 83 ("Execution Act") §§ 14, 58.

13. ONTARIO REV. STAT. (1927) c. 113 ("Creditors Relief Act") § 5 (2) (7) (10) (11) (12); c. 114 ("Absconding Debtor's Act") §§ 15, 17; c. 112 ("Execution Act") § 21.

14. *The United States Express Co. v. Lucas*, 36 Ind. 361 (1871); *Lytle v. Lytle*, 37 Ind. 281 (1871); *Rouse v. Wallace*, 10 Colo. App. 93 (1897). See also *Schmidt v. Colley*, *supra* note 5; *Compton v. Crone*, 58 Ind. 106 (1877).

15. *Stone v. Jones*, 4 Harr. 255 (Del. 1843); *Zeigenhager v. Doe on the Demise of Strong*,

Creditors entitled to prorate under an attachment, share in the lien from the date of the original attachment.¹⁶ Total claims allowed are fixed for payment in the order for the execution sale.¹⁷ No discharge of unproved claims or of unpaid balances is provided in the statute. Any sum realized upon the execution sale in excess of claims proved and allowed in the order of sale is returned to the defendant.

The Supreme Court of Indiana has observed upon the general purpose of its statute as follows:

"It is the purpose of our statute to secure a distribution of the debtor's property among all the attachment creditors, and not to permit it to be absorbed by the claim of the creditor who sues out the first writ."¹⁸

The Supreme Court of Colorado has rendered a similar opinion, as follows:

"The plain purpose of the statute was to permit creditors to prorate the proceeds of attached property, not to permit them to establish rights in a strange and unusual way. The provision simply makes it possible for all creditors to put themselves in a position of equality, in respect to the satisfaction, out of the property attached, of claims properly asserted and regularly adjudicated; and it is matter of administrative policy and convenience that all creditors intervening are, upon application, named as plaintiffs in one general proceeding for the purpose of determining and adjudicating their respective rights. Prior to its adoption the first in time secured a preferential right over the claims of all other creditors. Speed was made paramount, and the first attaching creditor gained an exclusive, and oftentimes an unfair advantage over others. Section 99 appeared in the amendment of 1894, and was designed, as its express terms indicate, to eliminate the possible occurrence of such inequality under the law."¹⁹

In sustaining the constitutionality of the Idaho statute, the Supreme Court of Idaho remarked as follows:

"In support of the argument touching the constitutional question, it is insisted that an attachment lien gives a creditor a vested right in the property, . . . and that, therefore, since the statute provides no notice or proceeding against the first attaching creditor, the prorating provision deprives the latter

1 Carter 296 (Ind. 1848); *Ryan v. Burkam*, 42 Ind. 507 (1873); *Cummins v. Blair*, 18 N. J. L. 151 (1840). See also *Taylor v. Elliott*, 51 Ind. 375 (1875); *Smith v. Warden*, 35 N. J. L. 346 (1872). Cf. *Trentman v. Wiley*, 85 Ind. 33 (1882).

16. *Shirk v. Wilson*, 13 Ind. 129 (1859). And consult *Plunkett v. Moore*, 4 Harr. 379 (Del. 1843).

17. Consult *Henderson v. Bliss*, 8 Tanner 100 (Ind. 1856); *Cooper v. Metzger*, 74 Ind. 544 (1881); *Lexington & Big Sandy Rr. Co. v. Ford Plate Glass Co.*, 84 Ind. 516 (1882); *Dupont Powder Co. v. Pennsylvania & Indiana Coal Co.*, 69 Ind. App. 320, 121 N. E. 680 (1919).

18. *Lexington & Big Sandy Rr. Co. v. Ford Plate Glass Co.*, *supra* note 17, at 519.

19. *Trinidad Bank v. Jamieson Co.*, *supra* note 5, at 360, 153 Pac. at 443.

of his property without due process of law and deprives him of the equal protection of the law. If counsel's first position were entirely correct, his latter contention might present a debatable point, but it should be remembered in this connection that the lien of an attaching creditor is wholly a creature of statute, and that an attachment proceeding such as we have under the code was unknown at common law, and that being entirely statutory it is within the province of the legislature to place any restrictions upon the extent of the right of an attaching creditor which it deems advisable. . .

"Under attachment statutes containing a prorating provision, the attaching creditor does not get an unqualified vested lien, but the lien that he does take by virtue of his attachment is taken subject to the provision that under certain circumstances other creditors who proceed to judgment and come within the terms of the statute will be entitled to share in the proceeds of the attached property, *pro rata*. The prorating provision does not deprive the attaching creditor of a vested right and we, therefore, hold that the constitutional provision securing due process of law and the equal protection of the law is not involved."²⁰

It was also held in the same case that the proration statute was not suspended by the Bankruptcy Act as being a state insolvency or bankruptcy law.

It will be observed that the proposed Act varies from these existing laws in two major aspects, as follows: (1) Under the proposed Act creditors are not allowed to underfile in any action, suit or proceeding constituting a collection proceeding until after final judgment is rendered in favor of the plaintiff. [See § 3 (1)]. (2) The provision that general creditors who extended credit upon a contract, express or implied, for the direct payment of money, shall rank according to the date they extended credit, and that other general creditors shall rank according to the date their cause of action arose appears only in the proposed Act. As heretofore suggested, the fixation of these priorities as provided in the Act is the principal purpose of the Act; underfiling is employed primarily as a means to the end.

The reasons for the departure in the proposed Act from the foregoing statutes by postponing underfiling till after final judgment or decree are as follows: (1) In many jurisdictions attachments are of limited use. To restrict underfiling to attachments and garnishments does not give adequate control of collections to make sufficiently comprehensive the enforcement of the priority protection accorded by the proposed Act. Collection suits, without attachment or garnishment, might well be carried to judgment and execution without creditors ever having opportunity to underfile. (2) Again, from the point of view of the bona fide debtor, it seems unnecessarily harsh to allow creditors to underfile and

20. *Greene v. Rice*, 32 Idaho 504, 509, 186 Pac. 249, 250 (1919).

prove their claims before the validity of the plaintiff's claim has been determined by final judgment. It seems that the debtor should be given opportunity to defend the plaintiff's claim to final judgment and also some brief period thereafter to satisfy that judgment before other claims may be pressed upon him by underfiling creditors. Under the proposed Act notice to underfile shall not be released by the clerk of court for publication until three days after final judgment or decree. [§3 (1)]. If the debtor satisfies the judgment within that time there will be no underfiling. Of course, if the debtor takes substantially the whole of his property which is not exempt from execution to satisfy the debt, and the debt arises out of a contract express or implied, then the transaction will constitute a "collection proceeding" under section 1 (2) (c), and underfiling will be in order. To give this opportunity to the debtor to defend himself is deemed adequate justification for postponing the underfiling until after final judgment or decree as provided in the Act.²¹

21. Of the laws allowing underfiling, that of the Province of British Columbia is the most inclusive. In attachment under the "Absconding Debtors Act" [REV. STAT. (1924) c. 2, § 38] and execution of judgment under the "Execution Act" (c. 83, § 58) creditors who obtain judgments or who underfile in the required time receive a pro rata distribution of the proceeds upon the sale of debtor's assets. The "Creditors Relief Act" [c. 59, §§ 4(1), (21)] also prevents any priority among execution creditors. Cf. the Province of Ontario, *supra* note 13.

The following letter (dated April 9, 1934) by Mr. H. W. Davey of the firm of Beckwith & Davey, Barristers-at-Law, Solicitors, etc., 109-111 Belmont House, Victoria, B. C., should be cited upon the operation of the statute of British Columbia. It reads as follows:

"Our 'Creditors Relief Act' was passed in 1902 and was apparently taken from the Ontario Act which had been in force for some time prior to that.

"As far as its practical operation is concerned, we believe that it is favourably regarded by both judges and lawyers. Before its passage it was extremely difficult for a debtor who was in financial difficulties to obtain any extension of time or other accommodation from any of his creditors; the individual creditor feared that if he should grant any indulgence other creditors might refuse to do so and secure judgment and issue execution and thus not merely deprive the debtor of the benefit of the extension or other accommodation granted, but postpone the creditor to other persons who might have taken action and secured judgment in the interim.

"The writer has had no experience under conditions prevailing before 1902, but from time to time he has spoken to other lawyers who practised before that date and without exception they are of the opinion that the statute was a great step forward in the interests of both debtor and creditor. Formerly when it became known that any business man or other debtor was in financial difficulty there was an immediate race between his creditors to secure judgment and issue execution. Under present conditions the creditors no longer fear another creditor stepping in and obtaining priority and are prepared to grant any reasonable extension of time to a debtor.

"The older practitioners tell us that before the passage of this Act many a solvent business was forced to the wall because of some temporary difficulty in meeting the current accounts.

"Our Act does not provide for distribution of the money realized on an execution pro rata among all creditors of the execution debtor but merely among those who come in within thirty days from date of sale and establish their claims under the provisions of the 'Creditors Relief Act' by securing certificates of claim after service of notice of their demands upon the debtor or securing judgment and issuing execution within that time. The result is that many creditors who have small claims because the amount realized on the

On the other hand, where the debtor voluntarily executes an assignment of wages or a transfer of substantially the whole of his property which is not exempt from execution so as to constitute a collection proceeding under the Act, it does not seem that fairness-to-debtor requires postponement of underfiling until the creditor receiving the assignment or transfer shall have recovered judgment. Consequently, under the proposed Act, such judgment is not made prerequisite to underfiling. [See § 3 (2) and (3)].

Effect of Proposed Act in Proceedings in the Courts of the United States

It seems clear that, in a case properly within their jurisdiction, the federal courts would conform to the practice and procedure of the proposed Act as a state law. More specifically stated, it seems clear that underfiling would be allowed in the federal courts,²² and that the provisions in the Act for the priorities of creditors would be given full effect according to the terms of the Act.²³ And as heretofore stated, section 64 b(7) of the Bankruptcy Act expressly accords power to the states to fix a priority for claims in bankruptcy proceedings, a power which is ample to give effect therein to the priorities contemplated by the proposed Act.²⁴ And also, as heretofore observed, Section 8, in fixing the

execution is so small that it will not pay worthwhile dividends, do not avail themselves of the privileges under this Act.

"The British Columbia statute does not delay collections, but on the other hand by permitting the creditor to make a reasonable arrangement with the debtor where circumstances warrant it without prejudicing his own interests, increases monies eventually collected.

"It does not affect the costs of legal proceedings as far as the execution creditor is concerned. The cost of securing a certificate of claim under the 'Creditors Relief Act' is about the same as that of securing judgment in an undefended action for the same amount.

"The privilege of under-filing is commonly exercised when the Sheriff proceeds to sale. The 'Creditors Relief Act' only applies to the proceeds realized by the Sheriff from the sale of the debtor's property under execution. It does not apply to monies paid to the Sheriff by the Debtor in order to obtain the withdrawal of the Sheriff from possession of the goods, or by way of settlement of the writ of execution before sale of the assets or to the Sheriff by way of compromise with the creditor. In the majority of the cases where there are any substantial assets, executions are settled in this way and sale of the goods averted; consequently the privilege of under-filing does not arise.

"The creditor who has first secured judgment and issued execution often regards himself as unfairly treated. We think, however, that speaking generally, it is favourably regarded by most creditors.

"We think the legislation is considered to be of general benefit to both debtor and creditor."

22. Under the conformity act, U. S. REV. STATS. 721, 28 U. S. C. A. § 725: "The laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at Common Law, in cases where they apply." See 6 HUGHES, FEDERAL PRACTICE JURISDICTION AND PROCEDURE (1931) §§ 3662, 3676; *Krippendorf v. Hyde*, 110 U. S. 276 (1884).

23. HUGHES, *op. cit. supra* note 22, § 3677; *Bates v. Days*, 17 Fed. 167 (C. C. W. D. Mo. 1883); *Mercantile Trust Co. v. Tennessee Central Rr. Co.*, 286 Fed. 425 (N. D. Tenn. 1922); *Schmidtman v. Atlantic Phosphate & Oil Corp.*, 230 Fed. 769 (C. C. A. 2d, 1916).

24. *In re Laird*, 109 Fed. 550 (C. C. A. 6th, 1901); *In re Wright*, 95 Fed. 807 (D. C. Mass. 1899); *In re Bennett*, 153 Fed. 673 (C. C. A. 6th, 1907); *Shalet v. Klauder*, 34 F.

priority of claims for all proceedings to liquidate or to reorganize a debtor's estate, does not conflict with the existing laws of the United States any more than with those of the state, for it is provided that claims shall be payable, subject to payment of costs, fees and expenses in the following order: "(1) Claims owned by any person, including the United States, the State and any subdivision thereof, *according to such priority or preference as is now, or may be hereafter, provided by law.*" [§ 8 (1)].

Proposed Act Not a Bankruptcy Law

It has already been noted that the Supreme Court of Idaho has held that its statute allowing underfiling and proration is not suspended by the National Bankruptcy Law.²⁵ Upon this question the Court remarked:

"Respondent's position, founded upon his argument that the prorating provision of sec. 6781, *supra*, is in effect an insolvency law, and hence suspended by the federal bankruptcy act, is equally untenable. Our statute makes no provision for a discharge of the debtor from his obligations. A statute in order to be such an insolvency law as is suspended by the federal bankruptcy law must provide for the discharge of the debtor, and has been defined as: 'A positive regulation made by the legislature to exonerate the person or property of a debtor and to relieve him from the pressure of creditors.' "

Recent decisions of the United States Supreme Court,²⁶ though relating primarily to statutes regulating general assignments for the benefit of creditors, tend to confirm the view of the Idaho Supreme Court and the view that the proposed Act is neither in conflict with the federal Bankruptcy Law nor otherwise subject to suspension by it.

Constitutionality of the Proposed Act

A general question relating to the constitutionality of the proposed Act is worthy of notice. The question may be stated as follows: Do the provisions of the Act for underfiling in actions constituting a collection proceeding and for priority of payment of claims so affect creditors' remedies as to violate the constitutional restraint against impairment of the obligation of contracts? It seems doubtful if these provisions of the Act can be validly applied to contracts entered into prior to the passage of the Act.²⁷ As a consequence, Section 11 provides

(2d) 594 (C. C. A. 3d, 1929). See *In re Hammond Interior Finish Co.*, 13 F. (2d) 578 (C. C. A. 7th, 1926).

25. *Greene v. Rice*, *supra* note 20.

26. *Pobreslo v. Boyd Co.*, 287 U. S. 518 (1933); *Johnson v. Star*, 287 U. S. 527 (1933).

27. *Adams v. Creen*, 100 Ala. 218, 14 So. 54 (1893); *Sun Mutual Insurance Co. v. Board of Liquidation*, 24 Fed. 4 (C. C. E. D. La. 1885); *National Bank v. Jones*, 18 Okla. 555,

that "this Act shall not apply to any action, suit, or proceeding to recover money upon a claim arising out of a contract, express or implied, or to any action, suit or proceeding to enforce any award, judgment or decree upon such claim or to any proceeding by a secured creditor to recover any deficiency upon such claim, constituting a collection proceeding as defined in Section 1, paragraph (2), sub-paragraph (a), if the contract was entered into prior to the effective date of this Act; *provided*, further, *however*, that the foregoing exception shall not apply in case of the extension or renewal of such contract after the effective date of this Act."

It will be observed that the foregoing reservation relates only to an "action, suit or proceeding" constituting a collection proceeding as defined in Section 1, paragraph (2), sub-paragraph (a). If a collection proceeding is constituted by the assignment of wages or the transfer of substantially the whole of the debtor's property [see § 1 (2) (b) and (c)], it is believed that the Act is validly applicable even to a claim arising out of a contract existing prior to the passage of the Act. This conclusion is based upon the following propositions: (a) that the creditor upon such preexisting contract is, as set forth above, left free to exercise all legal remedies of enforcement by action or suit as heretofore; (b) that the opportunity to acquire the assignment or transfer by voluntary act of the debtor, never constituted any part of the *obligation* of the contract; (c) that in view of the fact that the creditors' remedies by action and suit are unimpaired, this restraint upon these preferential transfers for the purposes of the Act does not offend the Constitution.

It seems clear that the foregoing reservations from the Act of actions, suits and proceedings to collect upon claims arising out of preexisting contracts will not seriously limit the comprehensive scope and operation of the Act. It seems probable that creditors holding contracts entered into prior to the effective date of the Act will generally be disposed to insist upon their immunity from underfiling. But, comparatively speaking, such contracts will not involve many debtors very long after the effective date of the Act. Moreover, if such creditor should invoke the benefits of the Act by underfiling in a collection proceeding instituted by another creditor whose claim is subject to the Act, it seems clear that such creditor's constitutional immunity upon such preexisting claim would be waived. Thus, if *A*, with a claim against *X* upon a preexisting

91 Pac. 191 (1907); *Yeatman v. King*, 2 N. D. 421 (1892); *Spangler v. Green*, 21 Colo. 505, 42 Pac. 674 (1895). But *cf. In re Inland Dredging Corp.* 61 F. (2d) 765 (C. C. A. 2d, 1932); *Baldwin v. Buswell*, 52 Vt. 57 (1879); *Hanes v. Wadey*, 73 Mich. 178, 41 N. W. 222 (1889).

contract, were to underfile in *B*'s collection proceeding against *X*, it would seem clear that *A*'s claim would be subject to the priority of other claims, for example, claims for food, clothing, fuel, etc., as provided in the Act (§ 8). On the other hand, although the creditor, *A*, may enjoy constitutional immunity for his claim when he institutes an action, suit or proceeding to collect, it seems clear that, if he elects to do so, he should be allowed to underfile in *B*'s collection proceeding and share according to the priority provisions of the Act.

A STATE COLLECTION ACT

Model Draft

Section 1. Definitions. The words and phrases used in this Act shall, unless inconsistent with the context, be construed as follows:

(1) A claim shall be deemed to have been allowed in a collection proceeding when final judgment or decree shall have been entered thereon for the creditor to recover the whole or any part of his claim.

(2) Collection proceeding shall mean:

(a) Any action, suit or proceeding to recover money upon a claim arising out of a contract, express or implied, including any action, suit or proceeding to enforce any award, judgment or decree upon such claim and any proceeding by a secured creditor to recover any deficiency upon such claim;

(b) Any transaction whereby a person owing a debt, theretofore incurred and arising out of a contract, express or implied, shall transfer any earned or future wages, salary or other compensation for his personal service, which are not exempt from execution, to pay or to secure the payment of said debt, or any extension or renewal thereof, or to pay or to secure the payment of any debt of another person, or any extension or renewal thereof, or as any consideration or security for any undertaking of another person;

(c) Any transaction whereby a person owing a debt, theretofore incurred and arising out of a contract, express or implied, shall transfer substantially the whole of his property which is not exempt from execution to pay or to secure the payment of said debt, or any extension or renewal thereof, or to pay or to secure the payment of any debt of another person, or any extension or renewal thereof, or as any consideration or security for any undertaking of another person;

(d) Any transfer set forth in sub-paragraph (b) or (c) of this paragraph (2) shall constitute a collection proceeding of the entire transfer, *except that*, when the transfer shall be made in part to pay or to secure the payment of the debt of the person making the transfer, as provided in said sub-paragraphs, and in part for new consideration paid or to be paid to such person, the transfer shall constitute a collection proceeding of only such part thereof as shall remain after deducting therefrom an amount equal to the new consideration.

(3) Court and clerk of court shall include a justice of the peace.

(4) A creditor shall be deemed to have extended credit to a debtor at the time the debt was incurred.

(5) Debt shall mean any obligation for the payment of money, whether or not it is due and payable.

(6) A person shall be deemed insolvent whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to hinder, delay or defraud his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts which are due and payable.

(7) Person shall include natural persons, limited or other partnerships, corporations, joint-stock companies, unincorporated companies and associations, and any business conducted by a trustee.

(8) Secured creditor shall mean a creditor who by any transaction or lien has property of the debtor as security for his claim, or who owns a claim upon which a person is liable in any manner as a co-debtor with the debtor, or in any manner as an accommodation party, guarantor or surety for the debtor, and such person has such security.

(9) Transfer shall include assignment, sale, conveyance, mortgage, pledge, trust and every other method of disposing of or parting with property absolutely or conditionally.

(10) Words importing the masculine gender may be applied to and include any person. Words importing the plural number may be applied to and mean a single person or thing; and words importing the singular number may be applied to and mean several persons or things.

Section 2. Liens, Levies and Transfers of Collection Proceedings Subject to Underfiling. Any attachment, garnishment, judgment lien or levy of execution in any action, suit or proceeding constituting a collection proceeding and any transfer constituting a collection proceeding shall be held for the benefit of underfiling creditors as hereinafter provided, and the proceeds of any such lien, levy or transfer shall be paid into court upon order. Any payment, or any transfer of any property of the debtor, which is not exempt from execution, to pay or to secure the payment of any debt of the debtor arising out of a contract, express or implied, or any debt of another person, or any extension or renewal thereof, or as any consideration or security for any undertaking of another person, shall, if made after the time prescribed in Section 3 for causing notice of the collection proceeding to be published, be held for the benefit of underfiling creditors as hereinafter provided, and the amount of any such payment or transfer shall be paid into court upon order.

Section 3. Notice to Creditors to Underfile. (1) No action, suit or proceeding constituting a collection proceeding as defined in Section 1, paragraph (2), sub-paragraph (a), shall be brought unless the plaintiff therein shall, upon filing his complaint also file notice thereof with the clerk of the court wherein the proceeding is commenced. Said

notice shall be verified by the creditor under oath and shall set forth the title of the cause, the amount of the debt, specifying the part representing the principal sum and the part, if any, representing interest thereon, whether any, and if so what, security therefor is held, and the consideration for the debt. If the final judgment or decree shall be for the plaintiff to recover the whole or any part of his claim, a finding shall be included as to the nature of the claim and the date when each item of the debt was incurred sufficient to determine the priority of the claim as hereinafter provided in Section 8. Three days after such final judgment or decree, the court shall, unless the judgment or decree has been satisfied, certify the record of the cause to the [name of court to be inserted] and the clerk of that court shall cause the notice aforesaid to be published in one or more newspapers of general circulation in the county with a notation of the amount of the final judgment or decree, the finding as to the nature of the claim and the date each item of the debt was incurred and warning to creditors to underfile their claims in said court. The clerk of court shall cause said notice to be given to said newspapers not later than six days after the final judgment or decree aforesaid, to be published as follows: if in a weekly newspaper, in [number of issues to be inserted] consecutive issues thereof; if in any other than a weekly newspaper, in [number of issues to be inserted] consecutive issues thereof. The court may require such further notice to be given creditors as it may direct.

(2) No transaction constituting a collection proceeding as defined in Section 1, paragraph (2), sub-paragraph (b), shall be valid as to any person, unless the transfer shall be in writing signed by the debtor making the transfer and by the creditor and shall be verified by each under oath, and unless within five days following the actual date of signing by said debtor the creditor shall serve the transfer upon the employer, and unless within said five days the creditor shall also file said transfer with the clerk of [name of court to be inserted, being a court of the county where the debtor making the transfer resides.] The transfer shall set forth the court wherein the transfer is to be filed, the date of the transfer, the name and address of the creditor as plaintiff and of the debtor making the transfer as defendant, the name and address of the employer, the total amount of wages, salary or other compensation for personal service subject to the transfer, the date when each item of the debt was incurred, the date when it became due and payable, if it is due and payable, the amount thereof, specifying the part representing the principal sum and the part, if any, representing interest thereon, whether any, and, if so what, security therefor is held, and the consideration for the claim. The clerk of court shall file the transfer and thereby con-

stitute it a collection proceeding pending in that court without further process or pleadings. Within three days after filing said transfer the clerk of court shall also cause it, with warning to creditors to underfile their claims in said court, to be published in the newspapers as provided in paragraph (1) of this Section 3. The employer shall pay into court any wages, salary or other compensation for the debtor's personal service, not exempt from execution, which shall be payable under the transfer.

(3) No transaction constituting a collection proceeding as defined in Section 1, paragraph (2), sub-paragraph (c), shall be valid as to any person except a bona fide purchaser, unless the transfer shall be in writing signed by the debtor making the transfer and by the creditor and shall be verified by each under oath, and unless within five days following the actual date of signing by said debtor the creditor shall file the transfer with the clerk [name of court to be inserted, being a court of the county where the debtor making the transfer resides or has a place of business.] The transfer shall set forth the court wherein the transfer is to be filed, the date of the transfer, the name and address of the creditor as plaintiff and of the debtor making the transfer as defendant, a full and complete description of the property subject to the transfer, including the location of the property and the name and address of any person to whom the property, or any part of it, has been transferred and upon what terms and conditions, the date when each item of the debt was incurred, the date when it became due and payable, if it is due and payable, the amount thereof, specifying the part representing the principal sum and the part, if any, representing interest thereon, whether any, and, if so what, security therefor is held, and the consideration for the claim. The clerk of court shall file the transfer and thereby constitute it a collection proceeding pending in that court without further process or pleadings. Within three days after filing said transfer the clerk of court shall also cause it with warning to creditors to underfile their claims in said court to be published in the newspapers as provided in paragraph (1) of this Section 3. Any person, except a bona fide purchaser, having or receiving any property subject to such transfer shall hold and care for the property and the proceeds and income thereof subject to the orders of the court.

Section 4. Underfiling—Matured Claims—Proof and Allowance. (1) Within thirty days after the date of the first publication of notice of a collection proceeding as provided in Section 3, or such further time as the court shall allow for cause shown, any creditor whose claim is due and payable may underfile therein by filing his claim with the clerk of court. Said claim shall be filed in writing and shall be verified by the creditor under oath. A claim so filed shall set forth the

date when each item of the debt was incurred, the date when it became due and payable, the amount thereof, specifying the part representing the principal sum and the part, if any, representing interest thereon, whether any, and if so what, security therefor is held, whether any, and if so what, payment or transfer has been made by the debtor to the creditor after the time prescribed in Section 3 for causing notice of the collection proceeding to be published, and the consideration for the debt. A copy of the claim so filed shall also be filed therewith for the debtor. Immediately upon expiration of the time for underfiling, the clerk of court shall notify the debtor in writing of the claims filed.

(2) Any party to a collection proceeding, including any underfiling creditors, may, within such time as the court shall allow, deny or otherwise put in issue the date when any debt, or any item thereof, was incurred, or the validity thereof, including any award, judgment or decree which shall have been entered by consent or default of the debtor.

(3) Any party to a collection proceeding, including any underfiling creditor, may subpoena witnesses and documentary or other evidence, and may examine witnesses under oath, including the debtor, any garnishee and any creditor, concerning the estate and effects of the debtor, any transfer thereof, and the claim of any creditor, or any payment thereof.

(4) The court, upon reasonable notice, may require the debtor to file under oath for record in the proceeding, a schedule of his property, showing the amount and kind of property, its money value in detail, the location thereof, including the name and address of any person who holds any of his property which is exempt from execution and the date, terms and conditions of the transfer, and a list of his creditors showing their residence, if known, if unknown, that fact to be stated, the amount owed each of them, whether or not it is due and payable, the date when each item of each debt was incurred, the consideration therefor, whether any, and if so what, security has been given for each debt, and whether any, and if so what, payment or transfer has been made by him to any creditor after the time prescribed in Section 3 for causing notice of the collection proceeding to be published, and a claim for any exemptions to which he may be entitled by law.

(5) After hearing, the court shall enter judgment upon each claim properly filed and proved in the proceedings, and if the judgment shall be for the creditor to recover the whole or any part of his claim, a finding shall be included as to the nature of the claim and the date when each item of the debt was incurred sufficient to determine the priority of the claim as hereinafter provided in Section 8.

(6) No secured creditor shall file or have his claim allowed other than for the amount of any deficiency upon his claim after the value

of the security has been deducted therefrom in such manner as the court shall approve.

(7) Whenever a creditor who owns a claim which is secured by the individual undertaking or property of another person fails to prove such claim such person may do so in the creditor's name.

Section 5. Underfiling—Unmatured Claims—Proof and Allowance. (1) Any creditor who shall have extended credit, or shall have allowed any extension or renewal of a debt, in reliance upon any material misrepresentation made, presented or published in any manner whatsoever in writing by the debtor relating to his assets, liabilities, earnings, or expenses, may file and have allowed his claim as an underfiling creditor in a collection proceeding although the claim is not due and payable.

(2) Any creditor, including a landlord claiming future rent, may, although his claim is not due and payable, file and have allowed his claim as an underfiling creditor if the pending collection proceeding is that defined in Section 1, paragraph (2), sub-paragraph (c), and in any other collection proceeding if the court shall find that sufficient claims have been allowed to render the debtor insolvent. Such claims may be filed within such time as the court, after notice, shall direct.

(3) When any unmatured claim arising out of a contract, express or implied, for the direct payment of money is allowed under this Section 5, interest at the rate stipulated, if any, shall be computed to the date of the final judgment or decree. If such claim does not bear interest, the principal sum shall be discounted at the legal rate of interest to the date of the final judgment or decree.

Section 6. Sale of Assets—Payment of Claims. (1) Property which shall have been subjected to attachment, garnishment, judgment lien or levy of execution in a collection proceeding, shall be sold as provided by law, and any property transferred so as to constitute a collection proceeding shall be sold as the court shall direct and the proceeds paid into court, *provided*, however, that the court may, in furtherance of the purposes of this Act, determine and postpone the time of any such sale, and may order a sale as upon execution in behalf of all of the judgments and decrees entered in the proceeding.

(2) The court shall order the payment of creditors' claims at the earliest practicable time after they have been allowed. Claims which have been allowed may be paid notwithstanding the judgment or decree entered upon one or more claims is pending on appeal; *provided*, however, that sufficient funds shall be reserved to pay such claims according to final judgment or decree and Sections 7 and 8 of this Act.

Section 7. Costs, Fees, Expenses. The court shall order payment of the costs, fees and expenses of a collection proceeding in the following order:

(1) Taxable costs as in similar actions, suits or proceedings, and each claim underfiled may be deemed a separate proceeding for this purpose;

(2) The actual and necessary costs of preserving property subsequent to the commencement of the collection proceeding, to be determined by the court;

(3) Reasonable costs of administration, including fees and mileage payable to witnesses as now or hereafter provided by the law of this state in civil actions, to be determined by the court;

(4) Reasonable costs incurred by a creditor in recovering in a collection proceeding property of the debtor which the debtor was about to remove from the state in fraud of his creditors, or which the debtor concealed or transferred in fraud of his creditors, to be determined by the court, together with fifty per cent of the net value of the property so recovered; *provided*, however, that no creditor shall be so paid more than the amount of his claim as determined by the final judgment or decree entered thereon in the collection proceeding;

(5) Reasonable costs of the party instituting an action, suit or proceeding constituting a collection proceeding, as defined in Section 1, paragraph (2), sub-paragraph (a), if the validity of his claim is sustained for any amount in the collection proceeding, to be determined by the court;

(6) Reasonable costs of each underfiling creditor, if the validity of his claim is sustained for any amount in the collection proceeding, to be determined by the court; also such costs as the court may determine shall reimburse any party successfully contesting the validity or the amount of any claim filed in the proceeding, or the date, as claimed by the creditor, when the debt was incurred.

Section 8. Priority of Claims. In order to effectuate the purposes of this Act, the claims of creditors in collection proceedings as defined in this Act, and in all proceedings to liquidate or to reorganize a debtor's estate, including bankruptcy proceedings, insolvency proceedings, receivership proceedings, general assignments for the benefit of creditors, administration of decedent estates and like estates administered by fiduciaries, shall be payable, after payment of costs, fees and expenses, in the following order:

(1) Claims owned by any person, including the United States, the State and any subdivision thereof, according to such priority or preference as is now, or may be hereafter, provided by law;

(2) Claims for wages, salary or other compensation for personal service of the creditor, which were earned within three months prior to the commencement of the proceeding, not to exceed \$600 to each claimant, with any amount payable upon any such claim under paragraph (1) of this Section 8 being deducted from said amount. If such claims shall not be fully paid, they shall be paid pro rata.

(3) Claims for food, clothing, shelter, fuel, medicine and dental and medical attendance furnished for the personal use of the debtor or of his dependents of an aggregate amount not to exceed \$300, with any amount payable upon such claim under paragraph (1) of this Section 8 being deducted from said amount. If such claims shall exceed said total amount of \$300, they shall be paid pro rata.

(4) Claims of all creditors filed and allowed in a prior collection proceeding against the same debtor, in the amount which they remained unpaid, to be severally paid, subject to paragraph (1) of this Section 8, in the order provided in paragraph (5) of this Section 8, *provided*, however, that unmatured claims which were not qualified to be filed and allowed in the prior collection proceeding, but which may be filed and allowed in the pending collection proceedings, shall also, if filed and allowed, be payable under this paragraph (4) of this Section 8.

(5) Claims of other creditors, including any amount remaining unpaid upon the claims of any creditors entitled, in the pending collection proceeding, or in any prior collection proceeding, to payment under paragraphs (2) and (3) of this Section 8, shall be paid in the order in which credit for the principal of the debt was extended by the creditors, to be determined as follows:

(a) By the actual date each item of credit was extended by the creditor to the debtor upon any contract, express or implied, for the direct payment of money, and if two or more creditors shall have extended credit to the debtor upon such contracts at different times on the same day, such creditors shall be paid according to the actual time they extended credit to the debtors. If the claims of creditors who extended credit at the same time shall not be fully paid, they shall be paid pro rata;

(b) Each item of credit extended by a creditor upon any contract, express or implied, for the direct payment of money, shall date as of the date of its original extension, notwithstanding the original time for payment thereof may have been extended and the obligation may have been changed in form; *provided*, however, if interest at a higher rate is paid or payable for such extension or renewal, or any security has been given therefor, such claim shall rank as of the date of such extension or renewal;

(c) All claims other than those arising out of a contract, express or implied, for the direct payment of money, including claims arising

in tort and claims for damages for breach of contract other than a contract, express or implied, for the direct payment of money, shall rank as of the date the cause of action arose.

(6) Any claim of any creditor, which by law may be transferred, may be transferred by the creditor with any priority to which the claim is entitled under this Act if such transfer shall be in writing and shall be signed by the creditor, or his duly authorized agent. Any person who shall pay any such claim for the account of the debtor shall be entitled to such transfer by the creditor or holder of the claim so paid.

Section 9. Appointment of Receiver. Whenever in a collection proceeding the court shall find it necessary to appoint a receiver to carry out the provisions of this Act, the court may appoint a creditor whose claim has been filed in the proceeding with such powers and duties as the court shall direct. The court shall take cognizance of the interests of such receiver when fixing his compensation and shall fix the rate of his compensation on a per diem basis which shall be payable only for time actually spent in performing such services.

Section 10. False Credit Statements—Penalty. Any person who shall intentionally make, present, or publish in any manner whatsoever, any materially false statement in writing concerning his property, liabilities, earnings or expenses with the intent of obtaining money, property or services on credit, or any extension or renewal of a debt, shall be guilty of a misdemeanor and shall be fined not more than \$500, or sentenced for not more than one year in jail, or both.

Section 11. Effective Date of Act. This Act shall take effect six months from the date of its passage; *provided*, however, that this Act shall not apply to any action, suit or proceeding to recover money upon a claim arising out of a contract, express or implied, or to any action, suit or proceeding to enforce any award, judgment or decree upon such claim or to any proceeding by a secured creditor to recover any deficiency upon such claim, constituting a collection proceeding as defined in Section 1, paragraph (2), sub-paragraph (a), if the contract was entered into prior to the effective date of this Act; *provided*, further, however, that the foregoing exception shall not apply in case of the extension or renewal of such contract after the effective date of this Act.

Section 12. Repeal. All acts or parts of acts inconsistent with this Act are hereby repealed as of the effective date of this Act.

Section 13. Title of This Act. This Act shall be known as the

.....Collection Act.
(Name of State)