ARIZONA BANKRUPTCY AMERICAN INN OF COURT
BANKRUPTCY LEGENDS PANEL
NOVEMBER 10, 2016
TUCSON, ARIZONA

I. Bankruptcy - A Short History

A. United States Constitution Article I Section 8 Subsections 1 & 4 -[1] "The Congress shall have Power' ... [4] "to establish ... uniform Laws on the subject of Bankruptcies throughout the United States;".

B. The 1898 Bankruptcy Act [basis for modern bankruptcy law]

C. The Chandler Act of 1938 [added reorganization and arrangements with creditors-forerunner to current Chapter 13]

D. Background of the 1978 Bankruptcy Code

1. Perception of bankruptcy rings and exclusion of some lawyers [Ron Trost example]
2. Problem of bankruptcy referees acting as judges and as administrators-perceived conflict of interest
3. National Bankruptcy Commission's role
4. Commercial Law League's role
5. George Triester- view that bankruptcy courts/referees "dispensed an inferior brand of justice"
6. Congress creates the National Bankruptcy Review Commission [Judicial Conference and District Judges object bitterly to two bankruptcy referees being on commission so they were not]
7. National Conference of Bankruptcy Judges led by then referees Joe Lee [KY] and Conrad Cyr [MA] drafted own bill [HB8200].....created bankruptcy judges with Article III status (life time appointment and fixed salary) which was vehemently opposed by some including Chief Justice Warren Burger
8. Major items debated
    a. Make bankruptcy an administrative matter-need far fewer judges
    b. Expanded jurisdiction v. old plenary & summary jurisdiction

c. Concept of property of the estate- broadly defined

d. Definition of claim- broadly defined

e. Exemptions-one national standard or each state - strong insurance lobby for state's exemption to preserve exemptions of insurance products-federalism-opt out compromise

f. Even then means testing was debated

g. Benefits of chapter 13 over chapter 7- cure mortgage default [chapter 13 bribe]–co-debtor stay–super discharge

h. Reaffirmations-court approval requirement

9. Testimony of Gerald K. Smith before the U.S. Senate Judiciary Committee - November 18, 1975

E. 1978 Bankruptcy Code [1]

[Due to opposition from Chief Justice Warren Burger and other federal judges asserting that it would dilute the federal bench due to the inferior quality of bankruptcy referees.....Congress ducked the Article III issue but gave the new bankruptcy courts expansive jurisdiction which created an obvious constitutional issue which the Supreme Court & Chief Justice Burger ruled on in Marathon in 1982]

F. Congress creates another Commission–role of Brady Williamson and Elizabeth Warren, NCBJ, means testing

1. Purdue Study

2. Books by Warren "As We Forgive Our Debtors" (1989) & "The Fragile Middle Class" (2000)

3. Minority view on Commission led by Judge Edith Jones (5th Cir.).....big split

4. Means testing.....$80 million spent by credit industry in lobby for new bankruptcy law.....credit counseling and financial management

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[1]An excellent history of the events leading to the enactment of the 1978 Bankruptcy Code is the five part series in Vols 81 & 82[Issue 1], The American Bankruptcy Law Journal [2007-08] by U.S. Bankruptcy Judge Geraldine Mund entitled "Appointed or Anointed,: Judges, Congress, and the Passage of the Bankruptcy Act of 1978"

requirements.....domestic support obligations.....homestead exemption abuses fixed.....all political compromises

G. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

H. Chapter 11 Mega Cases

1. Penn Central
2. Airline Industry
    a. TWA
    b. Eastern
    c. Continental [twice]
    d. U.S. Airways [twice]
    e. Braniff
    f. America West
    g. United
    h. Delta
    i. American [pending]
3. Mass Tort [Johns Mansville and asbestos cases; A.H. Robbins-dalkon shield; Dow Corning-breast implants]
4. Great Recessions Cases: General Motors, Chrysler, and Lehman Brothers
5. World Com, Enron & Madoff
6. K Mart

I. Delaware and the venue debate.....second Continental Airlines case, Enron, Worldcom etc.

J. International Cases and Chapter 15

II. Arizona Bankruptcy Practice - Then and Now

Cases:

A. The 1960s

1. Legend City
2. Consumers Mart of America
3. Arizona Atomics

B. The 1970s

1. Hyatt Regency Phoenix-Shapiros-Chanen- U.C. Bank
2. White Fence Farms
3. South Tucson

C. The 1980s

1. Ned Saban; Dennis Saban; the Schoen creditors
2. Arabian Horse Industry
    a. Lasma Arabians
    b. Loretta Kellet
    c. Wayne Newton
3. Residential Resources Mortgage Investments
4. American Continental-Charlie Keating
5. Circle K
6. Chapter 11 Farmers

D. The 1990s

1. The failure of all of the Arizona Savings and Loans - The Resolution Trust Corporation [RTC]
2. Conley Wolfswinkel & WGI & The Auction
3. Home Builders & Real Estate - Knoell Homes
4. Sun Valley- Road to No Where Cases
5. U of A Basketball Ticket Auctions & Phoenix Suns ticket case, Abele v. Phoenix Suns Ltd. Partnership (In re Harrell), 73 F.3d 218 (9th Cir. 1996) [Season ticket holder's expectation of renewal of season tickets is not property right when that opportunity is revocable.]
6. The Schoens and related debtors & U-Haul stockholders
7. America West Airlines
8. Tucson Diocese

E. The 2000s

1. First Magnus
2. Boston Chicken
3. Fulton Homes
4. Phoenix Coyotes
5. Mortgages Limited
6. Radical Bunny
7. ILX Resorts
8. La Paloma
9. Bashas

III. Certain Industries

1. Real Estate & Housing
2. Retail Food Cases
    A. A.J. Bayless
    B. Mega Foods
    C. Bashas
    D. Fleming Food [OK]
3. Golf Courses
    A. LePercq-Biltmore
    B. Ventana Canyon
    C. Wigwam
    D. Flagstaff Ranch
    E. Pine Canyon
    F. Sedona Golf Resort
    G. Seven Canyons
    H. Papago/City of Phoenix/AGA
    I. Hassayampa

IV. Arizona Bankruptcy Referees [pre 1978] and Bankruptcy Judges [post 1978]

A. Bankruptcy Referees

1. First Arizona Referees [1912]
    a. Robert Morrison
    b. Joseph S. Jenckes
    c. Richard Lamson (Prescott)
    d. F. H. Bernard
    e. Daniel McFarland (Tombstone)
    f. Geo. R. Hill (Globe)
    h. Walter Moore (Globe)
    i. A.L. Cummings (Morenci)
    j. Fred A. Larson
    k. L. Kearney
    l. H.H. Linney (Prescott)
2. Thos. W. Nealon (1917)
3. Huber A. Collins (1921)
4. R.W. Smith (1921)
5. Homer F. Allen (1923)
6. Joseph S. Hanson (1925)
7. Frank R. Stewart (1935)
8. Allan K. Perry (1936)
9. Henderson Stockton (1932)
10. Stanley Jerman (1936-1963)
11. Hugh M. Caldwell (1960-1983)
12. Joseph U. Cracchiolo (1963-1969)
13. Vincent Maggiore (1966-1981)
14. Edward E. Davis

B. Bankruptcy Judges

1. Hugh M. Caldwell
2. Vincent Maggiore
3. Edward E. Davis

4. William A. Scanland

5. Robert G. Mooreman [1981-2000]

6. George B. Neilson Jr. [1983-]

7. Lawrence (Moe) Ollason [1983-2006]

8. Sarah Sharer Curley [1986-2014]

9. Redfield T. Baum, Sr. [1990-]

10. James M. Marlar [1993-2017]

11. Charles G. Case II [1994-2013]

12. Randolph J. Haines [2000-2014]

13. Eileen W. Hollowell [2000-2016]

14. Daniel P. Collins [2013-]

15. Brenda Moody Whinery [2013-]

16. Eddward P. Ballinger [2013-]

17. Madeleine C. Wanslee [2014-]

18. Brenda K. Martin [2014-]

19. Paul Sala [2014-]

20. Scott H. Gan [2014-]

V. Bankruptcy Section of the Arizona State Bar formed in 1959

Created because of the increase in filings from 113 in 1952 to 531 in 1957! New Section consisted of a total of five members, Lowell E. Rothschild, Stanley A. Jerman, Lester Penteman, Ralph Brandt, and Anthony O. Jones.

VI. Significant U.S. Supreme Court Bankruptcy Decisions

A. Northern Pipeline Const. Co., v. Marathon Pipe Line Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). The broad grant of jurisdiction in the 1978 Bankruptcy Code violated Article III of the Constitution because bankruptcy judges are not Article III judges and thus can not exercise the full judicial power of the United States as granted by the Constitution.

B. Stern v. Marshall, 564 U.S. 462, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011). Bankruptcy judges lacked the judicial power to enter final judgment on pure state law claims and to the extent that 28 U.S.C. 157(b) authorized bankruptcy judges to do so, it is unconstitutional.

C. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989). Seventh Amendment entitles a defendant in a fraudulent conveyance action who has not filed a proof of claim in the bankruptcy case to a jury trial notwithstanding Congress' designation of fraudulent conveyance actions as core proceedings in 28 U.S.C. 157(b)(2)(H).

D. Langenkamp v. Culp, 498 U.S. 42, 111 S.Ct. 330 (1990). Defendant who has filed a proof of claim in the bankruptcy case is not entitled to (loses) the Seventh Amendment right to a trial by jury in trustee's fraudulent conveyance action.

E. Katchen v. Landy, 382 U.S. 323, 86 S.Ct. 467 (1966). Bankruptcy Act case, old plenary and summary jurisdiction, where creditor filed a proof of claim in the bankruptcy case that act gave the bankruptcy court the summary jurisdiction to order surrender of a voidable preference as proven by the trustee.

F. Case v. Los Angeles Lumber Products Co., 308 U.S. 106, 60 S.Ct.1, 84 L.Ed.110 (1939); Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 108 S.Ct. 963, 99 L.Ed. 169 (1988); Bank of America National Trust & Savings Ass'n v. 203 LaSalle Street Partnership, 526 U.S. 434, 119 S.Ct. 1411, 143 L.Ed.2d 607 (1999); U.S. Bancorp Mortgage Company v. Bonner Mall Partnership, 513 U.S.18, 115 S.Ct. 386, 130 L.Ed.2d 233 (1988). The absolute priority rule and the new value exception cases.

G. Celotex Corp. v. Edwards, 514 U.S. 300, 115 S. Ct. 1493 (1950). Section 105 injunction issued by the bankruptcy court must be honored and may not be collaterally attacked before another federal court.

H. Patterson v. Shumate, 504 U.S. 753, 112 S. Ct. 2242 (1992); Rousey v. Jacoway, 544 U.S. 320, 125 S.Ct. 1561 (2005). ERISA qualified pension plans [excluded from property of the estate under Section 541(c)(2) as a restriction on transfer enforceable under nonbankruptcy law] and individual retirement accounts are exempt property.

I. Toibb v. Radloff, 501 U. S. 157, 111 S.Ct. 2197 (1991). Individual may file a chapter 11 reorganization case.

J. Johnson v. Home State Bank, 501 U.S. 78, 111 S.Ct. 2150 (1991). A lien securing a debt that has been discharged in a prior chapter 7 case remains a claim which can be dealt with in a subsequent chapter 13 case.

K. United States v. Whiting Pools, Inc., 462 U.S. 198, 103 S.Ct. 2309 (1983). Upon the filing of a bankruptcy petition, property seized pre-petition by the IRS becomes property of the bankruptcy estate subject to the turnover rights under Section 542 provided that the interests of the IRS are adequately protected. The IRS has the same rights and obligations of any creditor.

L. Kelly v. Robinson, 479 U.S. 36, 107 S. Ct. 353 (1986). Criminal restitution obligations, imposed as a condition of probation in state criminal proceedings, are not dischargeable in chapter 7 bankruptcy cases.

M. Pennsylvania Dept. Of Public Welfare v Davenport, 495 U.S. 552, 110 S.Ct. 2126 (1990). Criminal restitution obligations are debts within meaning of Section 101(11) of the Bankruptcy Code and may be discharged under the super discharge provisions of then chapter 13. Decision was significantly abrogated by the Criminal Victims Protection Act of 1990 (see Section 1328(a)(3) of the Bankruptcy Code), which made restitution debts not dischargeable in chapter 13 if the restitution requirement is included in the sentence on the debtor's conviction, although the opinion's reasoning was reaffirmed.

N. Executive Benefits Insurance Agency v. Arkison, ___ U.S. ___ , 134 S.Ct. 2165 (2014). When the Constitution does not permit a bankruptcy court to enter final judgment on a bankruptcy-related claim, the statute nevertheless permits a bankruptcy court to issue proposed findings of fact and conclusions of law to be reviewed de novo by the district court.

O. Wellness International Network, Ltd. v. Sharif, ___ U.S. ___, 135 S.Ct. 1932 (2015). Article III is not violated when the parties knowingly and voluntarily consent to

adjudication by a bankruptcy judge.

V. Significant 9th Circuit and Arizona Supreme Court Decisions

A. Stay violations are void. In re Schwartz, 954 F.2d 569 (9th Cir. 1992); Great Southwest Fire Insur. Co. V. Triple "I" Insur. Services, Inc., 151 Ariz. 283, 727 P.2d 336 (1986).

B. Section 362 stay imposes an affirmative duty to discontinue post-petition collection actions and to remedy any actions violating the stay. Eskanos & Adler, P.C. v. Leetien, 309 F.3d 1210 (9th Cir. 2002); Sternberg v. Johnston, 595 F.3d 937 (9th Cir. 2010).

C. Power to appoint a trustee sua sponte where circumstances so require. In re Bibo, Inc., 76 F.3d 256 (9th Cir. 1996).

D. Fiduciary duty and other obligations of chapter 11 debtor's attorney to estate and creditors. In re Perez, 30 F.3d 1209 (9th Cir. 1994).

E. Court appointed attorney's duty of full disclosure. In re Park-Helena Corp., 63 F.3d 877 (9th Cir. 1995).

F. Arizona case regarding the scope of the automatic stay where chapter 11 debtor owned a partial interest in a promissory note. In re Bialac, 16 B.R. 982 (Bankr. D. Ariz. 1982), rev'd 24 B.R. 580 (9th Cir. B.A.P. 1982), rev'd 712 F.2d 426 (9th Cir. 1983) and In re Bialac, 694 F.2d 625 (9th Cir. 1982); Park Lee Corp., fka Harsch Building Co. 2: 91-bk-07067-SSC [chapter 11 case-final decree entered 1997].

This unique bankruptcy time line maps the evolution of bankruptcy law since its inception in 1787 in the U.S. Constitution through 2011. It also provides statistics demonstrating the burgeoning bankruptcy caseloads, and historical snapshots of select events that occurred along the way. Additional information can be found on the Center's websites. Suggested by the bankruptcy courts and advisory committees, this time line is the product of a long-term collaboration between bankruptcy judges, court staff, the Administrative Office of the U.S. Courts, and the Federal Judicial Center.

Past perceptions

Bankruptcy as Bluebeard. "Puck," 1913.

The Evolution of U.S. Bankruptcy Law *a time line*

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FEDERAL JUDICIAL CENTER

1787
The U.S. Constitution (Article I, sec. 8) authorizes Congress to establish uniform bankruptcy laws throughout the nation. Laws passed in the succeeding century, however, will be short-lived.

Bankruptcy Act of 1800 (2 Stat. 19) passes by one vote. The first federal bankruptcy law, the Act authorizes district court judges to appoint nonjudicial commissioners to oversee and help administer bankruptcy proceedings. Applying solely to merchant debtors with cases initiated by creditors, the Act allows discharges only if two-thirds of creditors (in number and dollar amount) agree. The Act contains a five-year sunset provision, in accordance with existing English law.

Bankruptcy Act of 1841 (5 Stat. 440) grants district courts "jurisdiction in all matters and proceedings in bankruptcy," including developing rules for proceedings and appointing bankruptcy commissioners and assignees. In addition, the Act

- allows voluntary cases
- extends relief to all debtors
- allows discharge of debtors who turn over assets
- provides for recovery of fraudulent transfers and preferences
- prohibits debtors from using state law exemptions

1800 — 1841

1803
Citing excessive costs and corruption, Congress repeals the Act of 1800. For the next three decades, the states will fill the legal void. In 1819, the U.S. Supreme Court bars states from discharging debts to citizens of other states.

1839
Federal law (5 Stat. 321) abolishes imprisonment for debt.

1843
High administrative costs, lack of state law exemptions, and creditor frustration lead to the 1841 Act's repeal.

NAMES & FACES

1777

Considered criminals, bankrupt individuals in colonial America were commonly imprisoned. The Articles of Confederation had no provisions for bankruptcy law.

1798

Impoverished by speculation, Revolutionary War financier Robert Morris is sent to debtor's prison. (Congress enacts the first bankruptcy law in part to get him out.)

1801

Thomas Jefferson (1743–1826) begins his first term as President.

1819

When a Kentucky business venture fails, John James Audubon is sent to debtor's prison. On release, he will embark on his celebrated bird painting series.

1845

Edgar Allan Poe publishes "The Raven," testing his fame. His and his wife's woes will dog the author till his death four years later.

1850

Introducing "Swedish Nightingale" Jenny Lind to U.S. audiences, promoter P.T. Barnum soon builds a vast fortune. He will file for bankruptcy in 1877.

CASES FILED

1867	1868	1869	1899	1932	1961	1983	1990	2000	2006	2010
7,348	29,539	6,021	22,446	70,049	192,830	374,734	725,484	1,577,462	617,660	1,593,061

Bankruptcy Act of 1867

(14 Stat. 517) marks the first time Congress refers to district courts as "constituted courts of bankruptcy" with original jurisdiction in all bankruptcy matters. The Act notably foreshadows today's debtor-friendly Chapter 12 and 13 provisions by introducing the "composition agreement" allowing debtors and creditors to negotiate repayment—often for less than full compensation. Other key provisions of the Act include

- allowing district judges to appoint non-judicial assistants, known as "registers in bankruptcy," nominated by the Chief Justice
- allowing debtors to choose between state and federal exemptions
- requiring creditor consent to discharge, or payment of a 50% dividend

Bankruptcy Act of 1898

(30 Stat. 544) is the first long-term bankruptcy legislation. In effect for the next 80 years, the Act establishes the position of referee to oversee administration of bankruptcy cases. Referees are appointed to two-year terms by the district judge and can be removed only for incompetency, misconduct, or neglect of duty. They are paid a percentage of funds brought into the estate. Besides the referee position, the 1898 Act establishes the office of trustee (previously assignee) in bankruptcy. In general, the Act is perceived as prodebtor, establishing relatively narrow exceptions to discharge. Corporations are ineligible for voluntary relief, but some can be involuntary debtors. (Amendments enacted in 1910 make corporations eligible for voluntary bankruptcy.)

Bankruptcy Reform Act of 1978

(92 Stat. 2667), superseding the 1898 Act, establishes bankruptcy courts in each district and allows for separate bankruptcy judges, appointed by the President and confirmed by the Senate, to serve 14-year terms beginning in 1984. While bankruptcy courts may now hear all matters arising in or related to bankruptcy cases, judges remain non-Article III adjuncts of the district courts. Also, a new Chapter 11 (replacing X, XI, and XII) and Chapter 13, which offers a "super" discharge, make filing and reorganizing easier for businesses and individuals. (Western rather than Roman numerals are adopted for chapter titles.) The following year a pilot U.S. trustee program is established.

Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986

(100 Stat. 3088) establishes Chapter 12 temporarily for family farmers and makes permanent the U.S. Trustee program except in North Carolina and Alabama, where bankruptcy administrator programs are established. The trustee program moves the appointing and overseeing of case and standard trustees from the judicial to the executive branch in participating districts.

Bankruptcy Reform Act of 1994

(Public Law 103-394) creates the second National Bankruptcy Commission to investigate changes in bankruptcy law. The Act expands bankruptcy courts' ability to hold jury trials in some proceedings and encourages circuit councils to establish bankruptcy appellate panels.

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

(Public Law 109-8), substantially amending the 1978 Act, establishes a means test based on state median income for individual debtors, makes a briefing on credit counseling availability a condition for relief, and requires financial management training for Chapter 7 and 13 debtors to obtain a discharge. In addition, the Act

- appears to require dismissal if required documents are not filed (courts have not all interpreted this in the same way)
- eliminates the Chapter 13 "super discharge"
- eliminates "strip down" on most automobile loans in Chapter 13
- allows waiver of the bankruptcy filing fee for Chapter 7 individual debtors meeting certain criteria
- allows direct appeals to the court of appeals in certain circumstances

The Act also makes Chapter 12 permanent (and includes "family fishermen" with farmers), creates the role of consumer privacy ombudsman, and incorporates a model law on international insolvency cases.

Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010

(Public Law 111-203) aims to promote the nation's financial stability by improving accountability and transparency in the financial system, ending bailouts, and protecting consumers from abuses by financial services. The Act establishes an orderly liquidation process for covered financial companies subject to FDIC regulation under the Act and establishes the Consumer Financial Protection Bureau to

- make rules and enforce laws
- restrict unfair, deceptive, and abusive practices
- promote financial education
- monitor financial markets for new risks to consumers

1867

1868
In response to abuses and excessive fees, Congress repeals the Acts of 1867 and 1874.

1874
Congress amends the 1867 Act so that debtors can create a plan for distributing assets among creditors as a way to settle a case.

1898

1933
The National Bankruptcy Conference is created to study bankruptcy reform.

1933–1934
Amendments to the 1898 Act allow reorganization for railroads and corporations as well as individual debtors. Congress drafts the first municipal bankruptcy laws.

1936
On grounds of unconstitutional interference with state sovereignty, Congress repeals the 1934 Act.

1937
Congress passes the revised Municipal Bankruptcy Act. Upheld by the Supreme Court, the legislation will come to be known as Chapter 9 bankruptcy.

1938

1946
Compensation of referees is changed from a fee to a salary basis.

1964
Congress authorizes promulgation of the Supreme Court's Bankruptcy Rules.

1970
Amendments to the 1898 Act give referees jurisdiction to determine the effect of bankruptcy discharge. In addition, Congress creates the Commission on the Bankruptcy Laws of the United States to recommend changes to the laws reflective of current social and economic conditions.

1978

1973
Per the Supreme Court's Rules of Bankruptcy Procedure, referees henceforth are known as bankruptcy judges and are conferred finality on findings.

1982
The Commission on Bankruptcy Laws submits its report, including draft legislation.

1983
The Supreme Court promulgates the Bankruptcy Rules and Official Forms to govern bankruptcy proceedings under the 1978 Act.

1984
Congress passes the Bankruptcy Amendment and Federal Judgeship Act (98 Stat. 333), which replaces the 1978 provisions dealing with jurisdiction, venue, jury trials, and appeals. Bankruptcy courts become units of the district courts, with jurisdiction by district court reference. The circuit courts are authorized to appoint bankruptcy judges to 14-year terms. Bankruptcy courts are authorized to enter final orders on core matters, with noncore matters subject to de novo rule by the district court, absent consent of the parties.

1986

1997
The National Bankruptcy Review Commission recommends direct appeals from the bankruptcy courts to the courts of appeals and changing bankruptcy courts to Article III courts. The commission is defunct as of November 19. Congress disregards most of its recommendations.

1994

1998
Congress passes the Religious Liberty and Charitable Donation Protection Act of 1998, amending several sections of the 1978 Act to limit the trustee's power to avoid debtor transfers to charities and churches of up to 15% of gross annual income. For Chapter 13 cases, a 15% income threshold is used to determine reasonableness of claimed charitable contributions.

2005

2006
In Central Virginia Community College v. Katz, the Supreme Court rules that the Article I Bankruptcy Clause abrogates state sovereign immunity in private suits.

2008
Passing the disastrous bankruptcy of Lehman Brothers Holdings Inc. plus American International Group's (AIG's) imminent collapse, Congress passes the Emergency Economic Stabilization Act of 2008 (Public Law 110-343), creating the Troubled Assets Relief Program to pump money into the financial and automotive industries to stabilize them during a worldwide credit crisis.

2009
Congress passes the Credit CARD Act (Public Law 111-24), which prohibits certain unfair and abusive practices and makes credit card rates and fees more transparent.

2010

2011
In Stern v. Marshall, the Supreme Court rules that bankruptcy judges lack the constitutional authority to enter final judgment based entirely on a state law counterclaim by a debtor against a claimant, a power reserved for Article III judges.

1860 Abraham Lincoln (1809–1865) is elected President.

1891 Ulysses S. Grant (1822–1885), retired general and former President, joins an investment banking partnership. Three years later a swindle will ruin him.

1894 Samuel Clemens, aka Mark Twain, publishes "Huckleberry Finn" to wide acclaim. A company formed by the author will file for bankruptcy ten years later.

1902 The highly successful (but quite different) stage version of L. Frank Baum's "The Wonderful Wizard of Oz" opens in Chicago.

1908 Ford Motor Co. rolls out the Model T, putting ordinary Americans in the driver's seat. (Founder Henry Ford's first two automobile companies failed.)

1917 Eddie Cantor stars in Florenz Ziegfeld's (whose Follies By 1920, bad investments and free spending will leave The Great Ziegfeld bankrupt.

1923 Lois Wilson stars in Paramount's "The Covered Wagon." Meanwhile Walt Disney's Laugh-O-Gram Studio files for bankruptcy (as will Paramount in 1933).

1938 In a rematch, Joe Louis, aka the "Brown Bomber," defeats Max Schmeling in two minutes, four seconds.

1945 Harry S. Truman (1884–1972) assumes the Presidency when Roosevelt dies 82 days into his fourth term.

1950 Lewis Howard, inventor of the Audion vacuum tube, publishes "Father of the Radio," his life story.

1953 Leontyne Price dazzles crowds as "Porgy and Bess." Oscar nominee Dorothy Dandridge will play Bess in the 1959 film version.

1962 Partly due to the failure of its wearable Predicta line, radio and TV maker Admiral is forced to file for bankruptcy.

1967 With public interest in travel dying, toy maker Lionel Corporation files for bankruptcy. A reconfigured Lionel will file again in 1995.

1972 President Richard M. Nixon (1913–1994) wins reelection, beating George McGovern in a landslide.

1979 To avoid bankruptcy, Chrysler Corp. petitions Congress for $1 billion in loan guarantees.

1989 Unable to compete following industry deregulation, Eastern Air Lines files for bankruptcy protection. (It's last flight will be in 1991.)

1999 In existence since 1851, The Singer Company files for Chapter 11 bankruptcy protection, partly as a result of global shifts in garment manufacturing.

2001 Having lost ground to foreign competitors, Bethlehem Steel files for bankruptcy after nearly 150 years in business.

2002 As ever more customers flee to big-box discounters, Kmart Corp. files for bankruptcy protection. "Big K" will emerge as Kmart Holdings Corp. the following year.

2006 Owens Corning Corp. emerges from Chapter 11 when its reorganization plan becomes effective on October 31.

2009 In business more than 100 years, General Motors Corp. files for Chapter 11 reorganization with government funds to avert liquidation.

2010 Slow to keep up with new mail and internet delivery trends, video rental pioneer Blockbuster Inc. files for bankruptcy.

2011 The Los Angeles Dodgers file for Chapter 11 protection.

The National Bankruptcy Conference and the Bankruptcy Act

By CHARLES S. J. BANKS*

WHEN an economic depression of such magnitude as occurred in the nineteen thirties takes place, it is but natural that thinking men should ask why it happened and why it was so long continued.

One can hardly present a short history of the National Bankruptcy Conference without setting forth the economic background and some of the conditions which preceded the organization of the Conference.

The break in the stock market in 1929 and the closing of State and National Banks were the results of deep seated causes, as well as causes of consequent distressing circumstances. Later in this article we shall mention the basic cause of the break, but at this time will touch on the distressing circumstances which followed. One of these distressing circumstances was the fact that people did not have enough money with which to pay their bills or to buy the necessities of life; similarly, corporate enterprise was short of funds, their sales dropped off and employment lessened. In a word, where had the money gone? The answer to this intriguing question is to be found in the peculiar nature of money. Money is not merely the silver dollar or the greenback, this form of our money represents probably less than 5% of our system of money, or shall we say, our system of circulating media.

The deposit items in our banking systems, Federal and State, constitute our money system. When times are good the market value of listed securities goes up, and these securities are accepted by the banks as collateral for loans, and these loans bring into being a corresponding deposit item in the bank; also corporate lines of credit based upon current asset and liability ratios create deposits; thus do we create money in this country. The security put up as collateral in itself is not valuable, for it is only an engraved piece of paper, but it is the equity interest in or the lien upon the property owned by the issuing corporation which is valuable, because it represents an interest in wealth.

When a corporation defaulted in an interest or principal maturity payment, the issue went into default, and the legal characteristics of the trust indenture were immediately applicable, namely, foreclosure, and the securities no longer had collateral value. The wealth found within such corporate structures vanished from the credit system, such wealth became stagnant.

According to statistics published by the Federal Reserve Board, the comparative bank deposits and bank clearings for all banks in the United States for the years 1929 and 1933 in billions were as follows:

Year	Bank Deposits As of June 30	Bank Clearing For the Year	Velocity of Turnover
1929	55	727	13 times
1933	41	241	6 times

It may thus be seen that not only had the deposits shrunk 25% but the velocity of turnover was less than half as fast, resulting in a cut in purchasing power to one third. These figures omit the turnover of active currency in circulation. This, therefore, was the reason why people had no money, and why enterprise was short of funds.

The Federal Government under President Roosevelt sought to remedy this condition by priming the pump of credit through federal loans, but there was also another way.

How to restore stagnant wealth to a virile status, so that it again might form the basis of credit within the banking system and thus increase our deposits, seemed to the author to be the problem, accordingly, he drafted a proposal for a bill to amend the Bankruptcy Act of 1898, so that an effective legal procedure might come into existence, and submitted the same to President Hoover, and received an acknowledgement that the same had been turned over to the Interstate Commerce Commission for study.

Other men had similar ideas, and § 77 and § 77B were submitted to Congress. The author believes that Mr. Lloyd Garrison drafted the main portion of the Hastings Bill and that the Interstate Commerce Commission and its counsel drafted § 77, relating to the reorganization of railroads.

The above sets forth the broad economic background and the genesis of the reorganization concept, but there were even more pregnant factors. The rights of parties-in-interest were involved and the bond holder and general creditor were both clamorous. State foreclosures and federal equity proceedings were underway, and many bankruptcies were in the courts. Inequities in the administration of the law were soon recognized, and various investigations were instituted.

Before this time, however, namely in 1929, Hon. William J. Donovan, former Assistant Attorney General, aided by Messrs. Lloyd Garrison and George A. Leisure conducted a series of investigations into the administration of bankrupt estates before Hon. Thomas D. Thacher, then Judge of the United States District Court for the Southern District of New York. Out of these hearings five remedies were suggested:

(1) More prompt administration upon; (2) a more business-like basis; (3) the relief of the courts from administrative burdens; (4) the limitation of credit control to cases of general creditor interest, and the appointment in such cases of creditor committees to assist in administration; and (5) stricter enforcement of the criminal and discharge provisions of the Act.[1]

This investigation was related to ordinary bankruptcy for, at that time the Debtor Relief Provisions had not yet been enacted.

The Donovan report led to a nation-wide survey by the Department of Justice under an order of President Hoover, dated July 29, 1930. Judge Thacher, who had become Solicitor General, and Mr. Lloyd K. Garrison, Dean of the Law School of the University of Wisconsin, presented a comprehensive report on December 5, 1931, and aided in the drafting of the Hastings-Michener Bill, which was introduced in the 72nd Congress in April 1932.[2]

It was at the hearings on the Hastings-Michener Bill before a joint special committee of the Senate and House Judiciary Committees that Mr. Robert A. B. Cook of Boston was recognized and presented his views. Mr. Cook, who might be called the father of the National Bankruptcy Conference, has very kindly furnished the author with his story of how the National Bankruptcy Conference came into being, and the liberty has been taken of quoting from

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[1] Report of the Committee on the Judiciary No. 1409 to accompany H.R. 8046, 75th Congress, 1st Session, Page 2.

[2] See treatise on Bankruptcy for Accountants, Banks, page 3.

his letter as follows:

"Judge Thacher took Mr. Garrison with him, and the latter at once set about the drafting of a bill. In due course this bill was presented to Congress, and public hearings were started in Washington before a joint special committee of the Senate and House Judiciary Committees. Mr. Garrison presented the proponents' side of the case. At the conclusion of his remarks, and because I had to be in Boston the next day, I was recognized to present the opponent's side. Towards the conclusion of my remarks and after pointing out the inadequacies of the bill before the Committee, I reminded the Special Committee that in the past the Bankruptcy Committees of various nationally known organizations had happily cooperated, with the result that the bills previously introduced had represented the thoughts of these national organizations, and, while I recognized it probably would not be possible to get a large group together and to secure the views of these national associations in time to be heard in connection with the pending bill, or any substitute therefor, nevertheless I did want to call into conference men associated with some of these organizations, and who I felt were well qualified to prepare and provide suitable amendments for the purposes of the Committee. This permission was granted."

"The next day and upon my return to Boston, I had a visit from Reuben Hunt of California, then attending a tennis tournament in Boston, and before we parted we had arranged for Paul King of Detroit, Carl Friebolin of Cleveland and Jacob Lashly of St. Louis to be in Boston the following Sunday. I knew that Mrs. Cook and our only child then at home were leaving on the steamer for the other side and that we would have the house to ourselves. Mr. and Mrs. King came, and later were joined by Mr. Friebolin and Mr. Lashly. On Monday Mr. Hunt, Professor MacLachlan of Harvard, and Joseph B. Jacobs of Boston, now deceased, who had served conspicuously on various bankruptcy committees joined the meeting and with myself constituted the roster of the original meeting. Mrs. King was designated house mother, and Paul was made chairman. Our first thoughts were to undertake 'a short form' bill, realizing, of course, that an over-all revision would involve much time, and certainly would not have the same chance of early passage as a shorter bill. However, before we concluded our activities, which lasted throughout the week, we found ourselves laying plans for a comprehensive revision. Paul had already designated our group as National Bankruptcy Conference, and had expressed the thought that the Conference should be kept alive and should be expanded from time to time so as to take in representatives of other organizations interested in the subject. All the work performed at this first conference, including the secretarial work, was performed in our home in Wellesley Hills, Massachusetts."

Under the patient and painstaking leadership of Paul King, of beloved memory, the Conference took shape, and committees of various national groups were appointed to sit in as active conferees in this new, and what was to be, powerful and significant body. Committees from the American Bar Association, the Commercial Law League of America, the National Association of Referees in Bankruptcy and the National Association of Credit Men, together with certain individuals including Professor James A. MacLachlan of Harvard and the author gathered in Chicago for a three day session. In later sessions held in various cities, although mainly in Washington, D. C., Friday, Saturday and Sunday were days of intense and thrilling comradeship, and on Mondays the drafting committee would whip into shape the work of the three preceding days. Later the American Institute of Accountants and the American Bankers Association appointed committees, and other leading individuals became part of the group. The meetings of the National Bankruptcy Conference were usually twice a year, and continued thus until the passage of the Chandler Act in June 1938.

No adequate recognition can be given to the voluminous correspondence that was almost daily between the members or to the unceasing labors of Jacob I. Weinstein of Philadelphia, Chairman of the Drafting Committee. It must be recorded that the subject matter of the deliberations involved billions of dollars of property, highly conflicting interests, and a great body of Judicial Law. Members of the Conference were for the most part learned men in the law, but they listened with respect when Jim MacLachlan discussed for two hours the historical background of the law on "Preferences," or when the keen mind of Watson Adair threw light on some difficult matter.

The conference would start at 10 A.M. and continue, more often than not, to long past midnight, with time out for a snack or a walk around the White House in the falling snow. When the weather was cold Paul would heap the logs in the fireplace and a lively debate would crop up. These busy men were not too busy to listen patiently and to give of themselves and their time. A never-to-be-forgotton evening was when Jake Lashly talked to uphold the section on jury trials. Jake was not well, but it was a subject dear to his heart. One evening, when the need for relaxation was apparent, after a particularly gruelling day, Ed Sunderland of New York quietly informed us that we were all his guests for the evening, and we all enjoyed the respite of good food and good entertainment.

Paul told us the story of the first meeting at Wellesley Hills, how it was hoped that a complete bill might be written, but after three days they still found themselves discussing Section One. In the first Chicago meeting, the author thinks in 1933, we had the Hastings-Michener Bill which had passed the House but had failed in the Senate, before us, and this new procedure necessitated the setting up of a new act of bankruptcy. Insolvency could not be the test, for that involved the question of valuations, and to value a railroad system or a large enterprise, was not only unfair at the depressed prices of the early thirties, but would have taken many months, or even years to complete. Accordingly, the fifth act of bankruptcy provided in substance that a petition might be filed where the debtor was insolvent, or *unable to pay his debts as they mature* and that the debtor should have suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of all or a major portion of his property. This fifth act was kin to the Canadian law, and brought within the scope of Federal Administration under the Bankruptcy Act those cases which were in State foreclosure and Federal Equity proceedings. Provisions for the relief of debtors, with the debtor-in-possession concept were accepted, and one might imagine that the ghost of the act of August 19, 1841 turned in its historical sleep.

The McKeown Bill setting up the famous § 77B became law in 1934, and the courts set in motion the machinery of reorganization.

As the magnitude of reorganization began to be realized and abuses crept in, it was but natural that Government should take a hand, the Sabath Committee held many hearings and presented a modified bill to Congress. The McAdoo Committee presented a report prepared by Percival E. Jackson, its counsel, and the Securities and Exchange Commission conducted exhaustive investigations and submitted a number of reports thereon to the Congress.

The securities and Exchange Commission which had then been but recently organized was represented in hearings before the National Bankruptcy Conference by William O. Douglas (now Mr. Justice Douglas), and his suggestions not only were inspiring but many of them were adopted. The Securities and Exchange Commission was vested with advisory power to aid the courts in the determination of whether or not the plan was fair, equitable and feasible. The disinterested person became a live factor, and full disclosures of inter-related interests was required. The McKeown bill, or § 77B thus underwent a sea change, and the Chandler Act under the statesmanlike guidance of Congressman Chandler, Tennessee, became the final and permanent statute on reorganizations. The years had rolled by, it was now June 1938, and five full years of labor had elapsed, and it was reward indeed to the laborers to hear the warm words of praise from Congressman Sam Hobbs of Alabama who stated that in his thirty years' experience as a legislator in Congress he had never seen so fine a piece of legislative draftsmanship, nor had he known of such years of unselfish devotion as that given by the members of the National Bankruptcy Conference, and on August 1938 on the floor of the House, he spoke appreciatively of the work of the Conference mentioning by name many of the members.

It would seem that the work of the Conference was done, and at a victory dinner in Cleveland to celebrate the pas-

sage of the Chandler Act, the members gathered to discuss the future. Some thought that the Conference should be incorporated and made a permanent body, others pointed out that in the very informality of its organization lay its strength. Accordingly it was decided to continue its existence as it had been awaiting the opportunity of further service.

One of the important services yet to be performed was that of education, members of the various organizations composing the Conference, agreed to hold symposiums among their own groups, and to the author's own knowledge both Carroll Teller and Charlie Adams did much to acquaint their groups in the middlewest. Jac Weinstein and John Gerdes both published books on the new law and numerous addresses which were printed and distributed were given by many of the members. The chairman requested the Circuit Judges to hold conferences with the referees in their circuits so that the referees might be informed of the new procedures.

A word should be uttered concerning finances. The Conference printed several voluminous Conference Prints and these were paid for out of contributions by the organization members thereof. Never did the budget exceed $1,000.00, and each member paid all of his own expenses. No thought was given to compensation for time spent, and many of the members participated at considerable pecuniary loss to themselves, and were glad to do so.

One cannot leave the five years 1933 to 1938 without some kindly mention of those who played a part and while it is not possible to remember all of the conferees, the author hopes he may be forgiven if he should mention some and forget others.

Bob Cook was the genial daddy, Paul the patient and tactful chairman, always able to keep his temper when the going got rough. Jac Weinstein, the artisan who fashioned the rough Ashlar with consumatic skill. Pete Olney, kindly protagonist of the just, John Gerdes, tower of strength in his erudition. Jake Lashly, bearing gifts of wisdom, urbane Ed Sunderland, always thoughtful and serene. Frank Olive, attentive and possessed of wide experience. Referee Carl Friebolin and later Fred Kruse, practical Bob Montgomery, Harry Zalkin, wise in stock brokerage, Reuben Hunt, and like a comet across the skies Mac, James MacLachlan.

Many more might be named, but the author will be laughed at if he uses more adjectives, so he will mention Colonel Needham and Homer Livingston, bankers; and of course, who could forget charming Charlie Adams, who has gone to his rest, and whose brilliant work was such an inspiration. Carroll Teller, Ben Wham and Luther Swanstrom, all of them from Chicago and each an authority in his field.

One cannot pass without some special word in memory of Paul King. He was a diminuitive person with a fine intellect and charming personality, and to him above all others must be given the main credit for the accomplishments achieved. He, of course, held the conference together. He, the architect, fashioned the structure made out of the thinking of many men, and to him — the accolade of history.

The work of the Conference was to continue through the years and helped in working out the so called Referees' Bill, worked out by the office of the Attorney General, and Hon. Henry P. Chandler, Administrator of the United States Courts, whereunder the referees in bankruptcy were brought within the Federal judiciary as permanent courts. Now, ten years after the passage of the Chandler Act, the Conference is still active and virile.

Much has been left unsaid. The author would like to discuss some of his pet theories, but common sense must prevail, and not too much liberty may be taken. In closing, however, he would like to make a few suggestions.

The Chandler Act made provisions whereby governmental taxing bodies might come to an agreement with the holders of special assessment or district bond issues without encroaching on sovereign rights, and this gives rise to the thought that perhaps a feasible way might be worked out within the concept of an International Law on Arrangements, whereby defaulting nations or their nationals could clean the slate of repudiated or defaulted debts. Perhaps within the frame work of the United Nations such a concept might be worked out, and what better group than the National Bankruptcy Conference could be found to explore the possibilities. Perhaps a Code! Perhaps a Court!

Earlier in this article we said we would indicate what in our opinion was the basic cause of the break in 1929. For a period of two generations the rapid growth of our economic frontiers had been facilitated by the use of the long term credit concept. Bond issues were floated to build railroads, utility systems, industrial plant, office buildings, hotels and apartment houses. These bond issues carried small repayment provisions or none at all, but did carry final maturity dates. It was through the use of the long term credit concept that we developed our marvelous economic mechanism, but the method was wrong. A day of reckoning had to arrive, serial maturities defaulted, even interest payments went into default, and finally final maturity dates arrived and refinancing was difficult. As early as 1913 one railroad refinanced two issues for one hundred million dollars to mature in 2013, so through the years this collosus of static debt mounted, and the credit spiral had to reach a peak. The stock market break was but a manifestation of the unsound credit structure.

The author believes that plant may come into existence without the use of bond issues. He believes that the true justification for plant expansion lies in consumer demand and not availability of long term credit. It would seem to be axiomatic that plant should be built with invested and not borrowed capital. The priority which the bond issue enjoyed in earnings and liquidation gave to such securities the nature of highest grade, of better worth than preferred or common stocks. But the author postulates a question: Of two corporations, theoretically identical except for the nature of their capital structures, which is the stronger — the one whose plant has been built with borrowed money, the bond issue, or the one whose plant has been built with invested capital? The simple answer is that the company which has no debt is a stronger company than the one which is heavily laden with debts. Which is then the better security, the first mortgage lien of the company heavily laden with debt, or the preferred stock of the company with no debt? The question might be debatable, but if we introduce the character of permanent priority to the preferred stock, the answer again is simple, for it will be, "Why, of course, the preferred stock is a better security than the lien, for the lien may default and all the lienholder will get after foreclosure or reorganization will be an equity interest in assets depleted by costs and dirupted going value."

The author has conceived of and designed a type of Protected Preferred Stock ahead of which no major issue of debt may be incurred by writing into the corporate charter and into the terms of the Certificate, the provision that no senior capital issue, either bond or stock, superior to that issue of Protected Preferred Stock then presently authorized to be issued may ever be issued. To provide for an expansive system of capital financing, it would be provided that additional shares of the same character of the Protected Preferred Stock might be issued at a reasonable cash discount.

If bankers, both commercial and investment would get together with the State Insurance Commissioners and view this subject broadmindedly, they could start a movement which would grow and permeate our capitalistic system of free enterprise, so that it would be impregnable to the virus of totalitarian ideologies. If labor economists took up the thought and adopted it as a national aim, they would do much to justify their claim to a share in management.

THE BANKRUPTCY REFORM ACT

HEARINGS

BEFORE THE

SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-FOURTH CONGRESS

FIRST SESSION

ON

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PART II

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ALPHABETICAL LISTING

There is a suggested change for sections 7-311 and 7-314, which are, again, really by way of clarification and do not perform any substantive purpose, or suggest any substantive change.

Finally, if I may spend just one second going beyond chapter VII, there is attached to this report of the National Bankruptcy Conference on suggested statutory revisions, a final page which deals with chapter IX, railroad reorganizations.

The National Bankruptcy Conference suggests that railroad reorganizations, under chapter IX, be within the jurisdiction of the bankruptcy court and not, as is proposed by the Commission's bill, in the U.S. district court.

Accordingly, that page of the National Bankruptcy Conference report indicates what changes should be made in chapter IX to reflect the change in the jurisdiction to handle the chapter IX cases. No substantive changes have been suggested as yet for chapter IX. The National Bankruptcy Conference, as a matter of fact, have not yet had a chance to consider the substantive matters in chapter IX of the Commission's proposal.

Thank you very much.

Senator BURDICK. Thank you very much.

Again, I want to thank you for this contribution, and the previous ones that you have made to this committee.

Mr. Smith?

STATEMENT OF GERRY SMITH, PRACTICING ATTORNEY, PHOENIX, ARIZ.

Mr. SMITH. Mr. Chairman, I want to first say that I very much appreciate the opportunity to be here this morning. Since I have submitted a written statement, I hope to keep my remarks short so that we can have some time for questions, particularly in light of the fact that we have Dean King and Professor Countryman here.

Dean King, as you will recall, is the one who essentially did the work for the Commission as far as the basic suggestion that chapters X and XI and also XII be consolidated into one chapter for rehabilitation of businesses. So I hope we will have time to get some of his thoughts.

I, primarily, want to address myself to the question of whether there is a need and is it desirable to consolidate chapter XI and chapter X. I strongly believe that it is important that we consolidate the existing chapters. There is an area of confusion and uncertainty to the practitioner as to which chapter should be applicable; there is no dividing line.

The Supreme Court has tussled with this problem and has not been able to give a dividing line, and indeed says that it depends upon the needs to be served in the particular case as to whether it should be in chapter XI or chapter X.

Well, you really should not have to decide that by process of litigation. You should be before the court, or whatever structure is decided on, in order to have a business rehabilitation go forward. There should be no need to litigate as to whether you are under the proper chapter. You should have the relief—whatever it is—desired, and you should be there and you should proceed with it.

Now the real issue is not which chapter is involved. The real issues are who controls the proceeding and who gets the fruits of the reorganization if it is successful.

Under chapter XI today, the debtor controls the proceeding; only the debtor can propose a plan; only the debtor can initiate the proceeding. Obviously, if you are a debtor, regardless of your past misconduct or the reasons why you are in the financial straits, you would want to be under chapter XI. Indeed, many financial institutions insist on chapter XI because they have a close relationship with the debtor, and they are comfortable because they can control the proceeding through the continued lifeblood of that business, the necessary financing.

Now, back in the thirties when the report of the Protective Committee study by the Securities and Exchange Commission concluded that there was a need for additional protections in reorganizations, those protections were drafted into chapter X, and unfortunately it became a fairly complex chapter. And that is another reason why lawyers and businessmen want nothing to do with chapter X; it is cumbersome, it is difficult.

But there is another reason also, and that is that debt must be taken care of before anything can go to stockholders. So obviously, the owners of an insolvent corporation are not going to precipitate a chapter X since the result would be to wipe out their interest in the corporation.

So there are built-in reasons why businesses and businessmen do not utilize chapter X, and the protections that were drafted into chapter X have not been available. Chapter X is the dominant reorganization vehicle today, and it will continue to be so. Now the Commission felt that there was still a need to protect the unsophisticated, the owners of widely held debt involved in many business rehabilitations. And it felt that the protecting should be available, if needed, in any given situation. And therefore, it recommended that we do away with the dichotomy between the chapters and have the protections there if they are needed.

The Commission also realized that we had to accommodate easy economical rehabilitations. Let us say we have a small businessman who has a cash flow problem. He does not need a major reorganization; this businessman needs some time within which to utilize his resources that are available to get the cash flow up again. You must preserve the expeditious and economical type of reorganization, and that is one of the reasons I appreciate the opportunity to speak this morning because I feel that what the Commission has done does preserve that.

There have been concerns raised, for example, by the Commercial Bankruptcy Committee of the American Bar Association. And in my prepared remarks, I have addressed myself to those concerns. And I believe that with only a few minor changes, if indeed the Congress believes that such changes are appropriate, chapter VII can meet the requests of the American Bar Association's Commercial Bankruptcy Committee. I do not see that there are any major problems here.

Senator BURDICK. Does your statement have the language of those?

Mr. SMITH. Yes, it does. I do not want to touch on them to any great detail, except to point out a few examples. In the area of who manages the business during the chapter proceeding, the Commission created a presumption, if you will recall, that if there was $1 million or

more in debt, and 300 security holders, there should be a change of management.

This has concerned many. The National Bankruptcy Conference, for example, is concerned and concluded that there should not be a presumption, that this should be left to the discretion of the court. And again, this is something that is easily remedied. We do not need to have a separate chapter XI and a separate chapter X to accommodate that result. It is something that we can address in one chapter; there is no reason to have the complexity that we have today.

Another matter of concern is whether there can be solicitation of acceptances of a plan under chapter VII. Today you may have a troubled business that tries to work something out with its creditors outside of a bankruptcy case. And you may have most of the creditors willing to go along, but you have some recalcitrant creditors. So you have to file a chapter XI; you already have your plan agreed to by the necessary majority. There should be no great delay in having this accomplished. Today you can use the acceptances you previously received.

The Commission did not intend in any way, where you are not affecting publicly held securities, to say that you cannot use such acceptances. Now this is simply a drafting point, and I have touched on it in my memorandum. It is an area where the Commission did not intend to disturb the existing law on that point, and any question can be cleared up easily.

I think perhaps the most important change procedurally is that there be the ability on the part of creditors to file plans. Even if we end up with a chapter XI, chapter X approach, it is extremely important that creditors have the ability to file a plan because otherwise creditors really have no alternative. They can either force a liquidation or attempt to convert to chapter X, and that is not what they want. They want an expeditious reorganization, but they also want a say in what happens, and they do not want to have to coerce better provisions of the plan by threatening disaster—that is, liquidation or a chapter X which delays the rehabilitation of the business.

So, regardless of what Congress does, in my opinion it is extremely important that there be the ability on the part of creditors to suggest what the terms of the plan should be. Thank you.

Senator BURDICK. In both X and XI?

Mr. SMITH. Yes.

Mr. KING. If I may respond to that for one second, Mr. Chairman. The National Bankruptcy Conference recognizes also that that is a proper provision as contained in chapter VII but feels that for a period of time, at least in a chapter XI type case, that the debtor have the exclusive right to file a plan. But that after time limitation, creditors may also propose a plan.

Mr. SMITH. There was a similar suggestion, Mr. Chairman, by the American Bar Association committee that is dealing with this, and I really have no problem with the idea. It still gives the creditors a viable alternative, short of forcing a liquidation or a chapter X. Let's give the debtor a period of time. I have no problem with that.

Senator BURDICK. Do you gentlemen agree on that period?

Mr. SMITH. The American Bar Association committee has suggested there be a 90-day period within which a plan can be filed, and 60 days

thereafter within which to obtain confirmation. I have no objection with that period of time.

Mr. KING. The period fixed by the National Bankruptcy Conference—obviously, any period that would be fixed is purely arbitrary, anyway—is very similar to that. It is a period of 30 days after the first date set for the first meeting of creditors, which can be a period, therefore, of something like 60 or 70 days after the filing of a petition. So, that is very similar. But I think that is just the mechanics, really, that anybody is talking about. Any period that would be fixed, I suggest, would be purely arbitrary anyway.

Senator BURDICK. I know it is mechanics, but we have to put a figure down in the bill.

Mr. KING. Well, there is a suggestion specifically made by the National Bankruptcy Conference in the report that you have.

Mr. COUNTRYMAN. One advantage, Mr. Chairman, to the National Bankruptcy Conference's proposals is that they are all nicely drafted as amendments to the bill.

Senator BURDICK. The staff now has some questions.

Mr. BURGUM. Now, this question—or any question that is asked—would be to any one of the three of you who wishes to answer, although it does deal specifically with the comments made by Gerry Smith. In prior hearings, we have had witnesses testify that the objectives of chapters X and XI are quite different; that chapter X is designed to permit the restructuring of corporations affecting the secured creditors, equity security holders, unsecured creditors, whereas chapter XI was intended to rehabilitate a debtor through the modification or extension of his unsecured debt.

Now, is this statement basically accurate?

Mr. SMITH. I think it basically is accurate. Originally, chapter XI was prepared and introduced at the request of the National Association of Credit Managers, and those involved were primarily concerned with extensions and modification of trade debt. And it was anticipated that relatively small businesses, in the sense of the dollar magnitude and the number of creditors, would utilize chapter XI. It was sort of a forced, common-law type of extension or composition, because a majority could force all creditors to go along. You could not do this under State law. You had to have a creditor's consent, or you could not achieve this. It was a quick and expeditious method of dealing with small businesses. But it has grown over the years to the point that it is utilized for the largest businesses imaginable.

Dean King can comment on the use in the large business context. But I think that chapter XI basically was anticipated for the small business, and it has grown all out of proportion. And there are no protections available in that chapter.

Mr. BURGUM. Would anyone else like to respond?

Mr. KING. I think Mr. Smith is right; that was the original concept of chapter XI. In recent years, however, that original concept has been eroded. There is no question but that chapter XI is being used by large companies with millions, even billions, now, in dollars indebt, with many securityholders—both equity and debt securityholders—in the public area. What is happening, really, is that it is the type of relief that is necessary which will often control the decision as to what chapter may be utilized, rather than the size of the company.

Mr. COUNTRYMAN. Could I say a word, Mr. Burgum? I do not believe—I think there has been one witness before this committee who made that argument to you as a reason for preserving two separate chapters. I do not believe it is a reason for preserving two separate chapters, as Mr. Smith explained. The proposed chapter VII is designed to handle both types of cases.

Now, the Commercial Bankruptcy Committee of the American Bar Association looked very closely into this question, and it had on it almost all of the lawyers whose practice deals with these sorts of cases. And that committee came to the conclusion that the Commission was right to propose a single chapter to deal with both different types of situations. So you do not get, in the first place, into the mess that Mr. Smith mentioned of where do you file. You do not have a lot of litigation about whether you have filed in the proper place.

The proposed chapter VII is designed to get under chapter VII, and then as you work out the case, you decide whether this is a chapter XI type. And if it is, you can handle it in proposed chapter VII, or you can decide this is a chapter X type. And if it is, you can handle that in proposed chapter VII. And I respectfully submit, Mr. Burgum, that the people who are opposing this idea at this point are simply people who do not want to change their method of practicing law. They are used to the separate chapters, and they do not want anything to change.

Just as I sometimes feel aghast that this committee, and its corresponding committee in the House, are about to repeal everything I know about bankruptcy law, that startles me a little bit, too. But that is not a reason for not doing it.

Mr. BURGUM. Now, the Commission had concluded, before it combined chapter VII in the process of its deliberation, that neither chapter X nor chapter XI is precisely suited to the needs that arise out of many common business situations; that neither one gives you the total flexibility that you need. However, we have had one witness state, and others imply, that in the some 35 years that we have had chapters X and XI, that they are not aware of an insolvent debtor who could not obtain the necessary and adequate relief under chapter X or XI. And one stated specifically that nor has he seen any documentation of any such case where the debtor could not obtain relief, either under chapter X or chapter XI.

Now, the question which I would like to have you address yourselves to is, did you know of such a situation, or did you envision such a situation?

Mr. SMITH. Let me take a stab at that one. It seems clear to me that where you need to do something, as far as the equity interests, you are going to have to do something in addition to filing a chapter XI. You may have to have, at the same time, a procedure going whereby, either pursuant to the State corporation code, or some other vehicle, you can deal with the equity interests.

It is clear that chapter XI does not allow a plan to affect the equity interests. So, you are going to need some other vehicle that you utilize at the same time. Similarly, you cannot—at least in the plan—affect secured creditors. So if you have widely-held secured debt, chapter XI is not going to be the vehicle that you need to deal with

that. You are just going to have to do something else. You are going to have to pay it off, or you are going to have to continue to meet the terms of those obligations. Chapter XI will not deal with those situations.

Chapter X will allow you to reorganize corporations. But it does not deal with partnerships, and it does not deal with individuals. So, to say that chapter X will accomodate any business is absolutely nonsense. It will not. It can only, as it is presently drafted, accommodate corporations.

So, I do not agree with the basic point. But I agree that any major corporate business can get adequate relief under chapter X. The problem is that the debtor is not going to control the proceeding in X, and the debtor—the ownership interests—may not retain any interest in X. So there is, naturally, a reason why people shift over to chapter XI and utilize it to whatever extent they need to; wrap it, play with it, use other proceedings in order to have a reorganization that they control and are going to end up with some of the fruits of the reorganization pie.

Mr. KING. I would like to add two things to that statement. One is that, just within the last couple of days, I received an inquiry on the telephone by a knowledgeable attorney in New York as to whether the particular debtor there involved could use chapter XII. This was a situation that involved real estate. They wanted to be able to use chapter XII. However, I had to tell them that that was impossible, because it was a corporate debtor; and because it was a corporate debor, and chapter XII was not available, and that the major problem was with regard to liens, because the only available relief would be under chapter X.

Chapter X was not suited for their purposes. So that now, they are stewing around, trying to figure out some way of getting the relief that is necessary. So that is one situation.

Now, the other response to the question, I think, is that it is a nonquestion. It really is not directed to the basic issues. A lot of the testimony, I fear, that has been presented to this subcommittee does not go to the very reasons why the consolidation of the chapters was originally proposed. It was not simply for the purpose of taking three chapters and putting them together into one. What originally instigated it was to look at the present operations of the chapters, and to see whether there are any defects in them which could be cured. And that is what led to a consolidation idea.

For example, one of the problems in chapter XI today is that it can be instituted only by the voluntary petition of the debtor. Concomitant with that is the problem that a plan under chapter XI today can be proposed only by the debtor. Therefore, the creditors are left to the whims and desires of the debtor. They have little or no control. They cannot tell the debtor when to file.

Now, what happens too often in these cases is that the debtor files too late. When there is a real money problem, it will file on a Thurdsay, when a payroll has to be met on a Friday. If creditors had some say, if creditors were able to file an involuntary chapter XI, it is quite possible that they would do so at a more meaningful time, sometime earlier in the period of financial difficulties of that particular debtor.

Secondly, when the debtor has the only opportunity to file a plan, that means essentially that the creditors, in many cases, are given the plan on a take-it-or-leave-it basis. Their only leverage is to say, "We will not take this plan; therefore, we will permit you to go into liquidation." Now, that certainly may well not be in the best interest of the creditors, because the plan of the debtor will probably provide for some payment that will be a little bit more than what they would get in liquidation.

On the other hand, the creditors may well feel that the debtor can afford to pay even more than is being proposed in the plan. But they have little say, and little leverage, to control the provisions of the plan. Therefore, one of the issues is, should creditors be able to file an involuntary petition? Another issue: should creditors be able to file a plan? A third problem is that today, in so many cases, there is a lot of secured debt.

Even though the plan cannot deal in chapter XI with secured debt, arrangements are made outside of the plan to deal with the secured debt. It would be a more forthright and honest approach to permit a plan to deal directly with secured debt when necessary. So that is another proposal that is made in present chapter VII.

A third has to do with the appointment of a trustee. One of the problems in chapter X is that it is mandated by the statute in every case to appoint a disinterested trustee. This means a change of management. It means problems with trade creditors in particular, and also with bank creditors. You do not know whether you are going to get somebody familiar with the business, and that leads to the result, in so many cases, of filing an XI where perhaps an X would be a more appropriate proceeding.

Chapter VII would eliminate the mandatory nature of the appointment of a trustee, and hopefully make a present chapter X somewhat less complex. Now, if all of these issues are responded to in the way that I have suggested, then that leads to the conclusion, essentially, that the chapters should be consolidated, because there is no longer any real reason for keeping them separate. So that, really, attention has to be focused on the underlying issues rather than the basic concept of consolidation.

Mr. COUNTRYMAN. Mr. Burgum, I would just like to add that I think the Commission's proposed chapter VII, if adopted, would finally get around to doing what Congress tried to do in 1938, when they tried to replace the old equity receivership, where there was no judicial scrutiny, really, of the contents of the plan, with the judicially supervised reorganization. As both Mr. Smith and Dean King have explained, the use of chapter XI today has grown way beyond what was ever contemplated. We see large outfits like W. T. Grant in chapter XI, and that was never even contemplated in 1938; and as they have both explained, since the plan can only deal with the unsecured debt, if it is necessary to deal with secured debt or with stock, that is done by an informal arrangment outside of the plan, which really never comes under court scrutiny.

And, that may explain why the Brookings Report found that only one-third of the people who went through a chapter XI reorganization survived it. Because the court was not able to take a look at all the commitments that were made to raise the money to keep going.

The great virtue of the Commission's chapter VII is that it would bring all aspects of the plan in a chapter XI type case before the court for examination. It determines whether the entire package is feasible. Under present chapter XI, the court only looks at what you are doing with the unsecured debt. I think that is a big advantage of proposed chapter VII.

Mr. KING. I could add one more comment with respect to the disadvantage of having the separate chapters which comes up quite often today. I have seen this in my own experience. That is, the attorney who is being consulted by the debtor oftentimes has a very, very difficult decision to make at the outset: whether to file a petition in chapter XI or in chapter X. That decision itself can take many, many hours in reviewing everything, discussion, and in just trying to make up your mind.

Now, even after that—after it is decided to file a chapter XI petition—it is done with a certain feeling of insecurity. You never know at what stage in that proceeding somebody over whom you have absolutely no control may file a motion to convert the case from XI to X. That can come early, it can come late, and it can in effect destroy the whole proceeding. I frankly think it should be unnecessary to have to go through the original decisionmaking process, and then also have to worry about a possible conversion later on in the proceeding.

Mr. Burgum. All right.

From your answers, I take it that it is quite possible, under the proposed chapter VII, to restructure a corporate debtor, taking care of the interest of the stockholders, the secured and unsecured creditors, the same as you could under chapter X now, if that is what the situation called for.

Mr. KING. That is correct.

Mr. BURGUM. And the same would be true if you had a small debtor dealing mainly with unsecured debt, which would now mandate a chapter XI proceeding. Under the present chapter VII, you could still have an identical proceeding to the chapter XI today.

Mr. KING. That is absolutely correct.

Mr. BURGUM. Then, I think it would also be true that the area that we are interested in ourselves is a unified chapter VII, for that debtor who exists in between the two ideals; who is the debtor that brings together the problems that would come under chapter X and XI, and cannot be solved today. Is that statement correct?

Mr. COUNTRYMAN. Yes, it is.

Mr. SMITH. Yes.

Mr. BURGUM. Now, a witness made a statement to this committee several months ago to the effect—and this is a direct quote—"Our economy is dependent upon flexible bankruptcy laws which can give insolvent debtors an opportunity to survive with the aid of creditor support." The inference from the record is that a proposed chapter VII would deprive the debtor of this flexibility and creditor support Would you address yourself to this remark? Is it basically true, and if it is inaccurate, then how is it inaccurate?

Mr. SMITH. Well, I am not so sure I agree that there must be a bankruptcy chapter allowing reorganizations under the Bankruptcy Act in order for our economy to continue functioning in a somewhat

comparable manner to what we anticipate and expect. I just do not believe that. I do not think that reorganizations are all that important, frankly, as far as the economy of the United States is concerned.

As far as the inference that somehow we are going to make it impossible to have business reorganizations in a reasonable, expeditious, sensible manner, I totally disagree with that. I think that what we have accomplished here is to eliminate much of the litigation, change the guidelines as far as who has a say in what creditors are to get—and they are really the ones who own the business that is insolvent—and we have accommodated everything in one chapter thereby avoiding useless litigation over which chapter should control.

Mr. BURGUM. Then, would the inference not be that the flexibility which we are talking about would be more readily available or inherent in the combined chapter VII than it would in a separate X and XI?

Mr. SMITH. Yes.

Mr. KING. That would be my response. I think there is much greater flexibility encompassed by proposed chapter VII than under the present law.

Mr. BURGUM. Is it possible that this type of view might stem from a misimpression that the proposed chapter VII is really only chapter X redressed, without the flexibility of the chapter XI?

Mr. KING. I think that is possible. I think that it is possible that the view does come from a basic misreading or misconception of what is intended by chapter VII, and that is one of the reasons why the National Bankruptcy Conference has proposed some of these drafting changes. As far as I am concerned personally, most of these changes are not necessary to accomplish that purpose; that is, the provisions are there anyway. These changes just clarify and make more apparent that this is exactly what was intended.

Mr. BURGUM. The last witness that testified prior to your appearance on chapter VII was Mr. Creel from Dallas, Tex., representing the Dallas Bar Association. And to the knowledge of this committee, he was the first witness who made the statement that, while you could do everything under chapter VII that you could do under a X and XI, plus some more probably, his concern was that the non-expert practitioner would have a hard time digging it out; he found readily where you could have a straight X or a straight XI under the present VII, or a combination, but he felt that the way the chapter was laid out is confusing.

But, that was the first witness that this committee had that did not contend that—or seem to imply that—the new chapter VII was really a chapter X, and thus we had lost XI somewhere in the process. That is the reason we have asked this question about the possible confusion. Mr. Countryman?

Mr. COUNTRYMAN. The Commercial Bankruptcy Committee of the ABA addressed itself to this specific question. It is a large committee, and it started out with a number of members opposed to chapter VII, basically from the viewpoint that you have expressed: that what they have done here is given us a X and forgotten about XI. So that large group sat down and worked its way through the entire chapter, to see if they could accommodate within the confines of chapter VII the sort of case they are now used to running through chapter XI. They

ended up, with one dissenting vote, concluding that they could do everything and more under the proposed chapter VII than they could now do under chapter XI.

And, so far as the nonexpert practitioner having difficulty with chapter VII, he should not have nearly as much difficulty with chapter VII as he now has with trying to figure out whether he belongs in XI or X, for the reasons Dean King has given you. That is one that will baffle the expert practitioner today.

Mr. BURGUM. The problem with X and XI that arises from the ability of the creditor to move to have an XI transferred to X has already been mentioned.

Is there a significant loss of time or any other legal problems that arise from the transfer of particularly latent proceedings?

Mr. Smith.

Mr. SMITH. Yes, this can be a serious problem. One famous case is the *Canandaigua* case that arose in the second circuit. There the chapter XI case had progressed to the point of confirmation of a plan acceptable to the creditors, but the SEC sought to have the use converted to chapter X, and even though the second circuit felt that it was probably the wrong thing to do, it felt constrained to go ahead and rule that the case should be converted to chapter X. Yes; the attempt to transfer can occur late in the game and it can create real problems.

Now, the point has been made by some that conversion does not occur all that often, maybe only a few hundred cases out of all the reorganizations that are pending. Well, even if there are only a few, two, three, or four, that is too many. And it can present problems in a given reorganization if there is litigation over which chapter is applicable and it may not be resolved until it goes all the way, for example in *Canandaigua*, to the court of appeals and that is going to delay reorganization for a considerable period.

Mr. KING. One of the problems is that, well, as Mr. Smith has mentioned, there have been occasions when a motion to convert has been made on the eve of confirmation of a plan. After the plan has been worked out with the creditors' committee, after it has been proposed, and after it has been accepted by the creditors but just prior to confirmation.

So that is one problem. Another problem is a very practical one. If there is the possibility of moving to convert a case from XI to X, you have a certain amount of uncertainty; in an operating case, one of the problems is to have the trade continue to ship merchandise, for example.

There is a psychological effect on the possibility of somebody moving to convert a case from XI to X. The trade may feel that if that may happen, it just does not want to continue shipping. And that can create some very, very practical problems.

For example, in the *W. T. Grant* case at the informal meeting that was held shortly after the filing of the petition in the grand ballroom of the Americana Hotel in New York City, there were close to 2,000 creditors in the audience.

The representation was given, or representations were given as to why XI was chosen over X. And there was an overwhelming response on the part of creditors favorable toward chapter XI. But you could

feel a concern among the body that anytime the case could conceivably be converted.

As a matter of fact, an attorney who had at that time made a motion to convert, but had the motion dismissed on jurisdictional grounds, noted during this meeting that he was going to appeal that decision; he was not at all warmly treated by the general body of creditors. So, it does have a certain psychological effect even in being able to continue the operation of a business in chapter XI.

Mr. COUNTRYMAN. I have nothing to add to what has been said on that point.

Mr. BURGUM. Well, at this time we have no further questions except to sum up the testimony in a very basic sense. I read the testimony of all three of you this morning that you feel that a unified chapter VII as proposed by the Commission with the amendments suggested by the National Bankruptcy Conference would be a more useful tool for the rehabilitation of business debtors than the present chapter X, XI, and XII.

Is that substantially correct?

Mr. SMITH. Yes.

Mr. COUNTRYMAN. Yes.

Mr. KING. Yes.

Mr. BURGUM. Oh, we do have one more question.

Section 7-314 of the Commission's draft states that the provisions of any law requiring registration of securities or registration or licensing of issuers of securities shall not apply, not only to issuance of certificates in the course of bankruptcy proceedings, but also to any transaction in any security issue, pursuant to such proceedings with certain limited exceptions.

The SEC testimony before the subcommittee felt that this would create a perpetual exemption from the securities laws for securities which happened to have been originally issued in a transaction on the bankruptcy laws.

They can see no justification whatsoever for allowing a publicly held company to enjoy a perpetual exemption from the continual disclosure and investigative protection scheme embodied in the Securities and Exchange Act simply because that company has gone through bankruptcy or reorganization.

Would you comment on this section and the SEC's reaction to it?

Mr. COUNTRYMAN. I can comment, I would be glad to, Mr. Burgum, but I cannot comment on the behalf of the National Bankruptcy Conference, because we have not addressed that point yet. We have been waiting for the SEC to formulate its position.

I will say that personally speaking, only for myself, I have been very concerned about the same thing and I agree with the SEC's position.

At our next meeting with the National Bankruptcy Conference at the end of January, the Conference will address that point. But none of us can speak for the Conference on that right now.

Mr. KING. I think that is right. I would endorse what Professor Countryman just said.

Mr. SMITH. I might be able to add something to that. I do not believe that the Commission intended to in any way override the provisions of the Securities Act as far as what the debtor had to do after reorganization was concluded.

For example, if the debtor otherwise would have to file certain papers under the 1934 act, it would continue to do so. I think all the Commission was aiming at in this provision was to say that if, for example, an individual received a share of stock in a reorganization, the individual who was not the issuer, or in control of or an affiliate of the issuer, would be free to go ahead and transfer the stock. And I think that we thought that we were coming out about where we were under the Securities Act of 1933; that is, that someone who has a share of stock in that situatiom would be free to go ahead and transder the stock without having to register the stock.

Mr. BURGUM. Thank you.

Senator BURDICK. Thank you for your informative presentation, gentlemen. Your prepared statement will be made a part of the record at this time.

[The prepared statements referred to follow:]

STATEMENT OF GERALD K. SMITH

I am Gerald K. Smith, a practicing lawyer with the Phoenix law firm of Lewis and Roca. Although I am a member of the National Bankruptcy Conference and the Commercial Bankruptcy Committee of the American Bar Association, and a former Deputy Director of the Commission on the Bankruptcy Laws of the United States, I am testifying before the Subcommittee on Improvements in Judicial Machinery solely at the request of the Subcommittee and I do not speak for or on behalf of the Commission, the Commercial Bankruptcy Committee or the National Bankruptcy Conference.

Concern has been expressed by some as to whether Chapter VII of the Commission's Bill prevents the expeditious and economical confirmation of a largely uncontested composition or extension with trade creditors now accommodated by present Chapter XI of the Bankruptcy Act. Although without portfolio, as the former member of the Commission's staff primarily responsible for the drafting of the Commission's proposed Chapter VII, I appreciate the opportunity to comment as to the concern expressed and to support the Commission's consolidation of Chapters X, XI and XII of the present Act.

COMPARATIVE ANALYSIS

In order to keep the text of my remarks as brief and to the point as possible, I have attached separate analyses of the treatment of a business rehabilitation in which the plan does not affect publicly held securities under the Commission's proposed Chapter VII, the Bankruptcy Judges' proposed Chapter VIII, and Chapter XI of the present Bankruptcy Act.[1] In summary form, the procedural steps are as follows:

Commission's proposed chapter VII	Existing chapter XI	Bankruptcy Judges' proposed chapter VIII
1. Petition filed with administrator.....	Petition filed with court.....	Petition filed with court.
2. Administrator appoints creditors' committee as soon as practicable.		
3. Independent trustee—Court may order administrator to appoint after hearing.	(a) Receiver may be appointed by court.	(a) Trustee—Court may order director to appoint (after hearing?)
	(b) Litigation may occur as to proper chapter.	(b) Litigation may occur as to proper chapter.
4. Administrator conducts meeting of creditors (and equity security holders if appropriate) 20 to 40 days after filing.	Court conducts 1st meeting of creditors (including election or appointment of creditors' committee 20 to 40 days after filing.	Court conducts 1st meeting of creditors (and equity security holders?) (including election or appointment of creditors' committee 20 to 40 days after filing.
5. Plan to be filed with administrator within time set by administrator.	Plan to be filed with court within time set by court.	Plan to be filed with court within time set by court.
6. Transmission and solicitation of acceptances.	Transmission and solicitation of acceptances.	Transmission and solicitation of acceptances.
7. Hearing on confirmation.....	Hearing on confirmation.....	Hearing on confirmation.

[1] Each reference to a section of the Commission's proposed Chapter VII is to the Report of the Commission on the Bankruptcy Laws of the United States, Part II, H.R. Doc. No. 93-137, 93rd Cong., 1st Sess. (1973), and each reference to a section of the Bankruptcy Judges' proposed Chapter VIII is to H.R. 16643, 93rd Cong., 2nd Sess. (1974), which is substantially the same as the bill reintroduced as H.R. 32, 94th Cong., 1st Sess. (1975).

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Commission's Proposed Chapter VII	Existing Chapter XI	Bankruptcy Judges' Proposed Chapter VIII
1. Petition filed with Administrator	Petition filed with Court	Petition filed with Court
2. Administrator appoints creditors' committee as soon as practicable		
3. Independent trustee - Court may order Administrator to appoint after hearing	a. Receiver may be appointed by Court	a. Trustee - Court may order Director to appoint (after hearing?)
	b. Litigation may occur as to proper chapter	b. Litigation may occur as to proper chapter
4. Administrator conducts meeting of creditors (and equity security holders if appropriate) 20 to 40 days after filing	Court conducts first meeting of creditors including election or appointment of creditors' committee 20 to 40 days after filing	Court conducts first meeting of creditors (and equity security holders?) including election or appointment of creditors' committee 20 to 40 days after filing
5. Plan to be filed with Administrator within time set by Administrator	Plan to be filed with Court within time set by Court	Plan to be filed with Court within time set by Court
6. Transmission and solicitation of acceptances	Transmission and solicitation of acceptances	Transmission and solicitation of acceptances
7. Hearing on confirmation	Hearing on confirmation	Hearing on confirmation

*. Each reference to a section of the Commission's proposed Chapter VII is to the Report of the Commission on the Bankruptcy Laws of the United States, Part II, H.R. Doc. No. 93-137, 93rd Cong., 1st Sess. (1973), which is the same as S. 236, 94th Cong., 1st Sess. (1975), and each reference to a section of the Bankruptcy Judges' proposed Chapter VIII is to S. 235, 94th Cong., 1st Sess. (1975).

It is readily apparent that the Commission's proposed Chapter VII provides a more expeditious vehicle for rehabilitation of a business needing relief from its trade creditors. There is no potential for disruption of the rehabilitation proceeding as a result of a motion to convert the proceeding to another chapter which may occur under present Chapter XI and proposed Chapter VIII at any time prior to the expiration of four months after the first date set for the first meeting of creditors, which is at least 20 days after the date of filing the petition. In addition, a creditors' committee can be appointed as soon as the petition is filed under proposed Chapter VII, while under existing Chapter XI and proposed Chapter VIII of the Judges' Bill, the creditors' committee cannot come into existence until the first meeting of creditors.

It is true that under proposed Chapter VII, if an independent trustee is appointed, there is to be an investigation of the "acts, conduct, liabilities, and financial condition of the debtor, the operation of his business and the desirability of his continuance thereof, and any other matter relevant to the case or to the formulation of a plan." And even if an independent trustee is not appointed, this investigation may be conducted by the administrator or a disinterested person appointed for that purpose. On the other hand, under existing Chapter XI, a creditors' committee is authorized to conduct similar inquiries and under the Bankruptcy Judges' proposed Chapter VIII, the committee is to do likewise and a disinterested person may be appointed to conduct the inquiry if a creditors' committee is not elected or

appointed. Since an independent trustee is normally appointed where there has been mismanagement or misconduct, the Commission's proposed Chapter VII will probably not result in an investigation except in those cases where a similar investigation would occur under either existing Chapter XI or proposed Chapter VIII of the Bankruptcy Judges' Bill. Especially is this so as to a plan which only affects trade debt and which has been accepted by a substantial majority of the trade creditors.

NEED FOR CONSOLIDATION AND THE REAL ISSUES

No one would argue with the concept that there should be an expeditious and economical method of rehabilitation for financially distressed businesses, whether large or small. The complexity of the procedure and the time involved will necessarily vary from case to case and is not necessarily related to the size of the business or whether the debtor is an individual, partnership or corporation. One of the basic problems with existing business rehabilitation provisions of the present Bankruptcy Act is whether Chapter XI or X is appropriate in a given case, an insoluble and unnecessary argument. There is no dividing line between the disparate rehabilitation chapters and one can probably not be devised. The result is that litigation occurs and rehabilitation is delayed.

The squabble over which chapter is applicable is not, of course, without motive or consequence. Under the present Act, the debtor and debtor's counsel control a Chapter XI case. In contrast, in a Chapter X case (unless the debtor's indebtedness

is less than $250,000), an independent trustee is appointed (Chapter X Rule 10-202(a)), operates the business, if authorized to do so (Chapter X Rule 10-207) and files a plan or a report as to why a plan cannot be filed (Chapter X Rule 10-208(a)). But not only control is at stake; the very fruits of the reorganization effort may be lost to stockholders and junior creditors under Chapter X as a result of the application of the absolute priority rule.

The Commission concluded that who should have control and who should share in the fruits of the rehabilitation should be decided forthrightly, not by an often unanswerable inquiry into which rehabilitation vehicle should be employed. Rehabilitation chapters were therefore consolidated and the real issues were brought into focus. First, as to the matter of control, under proposed Chapter VII the court is given discretion as to whether an independent trustee should be appointed. There is no arbitrary requirement that an independent trustee be appointed as under present Chapter X. If debts are $1,000,000 or more and there are 300 or more security holders, the court must direct the appointment of a trustee unless "it finds that the protection afforded by a trustee is unnecessary or that the expense would be disproportionate to the protection afforded." (§7-102(a)). Since security holders by definition excludes debt for goods and services (§1-102(18) and (42)), the presumption is not applicable to many cases. As to those cases, whether a trustee is to be appointed is in the discretion of the court. (§7-102(a)).

Obviously, the court will be influenced by the competence of present management and any prior misconduct of management. This is nothing new; it was the primary consideration in many of the decisions as to whether to convert to Chapter X.

As far as dividing the reorganization pie, trade creditor extensions and compositions are accommodated by the relaxation of the absolute priority rule

> "(a) by substituting for the unqualified 'fair and equitable' criterion, i.e., 'absolute or strict priority,' a test that precludes participation by junior interests where the going concern value does not cover senior interests, but easing the evidentiary basis for the valuation of the business; (b) by allowing another look after the facts are in; and (c) by allowing equity security interests to participate if their future contributions, e.g., continued management, are essential to the business." Report of the Commission of the Bankruptcy Laws of the United States, Part I, at 258, H.R. Doc. No. 93-137, 93rd Cong., 1st Sess. (1973).

In addition, and perhaps most important to advocates of expeditious trade creditor arrangements,

> "if no publicly held securities are affected by the plan of reorganization, and the court finds that the plan was knowingly and voluntarily accepted

by [each class of] the creditors and security holders affected after full disclosure, no finding of valuation as a basis for applying the 'fairness' doctrine is required." Id.

CONCERN THAT ECONOMICAL AND EXPEDITIOUS EXTENSIONS AND COMPOSITIONS ARE NOT ACCOMMODATED

The following is an analysis of how to eliminate problems suggested by some which have caused concern as to whether the Commission's proposed Chapter VII accommodates the type of reorganization now achievable under present Chapter XI "without undue requirements with respect to time and expense" including "a method whereby a non-statutory proceeding may be converted into a Chapter VII proceeding with the least loss of momentum." See 1974-1975 Annual Report of Commercial Bankruptcy Committee of the American Bar Association (July 2, 1975), at 8. See generally Coogan, Broude and Glatt, Comments on Some Reorganization Provisions of The Pending Bills, 30 Bus. Law. 1149 (1975).

Creditors' Committee. In connection with the out of court settlement which is frustrated by a minority, there is often a committee of creditors which has gained insight into the problems of the debtor and participated in the formulation of a plan acceptable to a substantial majority of the creditors. Some believe that the benefit of this effort will be lost unless the creditors' committee selected by the Administrator consists of a majority of the prefiling committee, which is possible under present Chapter XI. Section 7-101 of the Commission's

Bill provides that the official creditors' committee appointed by the administrator is to "ordinarily consist of seven persons, who shall be chosen from among the creditors [other than federal and state governments] holding the largest amount of unsecured claims against the debtor who are representative of the different types, if any, of the creditors having claims against the debtor." In some cases, this might preclude a majority of the unofficial creditors' committee being appointed to the official creditors' committee. If it is believed that there is merit to the idea of retaining a majority of the prefiling committee, this can be accommodated by amending §7-101(a) to provide that the administrator may appoint the official committee from among the largest unsecured creditors and the members of the prefiling committee.

Control. Concern has also been expressed about the presumption of a need for change of management where debts are $1,000,000 or more and there are 300 security holders. Again, this is easily remedied. If Congress believes that there should be no presumption, it can be eliminated and the court can be authorized to direct the administrator to appoint an independent trustee for cause shown.

Procedures Incompatible With Chapter XI. Concern has been expressed that certain duties of the trustee under Chapter VII, presumably those relating to investigation (§7-103(a)(5) and (6)) and the report of the results of the investigation (§7-103(a)(7)) are incompatible "with quick Chapter XI's." If Congress believes that an investigation and report may be

inappropriate in some cases where a trustee is appointed, §7-103(a)(5) can be amended to provide that this will occur only "if the administrator so authorizes," as in the case of §7-103(a)(6).

Prefiling Acceptances. Section 176 of present Chapter X precludes the solicitation of acceptances of a plan prior to court approval and transmittal of the plan and certain information to those solicited. Present Chapter XI has no such restriction and agreement is sometimes obtained prior to the filing of a Chapter XI by the requisite majorities. Some have expressed concern that the Commission's proposed Chapter VII does not accommodate the use of prepetition acceptances. This was not intended as to plans not affecting publicly held securities. See §7-307. Only plans affecting publicly held securities are subject to the present Chapter X requirement that approval and transmission of certain information take place prior to solicitation. The note to §7-306(a) states that "in order to accommodate present Chapter XI-type plans, the present Chapter X requirement of approval prior to transmittal to creditors and equity security holders is abandoned as to present Chapter XI-type plans if there are no publicly held securities." However, if it is believed that the concern has substance, the remedy is simple. A new subdivision can be added to §7-307 which states that acceptances of plans not affecting publicly held securities may be solicited at any time, even prior to the filing of the petition, to the extent otherwise permitted by applicable law.

Who May File the Plan. Other than the concept of an independent agency participating in the rehabilitation process, the most important change recommended by the Commission as to rehabilitation proceedings is the authorization of creditor plans (§7-304(b)). Under present Chapter XI, only the debtor may file a plan. Thus, the creditors are often faced with the undesirable choice of what the debtor offers or liquidation. Thus, allowing creditor plans is not a mere matter of scuttling presently expeditious relief under Chapter XI; it means that the debtor no longer can force an unfair plan on its creditors simply because the liquidation alternative is less desirable. If Congress prefers the present Chapter XI approach then, quite frankly, there should be two chapters as suggested by the Bankruptcy Judges, with all the attendant problems.

Some have suggested that the debtor should be given an exclusive period of time within which to file a plan and have it confirmed, as long as the plan does not affect publicly held securities. This is quite a different matter than precluding creditors from proposing a plan, and probably would do no real harm since the creditors have a real alternative to the debtor's plan, that is, the creditors can reject the debtor's plan and propose their own plan.

SEPARATE ANALYSIS

COMMISSION'S PROPOSED CHAPTER VII

A debtor eligible for relief may choose relief by way of liquidation or rehabilitation. If the debtor chooses rehabilitation relief under Chapter VII, the administrator directs such relief (§4-203(b)) and "[a]s soon as practicable after the filing of a voluntary petition," appoints an official creditors' committee. (§7-101(a)). The court can order the appointment of a trustee if necessary. (§7-102(a)). If a trustee is appointed, the trustee is to "investigate the acts, conduct, liabilities, and financial condition of the debtor, the operation of his business and the desirability of his continuance thereof, and any other matter relevant to the case or to the formulation of a plan." (§7-103(a)(5)). The trustee is also to file a plan or report as to why a plan cannot be formulated. (§§7-103(a)(9) and 7-304). If the court does not appoint a trustee, either the administrator or a disinterested person appointed for that purpose may conduct the necessary investigation. (§7-103(b)).

A meeting of creditors (and equity security holders if applicable) is to be held between 20 and 40 days after the filing of the petition. (§7-108). No agenda is prescribed for this meeting; it was contemplated that the meeting would furnish a means of informing all concerned about the financial condition of the debtor, answering creditor questions, and allowing creditors to make suggestions and obtain expeditious relief where appropriate.

The administrator is to set a time within which a plan

is to be filed. (§7-304(a)). Creditors, equity security holders, indenture trustees, and appropriate committees can file a plan. (§7-304(b)). "As soon as practicable after expiration of the time within which a plan may be filed, the administrator" is directed to transmit the plan along with instructions as to acceptance or rejection, copies of plans or summaries and copies of any analyses prepared by the administrator (§7-307). The administrator is directed to set a time within which a plan may be accepted or rejected (§7-304(a)), and promptly after expiration of this time, the administrator is to file an accepted plan or plans with the court and within a reasonable time thereafter the court is to set a hearing on confirmation. (§7-310(c)).

Objections to confirmation of a plan may be filed with the court at any time prior to the date of the hearing on confirmation. (§7-310(b)). Generally speaking, the court is to confirm a plan if the plan is feasible and not likely to be followed by the liquidation of, or a need for further financial reorganization by, the debtor or any successor under the plan and either (a) the relaxed priority rule is satisfied or (b) the plan does not materially and adversely affect the claims or interests of holders of publicly held securities and "the plan has been knowingly and voluntarily accepted by all creditors and equity security holders materially and adversely affected by it after full disclosure." (§7-310(d)(2)).

SEPARATE ANALYSIS

CHAPTER XI OF THE PRESENT ACT

Relief under Chapter XI can only be initiated by the debtor. However, a Chapter X case can be initiated by others and a Chapter XI case can be converted to a Chapter X involuntarily if, after motion and hearing, the court "finds that the case may properly proceed under Chapter X of the Act." Chapter XI Rule 11-15(b) and (d).

A first meeting of creditors must be held not less than 20 or more than 40 days after the petition is filed (unless there is an application or motion to dismiss or convert to bankruptcy). Chapter XI Rule 11-25(a)(1). At the first meeting, the bankruptcy judge presides over the examination of the debtor and, if held, conducts the elections of a standby trustee and creditors' committee. Chapter XI Rule 11-25(a)(2).

A plan may be filed by the debtor at the time of the filing of the petition or thereafter within the time set by the court. Chapter XI Rule 11-36(a). A hearing on confirmation of the plan is necessary, but it may be scheduled at any time after the conclusion of the first meeting of creditors (Chapter XI Rule 11-38(d)), and the only limitation is that there must be at least 10 days' notice. Chapter XI Rule 11-24(a)(5). If the necessary acceptances are obtained and the deposit required by Chapter XI Rule 11-38(a) made, the first meeting of creditors will be adjourned and the court will proceed with the hearing on confirmation. Chapter XI Rule 11-38(d). Under §366(2) of the Bankruptcy Act, before confirming the plan the court must

find that "it is for the best interests of the creditors and is feasible."

The foregoing time schedule may be disrupted by a motion to convert to Chapter X filed pursuant to Chapter XI Rule 11-15. Such a motion may be filed "[a]t any time until 120 days after the first date set for the first meeting of creditors" and this time may be extended by the court for cause shown. Chapter XI Rule 11-15(b).

SEPARATE ANALYSIS

BANKRUPTCY JUDGES' PROPOSED CHAPTER VIII

The legislation proposed by the National Conference of Bankruptcy Judges preserves Chapter XI of the present Act (and expands it to secured creditors (§8-301(2)) as Chapter VIII of the Bankruptcy Judges' Bill. The Bankruptcy Judges' Bill also contains what is basically Chapter VII of the Commission's Bill.

Chapter VIII relief under the Judges' Bill is only voluntary. (See §§4-205 and 4-210). On the filing of a voluntary petition (or the filing of an involuntary petition against an individual debtor with regular income who requests Chapter VIII (§4-210(e)(1)) "[t]he court may order the Director to appoint a trustee . . . when necessary in the best interest of the estate to operate the business of the debtor." (§4-302(a)). A first meeting of creditors (and equity security holders if appropriate) is to be held between 20 and 40 days after the filing of the petition under Chapter VIII (§4-311(a)(4)) and at least 10 days' notice is to be given thereof (§4-311(a)). At the first meeting, "[t]he judge shall preside over the transaction of all business . . . and shall publicly examine the debtor or cause him to be examined . . . ." (§4-311(b)).

At the first meeting of creditors, a creditors' committee may be elected or appointed. (§8-101(a)). Parties in interest may apply for the appointment of a trustee. (§8-102(b)). After hearing on notice, the court may "order the Director to appoint a trustee" for that purpose. (§8-102(b) and (c). The trustee is not authorized to investigate; this function is

left to the creditors' committee (§8-101(b)) or, in the absence of a creditors' committee, an examiner may be appointed by the Director pursuant to court order to conduct the investigation. (§8-104).

A complaint may be filed to convert a Chapter VIII case to a Chapter VII case by the Securities and Exchange Commission or other party in interest. (§8-201(b)). The application to convert must be filed within 120 days after the first date set for the first meeting of creditors, unless the court extends the time (§8-201(b)) and there must be at least 20 days' notice to creditors and stockholders, among others, within which answers may be filed controverting the allegations of the complaint and the date of the hearing must be at least 10 days thereafter. (§8-201(c)) After a trial, the court shall so order "if it finds that the case may properly proceed under Chapter VII . . . ." (§8-201(d)). [The Judges' Bill also provides that a Chapter VII case may be converted to a Chapter VIII case on application of the debtor but no standard is furnished. (§7-201).]

Under the Judges' Bill, only the debtor may file a plan (§8-302(a)). The plan is to be filed with the petition or within the time fixed by the court. (§8-302(a)). A hearing on confirmation may be held after the conclusion of the first meeting of creditors which will take place after the necessary acceptances are received and the deposit made. (§8-304). No

period of notice is established and this is presumably left to rules. (See §§4-310, 8-304(d), 4-309 and 4-701). The court shall conirm a plan if, among other things, "it is for the best interests of creditors and is feasible. . . ." (§8-304(d)(1)).

National Bankruptcy Conference

(A voluntary organization composed of persons and members of representative groups interested in the improvement of the Bankruptcy Law and Practice.)

February 5, 1970

Mr. Gerald K. Smith
3203 West Manor Drive
Phoenix, Arizona 85013

Dear Mr. Smith:

I am the Chairman of the Membership Committee of the National Bankruptcy Conference. You have been nominated for membership by Professor Loiseaux and seconded by Professor Seligson.

Wherever possible the Membership Committee would like to interview nominees for membership in the Conference. The other members of the Conference are Referee Rifkind in Los Angeles and George A. Hansen of Chicago. Do you ever get to New York, Chicago or Los Angeles? If you do, I would arrange for you to meet with the member of the Committee in that locale. Please understand this interview is not a prerequisite to membership in the Conference, it is just that we feel that we can best gauge a nominee after meeting with him personally. If you do not plan to be in any of our cities, it will in no wise affect our consideration of your nomination. I will be pleased to hear from you.

Sincerely,

ASA S. HERZOG

ASH:d

National Bankruptcy Conference

(A voluntary organization composed of persons and members of representative groups interested in the improvement of the Bankruptcy Law and Practice.)

February 10, 1970

Gerald K. Smith, Esq.
Lewis Roca Beauchamp & Linton
One Fourteen West Adams Street
Phoenix, Arizona 85003

Dear Gerry:

Professor Loiseaux has nominated you for membership in the National Bankruptcy Conference and I have forwarded your nomination to the Chairman of the Nominating Committee with a strong recommendation supporting the nomination. I am sure that you will receive a good deal of support in the Executive Committee which elects the members of the Conference. The only problem that I see is whether there are sufficient openings to permit of your election and the election of several other well qualified candidates. The Conference membership is fixed at approximately fifty and I am not sure as to the number of vacancies which now exist. In any event, I am going to do everything I can to see that you are elected to membership. If I do not succeed getting that accomplished at the next meeting of the Executive Committee in October then I will see that the nomination is brought up again the following year.

It was certainly good to see you in Las Vegas.

With all good wishes and kind regards, I am

Sincerely,

Chas. Seligson

Charles Seligson
Chairman
767 Fifth Avenue
New York, New York 10022

February 17, 1970

The Honorable Asa S. Herzog
United States Court House
Foley Square
New York, New York 10007

Dear Referee Herzog:

I was delighted to receive your February 5, 1970 letter informing me of my nomination. I have always been interested in the creditors' rights, bankruptcy and commercial fields since my early contacts with Professor Seligson at New York University School of Law. And, perhaps by coincidence, I have been able to do a substantial volume of work in the bankruptcy area.

I believe that sometime within the next thirty to forty-five days I will have an occasion to be in either New York, Chicago or Los Angeles. If this does not occur, I will go to Los Angeles for an interview on my own.

Do you want me to coordinate with you as soon as I learn whether I will be in either of the three cities? If not, do you want me to correspond directly with the appropriate member of the membership committee?

Sincerely,

Gerald K. Smith

GKS:sjb

bcc: Professor Charles Seligson

P.S. There are many areas of bankruptcy which would be excellent subjects for a law review article. For example, why have a double administration, that is, a receivership then a trusteeship. Why not a provisional trustee at the very outset appointed by the court with his appointment made permanent if and when the debtor is adjudged bankrupt. This leads into the question as to whether there should be debtor-creditor control in the election of the trustee. In the big cases filed under Chapter X, creditors have nothing to say about the appointment of a trustee. Chapter X has worked out well. Why shouldn't the same format be good for ordinary bankruptcy cases. This is just one example. There are other areas which could well be covered in a law review article.

2-24-70

National Bankruptcy Conference

(A voluntary organization composed of persons and members of representative groups interested in the improvement of the Bankruptcy Law and Practice.)

February 20, 1970

Gerald K. Smith, Esq.
Lewis Roca Beauchamp & Linton
One Fourteen West Adams Street
Phoenix, Arizona 85003

Dear Mr. Smith:

Thank you for your letter of February 17, 1970. It will not be necessary for you to take a special trip to Los Angeles, although I certainly appreciate the generosity of your offer to do so.

Just let me know when you will be in any one of the three cities, and I'll arrange the appointment.

This interview is by no means a prerequisite to membership in the N.B.C. However, with so many nominations to fill and but two vacancies (as things stand at present) we feel it would make our task just a little easier if one of us had the advantage of a personal meeting with the nominees.

Sincerely,

Asa S. Herzog

ASH:d

cc: Hon. Joseph J. Rifkind
George A. Hansen, Esq.

March 25, 1970

The Honorable Asa S. Herzog
U. S. Courthouse
Foley Square
New York, New York 10007

Dear Judge Herzog:

I truly enjoyed my all too brief chat with you the other day in New York. I enclose copies of the written materials that I prepared relevant to the Uniform Consumer Credit Code and a copy of my resume. I am also enclosing copies of a Law Review Article I co-authored and a Comment I wrote. My remarks concerning the general lien and its voidable preference nature at pages 953-954 of the Comment will be of particular interest to you. The remarks are pertinent as far as the vulnerability of the security interest created by Section 9-306(4)(d) of the Uniform Commercial Code.

Again, I would like to thank you for your courtesy and hospitality on my recent visit. I will give your regards to Judge Maggiore.

Sincerely,

Gerald K. Smith

GKS:cd
Encls.

bcc Professor Charles Seligson

11-16-70

National Bankruptcy Conference

(A voluntary organization composed of persons and members of representative groups interested in the improvement of the Bankruptcy Law and Practice.)

November 12, 1970

Gerald K. Smith, Esq.
Lewis Roca Beauchamp & Linton
114 West AdamsStreet
Phoenix, Arizona 85003

Dear Jerry:'

Welcome to the National Bankruptcy Conference. I was delighted that you were able to get to Washington in time to attend the full conference meeting. I consider you a very desirable addition to the membership ranks. I know that your contribution to the activities of the Conference will be a substantial one.

With every good wish, I am

Sincerely,

Charles Seligson
Chairman

BANKRUPTCY

Uniform Trust Receipts Act Section 10(b) — Security Interest in the General Assets of the Trustee Not Created

By
GERALD K. SMITH

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COMMENTS

BANKRUPTCY—UNIFORM TRUST RECEIPTS ACT SECTION 10(b)—SECURITY INTEREST IN THE GENERAL ASSETS OF THE TRUSTEE NOT CREATED.*—The purpose of the Uniform Trust Receipts Act[1] is to protect the entruster[2] against the "honest insolvency of the trustee."[3] To achieve this goal, the act gives to the entruster a security interest[4] in the entrusted goods[5] which "shifts," upon the sale of the entrusted goods, to all identifiable proceeds of the sale.[6] To this extent the act codifies the common law.[7] In addition, however, Section 10(b) of the UTRA eliminates the common law requirement of tracing[8] and specifically provides that the entruster is entitled to a priority in the general assets of the trustee.[9]

Under the Bankruptcy Act,[10] the entruster's security interest in entrusted goods[11] and identifiable proceeds[12] is superior to the rights of the trustee in bankruptcy. Since 1938, however, the priority provided by UTRA Section 10(b) has not been recognized in bankruptcy proceedings.[13] Although

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* Matter of Crosstown Motors, Inc., 272 F.2d 224 (7th Cir. 1959).

1 9C U.L.A. 231-72 (1957) (hereinafter cited as UTRA).

2 " 'Entruster' means the person who has . . . a security interest in goods . . . under a trust receipt transaction . . . ." UTRA § 1.

3 " 'Trustee' means the person having or taking possession of goods . . . under a trust receipt transaction . . . ." Ibid. "The Act proceeds on the theory that the entruster in such case [financing incoming stock] is entitled to protection *only* against honest insolvency of the trustee." 9C U.L.A. 224 (1957) (Emphasis added.) See also Bogert, The Effect of the Trust Receipts Act, 3 U. Chi. L. Rev. 26, 31 (1935).

4 " 'Security interest' means a property interest in goods . . . limited in extent to securing performance of some obligation of the trustee . . . and includes the interest of a pledgee, and title . . . ." UTRA § 1.

5 UTRA § 8 (validity against creditors); Bogert, supra note 3, at 31-32. This security interest is not valid against a buyer in the ordinary course of trade, since the purpose of the trust receipt transaction is a sale to raise the money owed the entruster. UTRA § 9; Bogert, supra note 3, at 32-34.

6 UTRA § 10(c); Bogert, supra note 3, at 35-36.

7 E.g., In re James, Inc., 30 F.2d 551 (N.D.N.Y. 1927) (entrusted goods); Hamilton Nat'l Bank v. McCallum, 58 F.2d 912 (6th Cir. 1932) (identifiable proceeds).

8 Under the common law the entruster's security interest or lien was lost if the proceeds could not be identified. Vaughan v. Massachusetts Hide Corp., 209 Fed. 667 (D. Mass. 1913). This requirement was eliminated to simplify "otherwise expensive administration of insolvent estates." 9C U.L.A. 225-26 (1957).

9 UTRA § 10(b) sets out the conditions precedent to a recovery of the value of proceeds and concludes that the entruster is entitled "to a priority to the amount of such proceeds or value . . . ." See Bacon, A Trust Receipt Transaction: II, 5 Fordham L. Rev. 240, 264-65 (1948) (entruster is a preferred creditor to the amount or value of proceeds whether or not identifiable).

10 30 Stat. 544 (1898), as amended, 11 U.S.C. §§ 1-1103 (1958).

11 E.g., In re Bell Motor Co., 45 F.2d 19 (8th Cir. 1930) (common law).

12 E.g., Taylor v. Quittner, 218 F.2d 549 (9th Cir. 1954) (UTRA).

13 Bankruptcy Act § 64, 52 Stat. 874 (1938), as amended, 11 U.S.C. § 104 (1958); 3 Collier, Bankruptcy 2052 (14th ed. 1941). The Bankruptcy Act does not expressly invalidate state priorities, but this is the necessary result, since the act's scheme of distribution is exclusive. Halpert v. Industrial Comm'r, 147 F.2d 375 (2d Cir. 1945); Strom v. Peikes, 123 F.2d 1003 (2d Cir. 1941).

the priority provision is no longer effective, it has been held in *Matter of Harpeth Motors, Inc.*,[14] that section 10(b) creates in addition to a priority a security interest in the general assets of the trustee which is superior to the rights of the trustee in bankruptcy.

In *Matter of Crosstown Motors, Inc.*,[15] Crosstown entered into a financing agreement with Commercial Credit Corporation pursuant to the Illinois Trust Receipts Act.[16] Commercial discovered that entrusted cars had been sold without a remission of the proceeds and, in compliance with the Illinois act,[17] demanded an accounting. Shortly thereafter Crosstown was adjudicated a bankrupt. Commercial filed a petition before the referee in bankruptcy for an order establishing its prior lien against the general assets of the bankrupt for the value of the cars sold out of trust.[18] The referee denied the petition, concluding that section 10(b) did not create a security interest in the general assets of the trustee, and that, even if such an interest had been created, it would have been invalid under the Bankruptcy Act. The district court affirmed, adopting the findings and conclusions of the referee.[19]

The Court of Appeals for the Seventh Circuit affirmed, holding that section 10(b) did not create a security interest in the general assets of the trustee, and that the priority it allowed was not enforceable. The decision, which was contrary to the holding in the *Harpeth* case,[20] was based upon a consideration of the historical background of section 10(b). The Seventh Circuit concluded that the legislative intent to create *only* a priority was "crystal clear."[21] It would appear that the purpose of this section was to

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[14] 135 F. Supp. 863 (M.D. Tenn. 1955). This case was favorably commented upon in Note, 66 Yale L.J. 922 (1957); 34 Chi.-Kent L. Rev. 294 (1956); 69 Harv. L. Rev. 1343 (1956). See also Matter of Russell E. Lowell, Inc., Civil No. 8929-M, S.D. Fla., July 22, 1959, which follows the Harpeth case; appeal is pending before the Fifth Circuit. But see United States v. Profaci, 137 F. Supp. 795, 798 (E.D.N.Y. 1955) (dictum).

[15] 272 F.2d 224 (7th Cir. 1959).

[16] Ill. Ann. Stat. ch. 121½, §§ 166-87 (Smith-Hurd 1959). (enacted in 1935).

[17] Ill. Ann. Stat. ch. 121½, § 175(b) (Smith-Hurd 1959) (§ 175 of the Illinois act is the same as § 10 of the UTRA, with the exception of a waiver provision not here pertinent, and will be referred to hereinafter as § 10 of the UTRA).

[18] A claim for identifiable proceeds was not possible as it was "agreed by the parties . . . that all the proceeds from the out of trust sale . . . were used . . . to pay its [Crosstown's] payroll and other current obligations and none of such proceeds came into the bankrupt estate." 272 F.2d at 225 (7th Cir. 1959).

[19] CCH Bankr. L. Rep. ¶ 59479 (N.D. Ill. Jan. 13, 1959), 33 Ref. J. 58 (1959).

[20] Matter of Harpeth Motors, Inc., 135 F. Supp. 863 (M.D. Tenn. 1955). See note 14 supra and accompanying text.

[21] "When the legislature provided in § 10 that the entruster was entitled, on the insolvency of the trustee, 'to a priority to the amount of' the proceeds from the goods or the value thereof it meant exactly what it said, *i.e.*, priority . . . . Thus had it intended to create a lien on the general assets of the insolvent to the exclusion of the costs of administration as well as the general creditors, it certainly would not have used the word 'priority.'

. . . .

"[T]he reason for the absence of the word 'lien' [security interest] and the use of

eliminate unnecessary problems of proof involved in tracing proceeds from an out of trust sale.[22] Either a priority or a security interest in the general assets of the trustee would have accomplished this result at the time the UTRA was drafted and enacted in Illinois.[23] A priority alone was sufficient for the entruster thereby to prevail over the general creditors without having to bear the burden of tracing the proceeds. Since the act specifically provided a priority,[24] the court concluded that this limited the extent of the right created by section 10(b).[25]

However, since 1938, state-created priorities have not been recognized in bankruptcy proceedings. Thus, if only a priority had been intended, the entruster would not now be protected. The court in *Harpeth*[26] found a solution to this in the language of section 10 which provides that "the entruster shall be entitled, *to the extent to which* and as *against all classes of persons* as to whom his security interest was valid at the time of disposition . . . as follows: . . . (b) to . . . the value of any proceeds . . . identifiable or not . . . ."[27] Since the entruster has a security interest in entrusted goods at the time of disposition of the goods superior to the rights of the trustee in bankruptcy,[28] the court concluded that section 10(b) created a security interest in the general assets of the trustee.[29]

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the word 'priority' is pellucid." 272 F.2d at 226-27. It is submitted that the absence of the word "lien" is irrelevant. "Lien" is used in the UTRA only in reference to the rights of third parties. Further, the absence of the word "lien" or of an express provision for a security interest does not prevent the existence of a security interest in identifiable proceeds. See UTRA § 10(c).

[22] "In the event of the trustee's insolvency, it [the act] simplifies the proof in administration proceedings by allowing a preference for any proceeds of released security which have been received by the trustee within ten days, so far as the trustee was under a duty to account for such proceeds." 9C U.L.A. 225-26 (1957). "The Act works to the interest of trust receipt financiers . . . by simplifying their problem of proof in the event of the trustee's insolvency . . . ." Id. at 229. See also Bogert, supra note 3, at 36.

[23] State-created priorities were recognized in bankruptcy proceedings until 1938. See note 13 supra. The UTRA was approved in 1933 and adopted by Illinois in 1935. 9C U.L.A. 220 (1957).

[24] The entruster is entitled "to any proceeds or the value of any proceeds . . . and to a priority to the amount of such proceeds or value . . . ." UTRA § 10(b).

[25] Matter of Crosstown Motors, Inc., 272 F.2d 224, 226 (7th Cir. 1959).

[26] Matter of Harpeth Motors, Inc., 135 F. Supp. 863 (M.D. Tenn. 1955).

[27] UTRA § 10. (Emphasis added.) "If Section 10 went no further than to confer upon the entruster the right to receive the value of unidentifiable proceeds and accorded such a right a priority in distribution . . . it would clearly be a mere state created priority. . . . But it appears to the Court that Section 10 can be given such a limited scope only by disregarding certain language of the section, particularly the clause 'to the extent to which and as against all classes of persons as to whom his security interest was valid at the time of disposition by the trustee.'

"This language, which qualifies all rights conferred by Section 10, places the entruster's right to receive the 'value' of unidentifiable proceeds upon the same plane and in effect gives it the same scope and status as the entruster's security interest in the entrusted goods before their sale by the trustee." Matter of Harpeth Motors, Inc., 135 F. Supp. 863, 867 (M.D. Tenn. 1955).

[28] E.g., Matter of Le Vee & Co., 252 F.2d 214 (7th Cir. 1958).

[29] "The right to receive the 'value' derived from the sale . . . of entrusted goods

On its face, the *Harpeth* decision appears reasonable for the apparent purpose of section 10(b) is fulfilled. That the case was not correctly decided, however, is made manifest by a comparison, as of the time the UTRA was enacted, of the effect of a security interest with that of a priority. A security interest is superior to all other claims, including costs of administration, wages and taxes,[30] while a state priority, allowed at the time the UTRA was enacted in Illinois, was superior only to the claims of general creditors.[31] It is improbable that an expertly drafted statute was intended to create both a security interest and a priority in this instance, for the former would make the latter superfluous.[32] A construction that creates rights exceeding those specifically granted is not permissible.[33]

The reasoning of the court in *Crosstown* is thus supported by the purpose of section 10(b),[34] the language of that section and its background.

necessarily contemplates payment of such value out of the general assets of the trustee . . . [and] since it is a claim which is enforceable to the same extent and as against the same persons as the entruster's security interest in the entrusted goods, it would appear that a lien is impressed to the extent of the value of the proceeds . . . ." Matter of Harpeth Motors, Inc., 135 F. Supp. 863, 868 (M.D. Tenn. 1955). This reasoning has been followed by the Court of Appeals of Tennessee in a recent case in which the court stated: "It is true that the statute does not expressly say the entruster shall have a lien on the general assets of the trustee for the value of such unidentifiable proceeds, but this seems to be the necessary effect of the language used." Commerce Union Bank v. Alexander, 312 S.W.2d 611, 614 (Tenn. App. 1957) (dictum). The court in Crosstown summarily disposed of this case, stating that the decision was inapposite since it did not concern a bankruptcy proceeding. This is incorrect since the issue is the intent of the legislature and not the validity in a bankruptcy proceeding of whatever interest might be intended. See Halpert v. Industrial Comm'r, 147 F.2d 375 (2d Cir. 1945). The decisions of other states construing uniform legislation should be considered in order to achieve the goal of uniformity. 2 Sutherland, Statutory Construction § 5211 (3d ed. 1943). However, the refusal of the court in Crosstown to follow the Tennessee decision does not make its result incorrect since the goal of uniformity should not outweigh the clear intention of the legislature. See text accompanying notes 32, 33 infra.

[30] 3 Collier, Bankruptcy 2054-55 (14th ed. 1941).

[31] Bankruptcy Act § 64, 30 Stat. 563 (1898).

[32] The official comment of the Commissioners on Uniform State Laws gives no indication of an intent to create a security interest and, if anything, supports an inference that only a priority was intended. The comment states that § 10(b) provides a "preference." 9C U.L.A. 225-26 (1957). The use of the word "preference" indicates that only a priority was intended. Cf. 3 Collier, Bankruptcy 2054 (14th ed. 1956).

[33] The express provision for a priority makes it clear that the entruster's right in the general assets of the trustee was intended to be superior to the rights of general creditors. But it is quite another thing to enlarge the right of the entruster to a security interest which would be satisfied before the costs of administration, taxes, and wages. Common sense and rules of interpretation preclude a finding that a security interest was created, since such an interpretation would not give effect to part of the section. See Market Co. v. Hoffman, 101 U.S. 112 (1879); Donaldson, Hoffman & Goldstein v. Gaudio, 260 F.2d 333 (10th Cir. 1958). Further, the specific provision should control over the general language of § 10. See Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222 (1957); Application of Rogers, 229 F.2d 754 (9th Cir. 1956).

[34] Although the purpose of § 10(b) is no longer achieved since the 1938 amendment to the Bankruptcy Act, note 13 supra and accompanying text, this is not determinative, since the question is what was intended when the act was drafted and enacted. At that time the purpose of the act was achieved by a priority. It seems clear that the court in

Nevertheless, since different rights are created under the same section in different jurisdictions it is desirable to discuss the validity of such a security interest in a bankruptcy proceeding.[35]

The district court in *Crosstown*[36] stated by way of dictum that even if section 10(b) created a security interest, such an interest would be invalid as a statutory lien under Section 67(c)(2) of the Bankruptcy Act.[37] Though there has been some confusion in the past as to what interests are within the meaning of statutory lien,[38] it is now settled that consensual security transactions are not included.[39] Since the operation of section 10(b) is dependent upon the agreement of the parties, it would seem that the district court was

Harpeth, in an effort to carry out the purpose of the section, exceeded the intent of the drafters and the legislature. Though a security interest in the general assets of the trustee *may* be desirable, this determination is for the legislature, not the court. The legislature might well decide that the dissipation of proceeds is not an "honest insolvency" risk, note 3 supra and accompanying text, that should be protected against, at least to the exclusion of costs of administration, wages and taxes.

[35] The issue will arise under the law of Tennessee and those states that follow the decision in Harpeth; it will also be presented under the Uniform Commercial Code § 9-306(4), which expressly provides for a security interest.

[36] Matter of Crosstown Motors, Inc., CCH Bankr. L. Rep. ¶ 59479 (N.D. Ill. 1959), 33 Ref. J. 58 (1959).

[37] 66 Stat. 427 (1952), 11 U.S.C. § 107(c)(2) (1958).

[38] This was inevitable since the Bankruptcy Act does not define "statutory lien." Further confusion resulted from a fear that secured transactions constituted voidable preferences under the "bona fide purchaser" test of perfection. Bankruptcy Act § 60(a), 52 Stat. 869 (1938). See 3 Collier, Bankruptcy 957-58 (14th ed. 1950); Keefe, Kelly, & Lewis, Sick Sixty, 33 Cornell L.Q. 99 (1947); Kupfer & Livingston, Corn Exchange National Bank & Trust Company v. Klauder Revisited: The Aftermath of Its Implications, 32 Va. L. Rev. 910 (1946). To avoid this result, it was contended that security transactions, such as trust receipts and modern factors liens, were statutory liens. Hanna, Preferences as Affected by Section 60c and Section 67b of the Bankruptcy Law, 25 Wash. L. Rev. 1, 14 (1950). Since the removal of the cloud on security transactions in 1950, Bankruptcy Act § 60(a), 64 Stat. 25 (1950), as amended, 11 U.S.C. § 96(a)(2) (1958), it is doubtful that the same argument will be urged. A possible solution to the meaning of "statutory lien" is provided by § 67(b), 52 Stat. 876 (1938), as amended, 11 U.S.C. § 107(b) (1958): "The provisions of section 96 . . . notwithstanding, statutory liens in favor of employees, contractors, mechanics, landlords or other classes of persons . . . may be valid . . . ." It is assumed that the scope of "statutory lien" is limited by this language. In re Tele-Tone Radio Corp., 133 F. Supp. 739 (D.N.J. 1955). Therefore, it is a permissible inference that "the lien created or recognized by statute within the meaning of § 67 arises primarily from an economic relationship defined by the legislature and not from the terms of a contract providing for security." 4 Collier, Bankruptcy 184 (14th ed. 1954). It has also been suggested that security transactions are excluded by the doctrine of ejusdem generis. Ibid. But see 69 Harv. L. Rev. 756 (1956).

[39] In re Tele-Tone Radio Corp., 133 F. Supp. 739 (D.N.J. 1955). This case was approved in Matter of New Haven Clock & Watch Co., 253 F.2d 577, 582 (2d Cir. 1958) (Medina, J.). See also 4 Collier, Bankruptcy 184 (14th ed. 1954); Note, 66 Yale L.J. 922, 929 (1956); 69 Harv. L. Rev. 756 (1956); 31 N.Y.U.L. Rev. 1313 (1956). A contrary holding would impair the effectiveness of security transactions, since, as statutory liens, they would be subject to invalidation and subordination under § 67(c) of the Bankruptcy Act. Also, construing statutory liens as including consensual security transactions would conflict with the intention of Congress to aid the flow of credit. H.R. Rep. No. 1293, 81st Cong., 1st Sess. 4 (1949). See also Note, 66 Yale L.J. 922, 929 (1957). A proposed amendment to the Bankruptcy Act would expressly exclude an agreement to give security. H.R. 7242, 86th Cong., 1st Sess. (1959).

incorrect, and that the security interest asserted under section 10(b) is not invalid as a statutory lien.[40]

It is yet another question whether section 10(b) would constitute a voidable preference under Section 60 of the Bankruptcy Act.[41] A transfer[42] is preferential under this section only if it occurs within four months of the filing of a petition for a proceeding under the Bankruptcy Act.[43] To determine the point of time at which it occurs, a transfer is deemed to have been perfected at the time no subsequent lienor could acquire a superior right to that of the transferee.[44] State law determines at what time the rights of the transferee are superior to the rights of subsequent lienors.[45]

Under section 10(b) of the UTRA, the security interest claimed in the general assets arises only upon the occurrence of future conditions, *i.e.*,

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[40] If it follows that any security interest permitted by statute is not a statutory lien when dependent upon the agreement of the parties, it is arguable that such a construction does not carry out Congress' intention to restrict state-created priorities. H.R. Rep. No. 2320, 82d Cong., 2d Sess. 13 (1952). See also Note, 62 Yale L.J. 1131, 1134 n.20 (1953). This is not so, however, since what are in fact state priorities are invalid as in conflict with § 64, see note 13 supra, while if they were statutory liens they would be valid if the provisions of § 67(c) were complied with. Therefore, it would more fully effectuate the intent of Congress to exclude such consensual transactions from the scope of § 67(c). Whether the security interest created by § 10(b) of the UTRA is in fact a state-created priority depends upon its effect outside of insolvency situations. If the section creates rights enforceable independently of an insolvency situation, it will not be held invalid as an attempted priority. Cf. 3 Collier, Bankruptcy 2055 (14th ed. 1941); Note, 51 Yale L.J. 863, 865-68 (1942); 69 Harv. L. Rev. 1343 (1956); 55 Harv. L. Rev. 1207 (1942). Since the right claimed under § 10(b) would arise upon demand, it is arguable that the section creates rights enforceable outside an insolvency proceeding. 4 Collier, Bankruptcy 1481 (14th ed. 1959); 69 Harv. L. Rev. 1343 (1956). However, as a practical matter, it is doubtful that the section has any purpose outside an insolvency situation. Cf. 9C U.L.A. 225-26, 229 (1957); 1933 Handbook of Commissioners on Uniform State Laws 250. It would seem, then, that § 10(b) creates a priority which would be invalid under the Bankruptcy Act. It is even clearer that the analogous provision of the Uniform Commercial Code § 9-306(4) (1958) is a priority provision. But cf. 4 Collier, Bankruptcy 1482-83 (14th ed. 1958).

[41] 30 Stat. 562 (1898), as amended, 11 U.S.C. § 96 (1958) (trustee in bankruptcy can avoid a transfer if it is preferential and the creditor had reasonable cause to believe that the debtor was insolvent when the transfer was made). The district court in Crosstown stated by way of dictum that the security interest asserted under § 10(b) was a voidable preference. Matter of Crosstown Motors, Inc., Civil No. 57-B-3879, N.D. Ill., Feb. 26, 1959, affirming referee's decision, Brief for Appellant, app., p. 146, 272 F.2d 224 (1959).

[42] The security interest granted under a trust receipt transaction is a transfer. See In re Harvey Distrib. Co., 88 F. Supp. 466 (E.D. Va. 1950), rev'd sub nom. Coin Mach. Acceptance Corp. v. O'Donnell, 192 F.2d 773 (4th Cir. 1951).

[43] Bankruptcy Act § 60(a), 52 Stat. 869 (1938), as amended, 11 USC § 96(a) (1958). To constitute a preference a transfer must be for the benefit of a creditor; for an antecedent debt; made while the debtor is insolvent; within four months of the filing of the petition in a bankruptcy proceeding; and the effect of which is to allow the creditor a greater percentage of his debt than some other creditor of the same class.

[44] Bankruptcy Act § 60(a), 30 Stat. 562 (1898), as amended, 11 U.S.C. § 96(a)(2) (1958).

[45] E.g., Porter v. Searle, 228 F.2d 748 (10th Cir. 1955). See also 3 Collier, Bankruptcy 913-14 (14th ed. 1950).

receipt of proceeds from an out of trust sale followed within ten days by either demand for an accounting, filing of a petition in bankruptcy, application for the appointment of a receiver or judicial insolvency proceedings. Prior to the occurrence of the necessary conditions, the security interest of the entruster attaches only to the entrusted goods. The general assets of the trustee are not encumbered. The security interest asserted under section 10(b) is not, as to subsequent lienors, perfected at the time of the original agreement; it is only perfected upon the occurrence of the specified conditions.[46] Therefore, since the out of trust sale and demand for an accounting in *Crosstown* occurred within four months of a petition in bankruptcy,[47] the asserted security interest would have constituted a voidable preference.[48]

The result reached in *Crosstown* is sound. It has, however, frustrated one of the key purposes of uniform legislation.[49] The Uniform Trust Receipts Act is no longer uniform. An attempt should certainly be made to remedy this situation by amendment. But even if the act is amended expressly to allow a security interest, the interest may still be subject to attack as a state-created priority or a voidable preference.

CREDITORS' RIGHTS—FEDERAL TAX LIENS—RELATIVE PRIORITIES OF TAX LIEN AND ATTORNEY'S INTEREST AS ASSIGNEE OF CLIENT'S CLAIM.*—When a person liable to pay any federal tax neglects or refuses to pay the same after demand, a general tax lien arises in favor of the United States[1] at the time the assessment is made[2] and attaches to all "property and rights to

[46] Since the general assets of the trustee are not subject to the security interest until the occurrence of certain events, the trustee can mortgage or pledge such assets.

[47] The sales and demands for accounting were in July, and the petition in bankruptcy was filed in August. Matter of Crosstown Motors, Inc., 272 F.2d 224, 225 (7th Cir. 1959).

[48] The other elements of a voidable preference, supra notes 41 and 43, were present. See Matter of Crosstown Motors, Inc., 272 F.2d 224, 228 (7th Cir. 1959).

A security interest claimed under § 10(b) is distinguishable from a security interest in identifiable proceeds or an interest under an after-acquired property clause. In those instances, although the security interest does not attach to the proceeds or after-acquired property until a later time, there is no point of time during which a subsequent lienor could acquire superior rights. Cf. Comment, 50 Nw. U.L. Rev. 541, 552 n.52 (1955).

[49] UTRA § 18.

* Matter of the City of New York, 5 N.Y.2d 300, 157 N.E.2d 587, 184 N.Y.S.2d 585, petition for cert. filed sub nom. United States v. Coblentz, 28 U.S.L. Week 3048 (U.S. July 30, 1959) (No. 259).

[1] Int. Rev. Code of 1954, § 6321 (formerly Int. Rev. Code of 1939, § 3670, 53 Stat. 448). The lien, although general and extremely broad in scope and purpose, is a perfected and choate lien upon the tax debtor's property. United States v. City of New Britain, 347 U.S. 81, 84 (1954); United States v. City of Greenville, 118 F.2d 963 (4th Cir. 1941). The tax lien has been held constitutional as within the power of Congress to levy and collect taxes. Michigan v. United States, 317 U.S. 338 (1943).

[2] Int. Rev. Code of 1954, § 6322 (formerly Int. Rev. Code of 1939, § 3671, 53 Stat.

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May 26, 1994

Honorable Randall J. Newsome
United States Bankruptcy Court
Northern District of California
1300 Clay Street
Oakland, CA 94612

Dear Judge Newsome:

Since we last spoke in my office I have found the paper on the origins of the National Bankruptcy Conference about which I spoke to you. A copy which I have made is enclosed and I think you will find it interesting.

John Honsberger, who composed the article, is a Canadian member of the Conference.

Sincerely,

Charles A. Horsky

Enclosure

National Bankruptcy Conference

(A voluntary organization composed of persons interested in the improvement of the Bankruptcy Act and its administration.)

The Origins of
The National Bankruptcy Conference:
A Hinge-point of Change
1932 - 1933

This article is primarily based upon the correspondence of Referee Paul H. King in the possession of the National Bankruptcy Conference. Other source material was found in Banks, Charles S.J., The National Bankruptcy Conference and the Bankruptcy Act Journal of the National Association of Referees in Bankruptcy [1948] July 115 ; McLaughlin, J.A., Amendments to the Bankruptcy Act 4, U of Ch. L. Rev. 309 (1936-37) and Hiller, Russell, A Conference Anniversary - Fifty Years in Retrospect 1926 - 1976 (Pamphlet).

John D. Honsberger

1985

I

Leaders are pushed forward by great events and in times of need. They participate in the making of decisions and policy and have a great capacity to influence events. The "organized power" that they represent, "tends to be most alert and active precisely at the hinge-point of change, where new options, or loss of customary ones impend" [1].

When the stock market crashed in 1929 and the Great Depression began there was increasing pressure for change in the bankruptcy laws. A small handful of men interested in bankruptcy administration were drawn together by their mutual interests. They became leaders at that historical hinge-point of change. They had an unusual influence upon the legislative process. When it was completed they found that their little group had evolved into the National Bankruptcy Conference.

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1. Lynd, Robert S., Power in American Society as Resource and Problem in Kornhauser, Arthur, ed. Problems of Power in American Democracy, (Detroit, 1957) 2d;

II

In the early spring of 1929 the Association of the Bar of the City of New York, The New York County Lawyers Association and the Bronx County Bar Association jointly petitioned the United States District Court for the Southern District of New York to conduct an investigation into the administration of bankrupt estates. The petition was prompted by the report in the previous month of a grand jury which disclosed serious abuses and malpractices.

The Honourable Thomas D. Thacher on behalf of the Court, directed that an investigation be conducted and that a report be made to him. He appointed Honourable William J. Donovan, a former assistant Attorney General to be counsel and several associate attorneys. During the course of the investigation associate counsel were sent to both Canada and England to examine the bankruptcy systems of those countries particularly in respect to bankruptcy administration. A report dated March 22, 1930 was made and filed with the Court. [2] It was drafted by Mr. Donovan with the assistance of a number of associate attorneys, but primarily by George S. Leisure and Lloyd K. Garrison. The principle recommendations

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2. W Donovan Administration of Bankrupt Estates, House Judiciary Print, 71st Cong., 3d Sess.;

related to the establishment of a centralized system of bankruptcy administration headed by a federal bankruptcy commission and a system of licensed trustees.

Judge Thacher left the bench shortly after the Donovan Report was filed and became Solicitor General in the administration of President Hoover. Almost at once, The Department of Justice with the advent of the Depression, with the approval of the President and no doubt prompted by the new Solicitor General ordered a nation-wide survey of bankruptcy administration. Lloyd K Garrison the former associate attorney in the Donovan Commission and who later became the Dean of the Law School of Wisconsin was appointed a special assistant Attorney General with primary responsibility for the new inquiry.

Mr. Garrison personally visited many centres across the country. Among those he visited was Detroit. There he met and interviewed at length, Referee Paul H. King who four years before was the founding president of the National Conference of Referees in Bankruptcy. He had advanced ideas on bankruptcy administration and ran one of the most efficient courts in the country.

Solicitor General Thacher held a conference in Washington in September of 1931 when Mr. Garrison completed his national survey and before a report was written, to discuss the results of the survey All interested organizations participated.

There was after the Conference and throughout the Fall of 1931 considerable anticipation mixed with some apprehension concerning the forthcoming report.. Referee King made it his business to keep informed as well as he could on the progress of the report.

Referee H.M. Bierce, the editor of the Journal of the National Association of Referees in Bankruptcy received periodical reports from Referee King. Referee Bierce in a Christmas newsletter of December 23, 1931 to all members of the Association wrote:

> Mr. Garrison has advised his report is complete as well as the bill to be introduced.

Referee King, being not one to beat around the bush wrote to the Solicitor General and asked him exactly when his report would be issued. Mr. Thacher refused to be pressured and replied in a letter of January 25, 1932:

> The Report we hope will be promptly printed when the President has submitted it to Congress and will be available through the Government Printing office.

The Thacher Report[3] or as it was sometimes called the Thacher-Garrison Report is dated December 5, 1931. It was released in February, 1932. At the same time the Hastings Bill which had been drafted primarily by Mr. Garrison was introduced. Among other things it provided for a system of centralized bankruptcy administration with regional bankruptcy administrators, corporate reorganization, new provisions for compositions and extensions and the supervision of voluntary assignments by debtors. The principle qualifications of Lloyd Garrison to draft the Bill was the work he had done in the Donovan and Thacher inquiries. He had however, very little practical bankruptcy experience.

President Hoover in his message to the Senate and House of Representatives on February 29, 1932 took up the cause of the improvement of bankruptcy administration. The President pointed out that the confusion of judicial and

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3. Strengthening Procedure in the Judicial System, S. Doc. No. 65, 72d Cong. 1st Sess.4th (1932);

business functions led to delay. He also pointed out the need for overall supervision of bankruptcy administration. As a solution he stated his support for a system of official supervision of bankruptcy administration and for a permanent staff of competent personnel whose job it would be to carry-out the liquidation of estates.

> "The choice of the liquidating personnel should be limited to competent individuals or organizations after careful consideration by the courts of their qualifications and ability to maintain an efficient and permanent staff for the conduct of the business. Compensation for such services should be upon a scale that will attract trained business organizations. Competent officials should be charged with the observance of the administration of the law and charged with the duty to suggest to the Courts and to Congress methods for its improvement. The present system is susceptible of improvement to eliminate delay in its cumbersome process much of which results from a confusion of judicial and business functions."

III

Paul King immediately swung into action. His principal target of opposition was the proposal to centralize bankruptcy administration. He had reason for reacting strongly. He had substantial practical experience. He was a

pioneer in the movement to make bankruptcy administration more efficient. In his own court he had been creative and had introduced many significant innovations. He was also a student with considerable intellectual curiosity in respect to bankruptcy in general. He had strong views on what needed to be done to improve the bankruptcy process and in particular what was necessary to provide relief to groups being hurt by the deepening Depression.

Referee King strongly disagreed with much of the Report, the solutions it proposed and the Hasting Bill designed to implement The Report. During the Spring of 1932 he worked like a "slave" which was his expression in preparing a digest of the proposed amendments to the Bankruptcy Act. When the analysis was completed he printed the digest at his own expense and circulated it to all whom he thought might be interested.

He began an extensive correspondence to gain support for his views. While he had a personal interest in opposing much of the Hasting Bill he never concealed it, but at all times tried to take an impartial and professional point-of-view.

He was a strong, effective and fair advocate for what he believed. He was always well prepared. However, if he failed to carry a point while refusing in most cases to be persuaded he was wrong he nevertheless would accept the result gracefully and would move to the next point of disagreement. He had a strong understanding of what was practical and might be achieved.

Occasionally when people would express opposing views Referee King, if he could, would suppress them. There is an interesting exchange of letters, for example, between Referee King and W.J. Reilley the Canadian Superintendent of Bankruptcy and former Canadian Referee. In a letter to Referee King from Reilley dated April 13, 1933 Reilley wrote "I am rather inclined to think that centralization is a necessary feature of successful bankruptcy administration" which is the Canadian approach. Referee King did not acknowledge the letter, but in pencil wrote at the bottom of Reilley's letter "no answer".

Referee King explained how he regarded the Thacher Report and the Hastings Bill while disclosing his own personal interest in a letter of March 31, 1932 to Referee E.W. Baker of Dallas.

I have been keenly interested in improvement of bankruptcy administration and I have set-up here what could be considered one of the best bankruptcy courts in the country. In the pioneering which we have done in the last thirteen years we have demonstrated, I think, that bankruptcy administration may be made a purely business like proposition, with offices conducted on a purely business basis. During this period of time we have closed 9415 cases, involving a realization of $38,403,934.33 with an average period of administration of 11.04 months and an average percentage cost of administration of 16.25%. While we have made progress, we do not feel that we have arrived by any means and are constantly working on methods for expediting administration and reducing expense. In view of these things, it is as you may imagine, with mingled feelings that I surveyed the departmental bill, the product of the survey which has been conducted during the past months. In this, as you may know, I gave every possible help, as did our Association of Referees. There are many excellent provisions contained in the bill, such, for example, as those providing for corporate reorganization in bankruptcy proceedings, the bringing under the protection and supervision of the law of voluntary assignments by debtors, and the revision of proceedings in composition cases combined with the provision for extension.

These have, however, been coupled with some things that I regard as positively harmful. I cannot visualize setting-up in Washington, a centralized

> administration of bankruptcy cases, with a small army of administrators and examiners. It is sought to place the supervision of a branch of the Judicial Department in the hands of an officer of the Executive Department. This is not only undesirable and unworkable, but basically wrong and being wrong in principle can never be made right. There is absolutely not reason for any such centralization of authority or supervision. The machinery we now have can be easily amplified to accomplish the same results.

Judge King expanded on his views in a letter to Burt D. Dady of May 12, 1932.

> "There is no doubt in my mind that the President desires most earnestly to secure a better bankruptcy law, but the promoters, or the chief promoter, the Solicitor General, who is a fine chap, is I think figuring more on the prestige it will bring to the Attorney General's office inasmuch as it will have entire control of the whole bankruptcy business in the entire country, than he is about anything else and who could blame him. If this thing goes through as it is, the organization could be made into the niftiest little political machine that ever was put together, with the ten lieutenants in the persons of the proposed ten administrators, and the 200 or 400 or 600 examiners as captains, and the small army of authorized trustees in every part of the country...
>
> No one has been asked to assist in the preparation of the bill except possibly the National Association of Credit Men. ...the Departmental representatives got

> all of the data and information from every source and they did a wonderful job of it - then they went to work and prepared a proposed law which they have handed to the two Houses of Congress with a message from the President "This is it. Adopt it".

There were many other organizations and persons who were also concerned about the Hastings Bill. One of these was Robert A.B. Cook of Boston.

Early in March of 1932 Mr. Cook wrote to Judge King suggesting that they along with Jacob M. Lashly the Chairman of the Committee on Commercial Law and Bankruptcy of the American Bar Association, might get together to discuss the new bankruptcy bill. In a letter dated March 10, 1932 Judge King replied:

> My Dear Friend: I am myself placed in a somewhat peculiar position. I have for years, as you know, been working for the improvement of the bankruptcy law and practice, and am keenly interested. Here a bill comes along which is designed in that very direction, but is is filled with things I am not for. I frankly do not want to take an antagonistic attitude at all. The only thing I can do, I suppose, is to be entirely impartial, stand for the things which appeal to me as good and as energetically oppose those which seem to be in error.
>
> Your suggestion about a conference with yourself and Mr. Lashly is just fine and I would very much like to sit in, I assure you.

Some two weeks later on March 31, 1932 Judge King wrote to Mr. Lashly:

> "Not long ago I had a letter from Mr. Robert A.B. Cook of Boston, suggesting among other things that it would be fine if you, he and I could get together, possibly in Detroit, for a conference and I wrote him that I would be delighted, although strictly speaking, I am not the Chairman of the Referees Committee and it might be well to include him, as I would not want him to think that I were usurping his functions. As you may recall, the Chairman is Honourable Watson B. Adair, of Pittsburgh. The conference he had in mind, however, was I think purely informal and I would indeed be happy if it might materialize.

Meanwhile Judge King was working hard on his analysis of the Hastings - Michener Bill. On the same day as he wrote Mr. Lashly he wrote, "I am working hard on my analysis every spare minute and expect to have it done this week".

The public hearings on the Hasting-Michener Bill were held before a Joint Special Committee of the Senate and the House Judiciary Committee early in June. Mr. Cook described them:

> Mr. Garrison presented the proponent's side of the case. At the conclusion of his remarks, and because I had to be in Boston the next day, I was recognized to

present the opponent's side. Towards the conclusion of my remarks and after pointing-out the inadequacies of the bill before the Committee, I reminded the Special Committee that in the past the Bankruptcy Committees of variously nationally known organizations had happily co-operated with the result the bills previously introduced had represented the thoughts of these national organizations and while I recognized it probably would not be possible to get a large group together to secure the views of these National Associations in time to be heard in connection with the pending bill, or any substitute therefor, nevertheless I did want to call into conference men associated with some of these organizations who I felt were well qualified to prepare and provide suitable amendements for the purposes of the Committee.[4] This permission was granted.

"The next day and upon my return to Boston, I had a visit from Reuben Hunt of California, then attending a tennis tournament in Boston and before we parted we had arranged for Paul King of Detroit, Carl Friebolin of Cleveland and Jacob Lashly of St. Louis to be in Boston the following Sunday. I knew that Mrs. Cook and our only child then at home were leaving on the steamer for the other side and that we would have the house to ourselves.[5]

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4. Letter from Robert A.B. Cook to Charles S.J. Banks which is reprinted in "The National Bankruptcy Conference and the Bankruptcy Act, Journal of the National Association of Referees in Bankruptcy July, 1948 p. 115 at 116;

5. Ibid;

Mr. Cook sent a telegram to Judge King on June 16, 1932.

> Lashly of St. Louis, Professor McLaughlin of Harvard, Hunt of San Francisco and myself meet here Monday to draft revision Bankruptcy Law would be delighted to have you or Referee Adair your legislation Chairman sit in with us please advise by wire.

Judge King replied the same day:

> Delighted to attend Adair cannot make it. He suggested you might wish to invite President Carl D. Friebolin of Referees Association Cleveland who has been doing some work along this line. If so please wire him. I will report your office for duty Monday morning. Regards.
>
> Paul H. King

Mr. Cook replied to Judge King:

> Thanks for your acceptance and excellent suggestion have invited Judge Friebolin.

The so called Boston Conference was held from June 18 to 27, 1932.

Mr. Cook recalled that sometime after the event[6]:

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6. This is an extract from a letter of Robert A.B. Cook to Charles S.J. Banks which is to be found in the latter's article "The National Bankruptcy Conference and the Bankruptcy Act, Journal of the National Association of Referees in Bankruptcy, July, 1948, p. 116. The article doesn't say when the letter was written. It simply says: "Mr. Cook who might be called the father of the National Bankruptcy Conference has very kindly furnished the Author with his story of how the National Bankruptcy Conference came into being and the liberty has been taken of quoting from his letter." It would seem from the context that the letter was written shortly before 1948 when the article was published;

> Mr. & Mrs. King came and later were joined by Mr. Friebolin and Mr. Lashly. On Monday Mr. Hunt, Professor McLaughlin of Harvard and Joseph B. Jacobs of Boston, now deceased, who had served conspicuously on various bankruptcy committees joined the meeting and with myself constituted the roster of the original meeting. Mrs. King was designated house mother and Paul was made chairman. Our first thoughts were to undertake a 'short form bill', realizing, of course, that an over-all revision would involve much time, and certainly would not have the same chance of early passage as a shorter bill. However, before we concluded our activities, which lasted throughout the week, we found ourselves laying plans for a comprehensive revision. Paul had already designated our group as the National Bankruptcy Conference, and had expressed the thought that the Conference should be kept alive and should be expanded from time to time so as to take in representatives of other organizations interested in the subject. All the work performed at this first Conference, including the secretarial work was performed in our home in Wellesley Hill, Massachusetts.

A more immediate recollection of the Conference was that of Referee King who in a letter of July 12, 1932 to Harold Remington wrote:

> In response to a telegraphic invitation I attended a Conference in Boston recently called by Mr. Robert A.B. Cook, Chairman of the Bankruptcy Committee of the Commercial Law League, and we spent a

most intensive ten days in the consideration of the criticisms of the present law and the proposed remedies and the drafting of a tentative revision which to our minds more nearly meets the conditions. The Conference was attended also by Mr. Jacob M. Lashly, Chairman of the Committee on Commercial Law and Bankruptcy of the American Bar Association, Honourable Carl D. Friebolin, President of the Referees Association, Professor James A. McLaughlin, of Harvard University, Mr. Reuben G. Hunt, San Francisco, Specialist, and Mr. Joseph B. Jacobs of Boston, also a member of the League Committee. While every man present had his own notions, each one was involved with the desire to collaborate in a draft which would be workable and therefore more acceptable than the proposed departmental revision. All the conferees could not remain till the conclusion of the Conference. So that the draft which Mr. Cook and I finally completed has been sent to the others for criticisms and suggestions. As soon as it is in a final form for submission I want to send you a copy for your criticisms. I might say that this proposed revision is in response to Chairman Hastings' suggestion when Mr. Lashly appeared before the Congressional sub-Committees, which in effect amount to this: that if he, Mr. Lashly, were going to criticize the pending bill, he ought to submit something constructive in its place. The Conferees have not the temerity to think that the product of their labours will run the gauntlet of criticism without change, and in fact welcome any constructive suggestions that may be made.

The following day July 13, 1932 Referee King wrote to Ralph Stone:

> We spent ten intensive days discussing first the criticisms of the present Act and the proposed remedies, finally working-out a tentative draft of proposed amendments which to our minds would more nearly meet the conditions than the pending revision.

Professor MacLachlan who played an important part in the Boston Conference and an important continuing role in the bankruptcy reform movement of the Thirties came from a distinguished academic family and was himself an outstanding student, a respected teacher and was to become a legend of Harvard Law School. He had red hair and was often known as "Red Mac". When he was 16 he wrote to his parents, "I wonder if you realize what a peculiar combination I am of highly developed analytic and introspective powers and naive boyishness."[7] His family name was McLaughlin. In mid-life he changed it to MacLachlan as he thought that the spelling was the one that was used by the earliest branch of the family. It produced some confusion to future librarians who had to catalogue articles and books written by both James A. McLaughlin and James A. Maclachlan.

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7. See Ellen Bernstein, Red Mac, Harvard Law School Bulletin, Summer, 1979, pp. 20-23;

MacLachlan was an enthusiastic participant in most sports. He regularly jogged to the Law School from his home many miles away. In between classes he could be found chinning himself on the metal bar that ran across the top of the cubicles in the men's room In the early years of the National Bankruptcy Conference when it met in the board room of the Union Trust Company in Washington, MacLachlan would insist on throwing open all of the windows half-way through each morning and afternoon session and ask for volunteers to run with him around the White House.

He was not always the easiest person with which to work. He, for example, wrote to Paul King in June of 1932 saying that he was not impressed with Lashly and suggesting that the group rely more on Weinstein and Friebolin.

At the same time Robert Cook took the occasion to write a similar letter on July 14, 1932:

> "I should like to see Lashly and McLachlan get together and reconcile their views, for I feel that if there are any two of our Conferees apart it is they. The rest of us are so strongly of one mind that we do not seem to have much difficulty in accommodating ourselves to another's viewpoint.

Professor MacLachlan also wrote about the Boston Conference some years after the event in an article published in the University of Chicago Law Review in 1937:[8]

> The opinion prevailed that the best way to meet the Thacher proposals in Congress was to be prepared with an alternative positive program. The administration's lawyers politely recognized the scholarly character of the proposals made with equitable distribution, but showed no interest in incorporating them into administration bills. In fact the proposals affecting administration which interested the Solicitor General's office operated in a field so distinct from that encompassed by the substantive law proposals that there was no substantial contact between the exponents of the two lines of thought. The lawyers and referees, however, were interested in the substantive law proposals, not merely as affording a tangible alternative to the Solicitor General's program but also as having intrinsic merit warranting their careful study and promulgation in the most practical form. The result was what later came to be styled the National Bankruptcy Conference. Two referees, four lawyers, and one full-time law teacher met at a lawyer's home in Wellesley, Massachusets, one weekend in June, 1932, and pursuant to a declared intention to draft all necessary amendments to the Act by Monday next spent three days arguing over the definitions in section 1. Some of the members of this group were amused at the idea that anything more than a broad discussion of principles could be accomplished in such a limited time, but none anticipated the volume of intensive work, negotiation, and correspondence

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8. McLaughlin, Aspects of the Chandler Bill to amend the Bankruptcy Act (1937), 4 U. of Ch. L. Rev. 360;

> lay ahead. Such anticipation would probably have deterred even the most enthusiastic from committing themselves to the investment of time and energy that was to be required.

A few days after the Boston meeting Reuben Hunt wrote to Referee King in a letter of July 5, 1932:

> It was a great pleasure to me to work under you at Boston, and I hope we will be able to get together again soon. I will be glad to go East again at any time when I may be of service. Having grabbed the bear by the tail, I am desirous of holding on until something constructive is definately accomplished.
>
> I am sorry I did not stay with you at Boston until the end...

Referee King in his letter of July 12, 1932 replied to Mr. Hunt:

> ...Mr. Cook and I spent a great deal of time in the phrasing, but we did not dare to hope, of course, that it would finally stand the tests of the thousands of critical eyes that would be turned upon it and come through without change. In fact, we assumed that there would be many changes suggested, and I telegraphed him from Bay City, only Friday night stating that it is my idea as soon as we have the reaction of the various groups which are giving the subject matter special consideration we should all meet again for a revamping of the drafts. I have not had time to hear from him yet in response to this telegram, although a letter may be received before this is transcribed. If so, I will make reference to it in a postscript.

> I do not know when I have enjoyed a conference so much as the one in Boston. Each man present seemed to be involved with the idea of getting the best draft possible without regard to personal views. I know that you generously discarded several pet proposals and I know that I did.

"Our informal committee of seven" was how Professor McLaughlin described the group in a letter he wrote on June 29, 1932 to Mr. Cook. A few months later Judge King began to describe the group as "our conference" and "a voluntary conference" while Mr. Cook referred to "our conferees". The name was not important at the time. What was important was that the little group was extremely active in drafting amongst themselves and forwarding drafts to each other for comment. However, the early use of the expressions "our conference", "voluntary conference" and "conferees" was undoubtedly the origin of the name of what was later to be known as the National Bankruptcy Conference.

The group continued to do much drafting amongst themselves. The drafts were forwarded to each other for comments. They soon developed an immense correspondence.

It was soon decided that a second meeting of the group would be better located than Boston had been, but Mr. Cook cautioned Judge King in a letter of July 19, 1932:

With regard to our further conference, and so far as our conferees are concerned, I must agree with you that Detroit is more centrally located than is Boston. But, have you given thought to the fact that men like McLaughlin have no expense account upon which they can draw, and hence we would probably be without their services.

Judge King replied in a letter of July 26, 1932:

I quite realize the difficulties of Professor McLaughlin's situation, and would like, myself, to defer to it provided that it is agreeable to the others. As a matter of fact, I have no expense account on which I can draw for such purposes. You might be surprised to know this, and I am sure you will be surprised and pleased to learn that my good associate, George Marsten, always insists on bearing a half of such expenses. We pay if out of our pockets and are glad to do it for the good of the cause. We have no doubt also we are in a much better position to pay the expense with our larger income than is Professor McLaughlin. Referee Friebolin is in the same position as Referee Marsten and myself - to pay his own expenses. I presume Mr. Hunt may be paid by the organization which he represents and I do not know how Brother Lashley fares. Possibly his reasonable travelling expenses are defrayed by the American Bar Association. Referee Coles would, I have no doubt, have to pay his own. I had not thought of the next meeting as my conference in any sense of the word, although you are good enough to refer to it as such. It simply occurred to me that it was, but a continuation of your conference. I suppose this may come about because of the fact that in a burst

> of good feeling I was chosen Chairman, and yet I am perfectly willing to go ahead and act if you think I should.

There was also activity in other fronts. A group of three of the leaders of the National Association of Credit Men decided to draft a substitute bill. Reuben Hunt heard of the proposal and wrote to Judge King on August 13, 1932 and proposed that W. Randolph Montgomery of New York who was the attorney for the association (and who would later become a Chairman of the National Bankruptcy Conference) should be invited to join the Boston group. "It would save time and expense if they were to amalgamate with us". Earlier Mr. Cook had written to Referee King also suggesting the name of W. Randolph Montgomery with the request that he bring with him the Chairman of the Association's bankruptcy committee.

Other names proposed by Mr. Hunt to whom invitations might be sent were William J.H. Hayes the attorney to the San Francisco Board of Trade, William H. Moore Jr. of Los Angeles and Thomas G. Layton of Portland. Mr. Lashly suggested Referee Coles of St. Louis while Judge King requested invitations to be given to Harold Remington and Jacob Weinstein.

It was finally decided that the second meeting should not be held in Detroit, but in St. Louis in September. Judge King sent a letter on August 12, 1932 calling a meeting of

our conference" in St. Louis on September 15, 1932 to Hubert A. Cook, Honourable Carl D. Friebolin, Reuben G. Hunt, Joseph B. Jacobs, Jacob H. Lashly and James A. McLaughlin. He also indicated that he would invite William H. Moore, W. Randolph Montgomery, Jacob Weinstein and Referee Coles of St. Louis. Judge King was asked to extend an invitation to Harold Remington a few days before the meeting was to take place. In a letter to him of September 10, 1932 he wrote:

> As you may know, a small group of those actively interested in bankruptcy administration and practice got together in Boston in June to consider the proposed revision of the Act with the idea of comparing notes and possibly evolving a substitute draft.
>
> Attending this conference were Mr. Robert A.B. Cook, Chairman of the Committee on Bankruptcy of the Commercial Law League; Mr. Jacob M. Lashly, Chairman of the Committee on Commercial Law and Bankruptcy of the American Bar Association; Professor James A. McLaughlin of Harvard University; Mr. Reuben G.Hunt, of San Francisco, a bankruptcy specialist; Honourable Carl D. Friebolin, President of the National Association of Referees in Bankruptcy; Mr. Joseph B. Jacobs, of Boston; and myself. We were in intensive session for more than a week, developing a tentative draft of amendments to certain sections of the law which we felt should be and could be improved.
>
> Our proposed revision has been the subject of correspondence ever since, and it is now felt desirable to get

together again. The conference has been arranged for St. Louis, beginning Thursday, September 15th, and with the exception of Professor McLaughlin who unfortunately will be unable to attend, all of the Boston conferees expect to be present. The purpose is, of course, to try to agree on a perfected draft for introduction at the December session of Congress. It is not known, of course, just what form this will take, but it might very well be the American Bar Association bill, inasmuch as the sub-Committees of the Judiciary Committees of both Houses have invited the preparation and presentation of such a draft.

While it is desirable, in order to avoid protracted discussion which might result in getting nowhere, to keep the membership of the group as small as possible and yet have it representative, we feel that it would be incomplete without your presence and I have been given the pleasure of extending a most earnest and cordial invitation to you to attend the St. Louis meeting.

Arrangements have been made by Mr. Lashly for the holding of the conference at the law library in the Civil Courts Building and to have those attending accommodated at the Jefferson Hotel. As I say, we will convene on the morning of Thursday, the 15th, at as near ten o'clock as possible.

With kind regards, I remain

Sincerely yours,

Just prior to the St. Louis Committee the standing committee on commercial law and bankruptcy of the American Bar Assocation made a report on the Hastings - Michener Bill.

The Chairman of the Committee was Jacob H. Lashly. The report noted that there were fundamental charges proposed by the Bill which were unsound and impractical. It recommended opposing the Bill.

> "The Bill seeks largely to eliminate judicial control or supervision of bankruptcy administration and to replace it with a new type of so called creditor control which in practice is certain to degenerate into "proxy" or "assignment solicitor" control.
>
> The present bankruptcy law, enacted in the year 1898 and as subsequently amended is fundamentally sound and upon it has been built a great body of judicial decisions which must not be destroyed."

Certainty in the law is always important. It is always interesting however how certainty in the form of a body of judicial decisions is often used to oppose new legislation when a law has lived beyond its time as if the body of judicial decisions interpreting the old law is preferable to a new law designed to meet new circumstances.

The St. Louis meeting worked well in no small measure due to the meticulous planning by Judge King. The agenda he prepared went from early in the morning until late at night. Every few minutes there was listed some section of the bill for discussion, the speaker to make the initial presentation and the time allotted for the entire discussion. Sometimes as little as five minutes was set aside for a topic. Twenty minutes was the most.

Reuben Hunt said in a letter of September 28, 1932 to Judge King:

> My own reaction to the St. Louis conference is that it functioned even more smoothly than we did at Boston, owing to your able leadership.

A few days before Judge King had written to Jacob Weinstein who had been invited to attend the St. Louis meeting, but could not.

> The St. Louis conference was a great success: in fact the results accomplished were much more favourable than I dared to hope.

Events were moving fast. The little group continued its phrenetic pace. Judge King circulated almost weekly memoranda. The others responded with their own. Judge King modestly remarked that he only acted as a clearing house. It nevertheless became apparent that the circulation of memoranda was not enough and that a new meeting was necessary.

A Third Conference was held in Washington on January 26 and 27, 1933 at the Hotel Willard. There were some twenty-five persons in attendance representing nine organizations. The only members of the founding group as expanded was Referee King, W. Randolph Montgomery and Jacob Weinstein.

The minutes described the conference as being "a conference of various organizations interested in the bankruptcy law and its administration and the amendments proposed thereto now pending before Congress".

"The Conference was called to order by the Convenor, Paul H. King, who stated that it is the natural outgrowth of preceding conferences held in Washington, Boston and St. Louis last year, that its immediate purpose is the consideration of certain proposed amendments now pending in Congress; that there is every reason to believe that by virtue of its representative character and the experience of its members as judicial officers, lawyers and credit men, to believe that it may be of service at this juncture".

Another purpose of the January, 1933 Conference in Washington was to meet with Senator Hastings. Two long meetings were in fact held with him and the Conference was assured that the most objectionable features of the bill would be eliminated.

The intensive discussions and meetings that went almost around the clock at the January, 1933 meeting in Washington was described at length in a letter of February 1, 1933 to Herbert M. Bierce the secretary of the National Association of Referees in Bankruptcy.

I have just wired you a brief report on the Washington conference. Not a day went by there but what I thought of you, and many times a day, and wished for your kindly, helpful presence. The burden of the conference naturally fell rather heavily on me, although everyone was disposed to assist in every way possible. We had, as I wired, 25 men there, and, thanks to your splendid backing and support, a goodly number of referees, 14 as I recall. They were not all there at any one time, Mullinix having to go Friday night and Hecker and McAllester not arriving until Saturday morning. Eden was away on account of the funeral of his wife's brother in Illinois, so I made the arrangements for the rooms and copies of the bills, etc. and was all set for the conference when it convened. In order to get lined up I went down a day early, as you know.

We spent Friday morning in reading the bill aloud, and in the afternoon took up Section 74 and went through it word for word, clause by clause, and subdivision by subdivision. This ran us up to midnight and we made altogether about 40 suggestions.

Saturday morning I appointed a committee to check over our work and to redraft the section as we would amend it. This consisted of Messrs. Weinstein, Olney and Friebolin.

I might say that our first committee was a Conference Committee appointed to meet with Solicitor General Thacher and I designated Messrs. Montgomery and Sunderland. The former you know, but the latter probably not. He is a very able lawyer belonging to the John W. Davis firm, and has been counsel for the

receivers in a half a dozen big railroad cases, including the Frisco and the Missouri Pacific. He is a likeable chap and a hard worker. Before this committee met with the Solicitor General we had rather come to the conclusion that we should try to save our regular procedure and draft a special bill to meet the emergencies, and I appointed a Drafting Committee consisting of McCracken, Secretary of the American Bar Association, Olney, Kagy, Richman and McCrackin of Valdosta, Ga., to see what they could do. During the dinner hour on Friday they prepared a rough draft of a bill which was really a very good start, but in the evening our Conference Committee with Judge Thacher reported that he was satisfied that some legislation of the character pending is bound to go through, not because it is economically sound nor because it is in accordance with legal principles, but simply to meet the emergency, that a well defined movement for currency inflation has been started and that this legislation is the only thing that can stave off the inflation. In other words, it is the lesser of the two evils. The General was very approachable and agreed to several of the proposals to remedy some of the worst defects in the bill, such as the one providing for a referee in each county, limiting the fees in extension cases and the one authorizing the court to approve and put into effect a settlement with creditors without their consent or the consent of a majority in number and amount.

On Saturday morning the Conference Committee went back to the Department of Justice to get Judge Thacher's proposed amendments to the corporate reorganization section and the

Department amendments to the railroad reorganization section. They returned at noon with the former, but could not get all of the latter until five o'clock in the afternoon. In the morning we considered an important memorandum from Professor Frankfurter of Harvard with reference to the railroad reorganization bill and passed upon two amendments to Section 74 left over from the day before. In the afternoon we had the amendments to Section 75 to work on and this took us up until the dinner hour, when we went to work on the proposed changes to Section 75.

At the evening session we had become greatly reduced in number, but still a good working force, so we proceeded to draft the letter of transmittal to Senator Hastings and a statement of the reasons for the various amendments. At ten o'clock I was all fagged out and had to be excused, but the rest of the group worked until 1:30 Sunday morning, their train not leaving until 1:55.

The Department of Commerce furnished a stenographer, who got the dictation out Sunday, and it was in my hands at 6:00 o'clock in the afternoon. It being our wedding anniversary I took Mrs. King out to dinner and to "Of Thee I Sing" in the evening, then went back to work and stayed by until 4:00 o'clock Monday morning. I was up at 7:00 and checked the language of each of the amendments to Section 74, had a hasty breakfast and hurried to the Capitol. I wanted to see Senator Hastings the first thing and got there before his office was open, picking up some extra copies of the House bill on the way. I was "Johnny-on-the-spot" when he walked in and he was exceedingly gracious, inviting me in and spending nearly an hour with me. He asked me to

take his bill which had been introduced the previous Saturday afternoon, containing all of the recommendations of the Solicitor General, and annotate it for such changes as our group wished to make. The bill was ready at eleven o'clock, when I again went to the Capitol to get copies, and started in on the annotations, taking the stapling out of the bills, splitting the forms so that each page could be handled separately, having the new matter typed in in red and existing matter deleted by lining out in red, then pasting the statement of reasons on sheets of white paper opposite the sections affected as interleavings, finally binding the whole thing together in the form of a book, as you might say. I had to hold this, however, until the last minute Tuesday, because Sunderland came down early that morning with a whole flock of amendments to Sections 75 and 76, which had to be prepared and put into shape as I have indicated. I got him started on the work with two stenographers and helped him up until noon, when I had to beat it out to Alexandria to keep my Rotary attendance record perfect, but got back in time to finish up the job, check it and send it to the Senator.

It was certainly a busy week. I sent out the telegrams calling the conference on Tuesday, went to Washington on Wednesday evening, spent Thursday in arranging for the meeting, Friday and Saturday in presiding over it and had the satisfaction Tuesday of turning over a complete report. The question now is how much of it will be used. Yesterday I finished up the job by writing Senator Hastings, Solicitor General Thacher and Bob Cook, who is going to be in Washington on the matter for the next few days. I think we ought to have someone there from now on and am going to arrange

for a number of our conferees to take turns, so to speak, until Congress adjourns. Senator Hastings is not sure that any bill will pass, but believes one will. He thinks that if he can get it into conference the managers of the two Houses will readily agree, provided no material changes in substance are made. While I have done my level best to perfect the bill, I would be relieved if the legislation does not pass, because it is certainly unsound in every way. Economically it seeks to stay the necessary processes of liquidation and cancellation of indebtedness that is never going to be paid, and that, of course, cannot be accomplished by law. It is much in the same category as plowing under every third row of cotton, destroying half the coffee crop of Brazil, and buying up all the wheat to stabilize the market. From the standpoint of the law it changes the very foundation principle of our bankruptcy procedure and without question, no matter how they put it, it does impair the obligations of contracts.

The situation in Washington is well nigh indescribable. Economic conditions are so desperate that ordinarily conservative men are suggesting almost anything that has the semblance of being helpful. This is markedly so in the bankruptcy field. It is not so much to say that not a member of the House knew exactly what was in the bankruptcy bill which was passed on Monday. Congressman McKeown, who fathered the composition and extension section had some ideas about that. The LaGuardia railroad bill was written for him. Solicitor General Thacher drafted the corporate reorganization section. No hearings were held and no real Committee meeting. The sub-Committee met frequently and every day a new flock of amendments would come in. The three bills were jammed together in one draft and they didn't

even bother to remove the sections of the corporate reorganization bill making it operative, from the text, but, as you probably noticed, ran them right in with the text--and then passed the mess under suspension of the rules in a two-hour debate. Congressman Michener told me that he was regarded as having put the bill through but he did it entirely as a matter of policy, notwithstanding its faults and knowing that the Senate would fix it up. In the Senate, Senator Hastings is conscientiously doing his level best. He told me frankly that he knows nothing especially about the subject and that he must rely on Judge Thacher to furnish the draft. He welcomes suggestions and criticisms, and altogether was very fine about the whole matter.

On my return to the office I find a letter from Judge Tuttle, written in his characteristically forceful way. It is so good that I have had copies made and am enclosing one to you. In the first section of this letter I enclosed copies of my communications to Senator Hastings, Judge Thacher and Bob Cook. Also a copy of the Senate bill which includes all of Thacher's amendments to date. I did not count them, but our report will make 55 or 70 changes in this draft if they are accepted.

The Journal (Journal of the National Association of Referees in Bankruptcy) arrived as I am dictating this and I have dropped everything to look at it, as I always do when it comes. It is just like getting a letter from home, and this one is fully up to the standard. Every time a new issue arrives I feel proud of it, and of the Association, and of you.

Thank you for the carbon copies of the various communications you have been writing in reply to inquiries. I am glad, indeed, to have these and they have sponsored the thought that it would be wise for me to send out to each Referee a brief statement of the Washington situation. President Beach called me long distance yesterday to thank and congratulate me in connection with the conference, stating that Referee Olney had told him that it was a very great success and complimenting me on my handling of it, and of course, I was glad to have him feel this way about it. During the conversation I suggested the sending out of the circular letter and he thought it would be a splendid thing, because most Referees are naturally without information and have to depend upon what they get in the newspapers, which is not very reliable and certainly not up to date, so I am sending the bulletin today. You will, of course, receive a copy of it. I think I will send it also to the conferees who are present, in addition to the referees attending , the members of the Bankruptcy Committee of the American Bar Association, Commercial Law League and the American Bankers Association.

George suggested that our Directors meeting will probably be held in New York some time within the comparatively near future and wanted me to attend in connection with the working out of the regional conference idea. This I agreed to do.

I do not know that I ever wrote a serial letter like this before, but it was impossible to finish it yesterday and I did want to get something to you right away.

With cordial regards, I remain

As ever yours,

On the legislative front Congress was busy. Indeed, this was the principle reason that prompted the January, 1933 meeting in Washington. Bill (P.L. 27) was the first Bill to be enacted following the Hasting - Michener Bill which had been withdrawn became effective February 11, 1932. Less than a month later the increasing pressures for codification of equity receiverships particularly in respect of insolvent railways resulted in the enactment of section 77 of the Bankruptcy Act. This Bill (P.L. 420) provided for the reorganization of a railroad engaged in interstate commerce. It became effective March 3, 1933.

Congress next addressed itself to the pressing problems of municipalities. It was in the depth of the Depression. Municipality after municipality across the land was defaulting. The two hardest hit cities were Chicago and Detroit. Judge Friebolin in a letter of March 7, 1933 to Judge King however wrote, "Cleveland joins Detroit in what Mr. Hoover called "a reverse of prosperity". A few days before Judge Adair in a letter of March 4, 1933 to Judge King took a philosophical aproach to the problems. "After all no

one had seen the like before in the United States and who could say how it would all end." He wrote, "we are living in a very interesting time. They have had such situations in Europe and have lived through them, so I suppose we shall do the same".

Jacob Lashly in a memorandum dated March 23, 1933 to Judge King and to the others in the Conference reported that there were a number of bills pending in Congress designed to extend the operation of the bankruptcy law to municipalities primarily to aid Detroit and Chicago. He concluded his letter by stating "your organization or group might consider it. " Judge King replied a few days later in his letter of March 28th. His letter is indicative of a national bewilderment at the immensity of the economic breakdown. It also indicates how Judge King was prepared to face up to the problem and seriously consider solutions that he otherwise thought to be unthinkable. This in itself was a mark of a leader as he undoubtedly was.

> "In normal times the proposal would be simply unthinkable, generally speaking, that a municipality should avail itself of our bankruptcy laws, but under present conditions we need not, I suppose, be surprised at anything, not even if they suggest running the United States Government and its tremendous liabilities through a bankruptcy court,

> or if they set up some international bankruptcy court so that all of the nations of the world could go through.
>
> I know the situation with us is desperate. A special session of the legislature saved us from defaulting in January. We are taking care and feeding every day 200,000 people, if not more. Our deficits are steadily mounting, our taxes are falling off. I don't like the idea of doing it through the bankruptcy court; it does seem that there ought to be some other way.

Congress ultimately passed the Municipal Bankruptcy Act (P.L. 251) effective May 24, 1934.

Both Congress and the "Bankruptcy Conference" were working at a breakneck pace. The relief amendments were passed on March 3, 1933. Referee King who referring to himself as temporary Chairman called a "Fourth General Bankruptcy Conference" on April 29, 30 and May 1, 1933 to be held again in Washington. The site was the Conference Room of the Chamber of Commerce of the United States.

Referee King was elected permanent Chairman at the Washington meeting of and which Mr. Lashley referred to as the "Joint Conference". During the meeting all major draft amendments which had thus far been proposed by the different organizations were referred to several "Committees and Assignments" for discussion. The seven major committees and their Chairman were: (i) Definitions and Offences, Harold Remington; (ii) Jurisdiction and Procedure, Jacob Lashly;

(iii) Bankrupts, Robert A.B. Cook; (iv) Administration, Paul H. King; (v) Creditors, W. Randolph Mongomery; (vi) Preferences, Liens and Titles, James A. McLaughlin; and (vii) Reorganization - Corporate and Railroad, Edwin S.S. Sunderland.

There was in addition a drafting committee appointed to draft appropriate provisions to be used in proposed legislation to incorporate the resolutions approved by the Conference.

A week after the end of the Washington meeting Robert Cook wrote to Paul King in a letter of May 9, 1933:

> We took a giant stride in our Washington meeting...your direction of the meeting was just perfect and surely without your preliminary effort and preparatory work we could not have made early the progress that was achieved within the few days we were together.

A second letter was received by Referee King to the same effect from Reuben Hunt. In a letter dated May 8, 1933 he said:

> "The Hastings Bill appears not only to be dead, but completely Burried.
>
> After we get an improved Bankruptcy Act along the lines approved at the Washington Conference we must turn our attention to the next step up the ladder by making referees the court of bankruptcy.

> We all appreciate your untiring efforts at Washington and the courteous but firm way you guided the proceedings.
>
> Randolph Montgomery seems well pleased with the results of the Washington Conference and appears definetly allied with us.

Two meetings of the Drafting Committee were held following the Fourth General Bankruptcy Conference. The first was in New York on May 20, 21, 22, 1933 and the second in the Law School, Harvard University, Cambridge on Friday, Saturday and Sunday, June 23, 24 and 25, 1933. The New York meeting was arranged by Randolph Montgomery at the Downtown Athletic Club. Members were informed that rooms could be obtained at the Athletic Club for $2.50 per night. The Cambridge meeting was arranged by Professor McLaughlin.

The Drafting Committee was the "real" Conference. Those, for example, attending the New York meeting were Paul H. King, Robert A.B. Cook, Carl D. Friebolin, Jacob M. Lashly, James A. McLaughlin, W. Randolph Montgomery, Harold Remington, Edwin S.S. Sunderland, Jacob I. Weinstein who were "assisted by Max Isaac (and) Peter B. Olney Jr."

It was beginning to be difficult for Judge King to hold together his little "Conference". They were getting tired and the travelling expenses were becoming too much for some of the members.

In the summer of 1932 Mr. Cook had written to Judge King that men such like McLaughlin had no expense accounts and accordingly might not be able to attend a meeting if it was to be held in Detroit.

A year later in the summer of 1933 Referee Friebolin of Cleveland felt that he could not attend the meeting of the drafting Committee in Cambridge. He wrote to Referee King, "I think I'll have to let you go along without me.

Referee King immediately replied in a letter of June 15, 1933 imploring him to come:

> So please stick to the ship for one more voyage, because without flattery at all we need you. Right now, we must have McLaughlin in order to finish section 60, 67, 68 and 70 and I figure the only way to get him was to have the meeting in Cambridge.

With another meeting coming up later in the summer Carl Friebolin wrote Watson Adair, the Referee in Pittsburgh and the second President of the National Conference of Bankruptcy Referees, that he would send a cheque to Paul King to help pay the costs of the association but:

> "I am prompted to say however, that I would rather contribute than attend the Conference. As it is, those of us have attended all of them have spent several hundred dollars already in railroad fares and hotel bills.

> The only thing that induces me to send a cheque is that it is going to Paul who has not only been to the expense of the rest of us, but in addition the "Atlas" who has been shouldering the Chief burden.

Referee Friebolin did not attend all the meetings thereafter, but continued to work with the Conference and took an active part with the Referees Association. He was elected its sixth President at the fith annual meeting held in Atlantic City in 1931.

From all accounts Carl Friebolin was a good lawyer and judge and above all a gentleman with a quiet sense of humour and a natural dignity. Towards the end of his year as President of the Referees Association, Judge Charles H. King of Memphis, the immediate past President wrote to him asking that he speak out on the subject of Referees salaries. Referee Friebolin replied in a letter of August 24, 1932:

> "I am sorry that I cannot agree with you that the association take-up the matter of Referees' Compensation. While not addicted to exaggerated assumptions of dignity and being congenitally opposed to stuffed shirts, I still think that for the Referees' Association to initiate anything with regard to compensation is wholly lacking in the dignity which certainly accompanies the judicial position to which we always aspire."

Referee Friebolin was not one to evade the truth even when it hit close to home. The Solicitor General had said that the Bankruptcy Court was no longer a worthwhile and appreciable medium of distribution of insolvent estates. "What he said is true" wrote Carl Friebolin his remark being all the more telling as he was at the time he wrote this the President of the National Association of Referees in Bankruptcy.

Between the two meetings of the Drafting Committee, Harold Remington wrote to Referee King on June 9, 1933 in support of the "great body of judicial decions" about which Jacob Lashly had written the previous September.

> I am entirely out of sympathy with the idea of amending every section of the Bankruptcy Act. That Act has been interpreted and construed by thousands of decisions, and so interpreted and construed is a subtantial, valid and well constructed statute. Stability in the law is desirable and there ought to be no general revamping of each and every section of the Act, as seems rather to be the inclination. It will no doubt become the duty of yourself, the astute careful leader of the whole thing, to perform the appropriate cutting out process.

In July of 1933 the National Association of Referees in Bankruptcy which had been founded largely by the efforts of Referee King in 1926 met at the Grand Hotel on Mackinoe Island, Michigan. Those who were made honorary members of

and who spoke to the Association at this meeting also suggest the influence of Referee King. Lloyd K. Garrison, who by then had become Dean of the University of Wisconsin Law School, was made an honorary member as was W. Randolph Montgomery, Counsel to the Association of Credit Men and Jacob M. Lashly Chairman of the Committee on Comercial Law and Bankruptcy of the American Bar Association. Reuben G. Hunt in a major address told the legislative history of bankruptcy from the Act of 1800 to date. The remainder of the programme was principally devoted to discussion of the 1933 amendments to the Act.

The American Bar Association met in Grand Rapids at the end of August in 1933. Referee King thought it appropriate to hold one more meeting of the Conference at the same time to enlist the support of the A.B.A. Jacob Lashly by a notice dated August 5, 1933 notified the Conference of a special meeting to be held on August 29th. The notice went to Paul H. King, Robert A.B. Cook, Reuben G. Hunt, C.D. Friebolin, Hubert M. Bierce, Jacob I. Weinstein, W. Randolph Montgomery, Peter B. Olney, Harold Remington and James A. McLaughlin.

The major initial thrust of the new Conference concluded with a meeting in Chicago on December 7-10, 1933. It was held in the Law School of Northwestern University. It was described as the second session of the Fourth General

Bankruptcy Conference. The meeting was held to receive the report of the Drafting Committee appointed in the first session of the Fourth Conference which had met on two occasions.

With so much activity one might wonder about the expenses of the Conference. The fact is that while they were always kept to a minimum, they were not insignificant from the point-of-view of 1933 dollars. A statement of "Bankruptcy Conference Expenses of July 31, 1933" showed the major expense to be printing. There were two drafts of 100 copies each and a third draft of 1000 copies for a total cost of $877.93. The other expenses for postage, telephone, telegraph, multigraphing and the like were some $200.00 for a total of $1,096.00 expenditures. The receipts were $75.00 contributed by the Conferees themselves and the balance was evenly contributed by the request of the Conference from the American Bar Association, Commercial Law League, National Association of Credit Men and the National Association of Referees in Bankruptcy.

By the end of 1933 the Bankruptcy Conference was thoroughly established. Professor McLaughlin in 1936 gave a description of its founding which has been previously quoted in part. He concluded by describing the growth of the Conference during the few years following.

> The Conference later grew to more than forty members. The Bar Association, Referees', Credit Men's and Commercial Lawyers' Associations each undertook a small contribution to pay clerical and printing expenses Members of the appropriate committees of these organizations were made the basis of the Conference. Additional members were added from time to time as particular interest or particular competence appeared or as a particular subject matter called for the introduction of specialized talent, as in the case of corporate reorganization, stockbrokerage bankruptcy, or real property arrangements by unincorporated persons. Members occasionally added for reasons of diplomacy or promotion did not seriously impair the work. Aged conservatives impressed with the perfections of the Act of 1898 died, withdrew from active participation or gradually acquired an almost human elasticity of mind. Between the ten or more meetings of the Conference which have usually been attended by from 15 to 25 members a lively correspondence has been carried on by the more active members. A Drafting Committee of 5 to 10 has had more frequent meetings. Collaboration between even smaller groups involving occasional personal meetings has contributed to the evolution of the bulk of the actual language. The detailed work of polishing the form of all proposals has naturally fallen into very few hands by a process of informal natural selection.[9]

Professor McLaughlin concluded by saying that:

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9. McLaughlin, Amendments to the Bankruptcy Act, 4 U. of Ch., L.Rev. 364 at 377 (1936-1937);

> Although this description of this operation of the Conference has avoided giving prominence to names of individuals, no description of the work of the Conference would be adequate without calling attention to the extraordinary contributions of a few members. The superb tact and tireless leadership of Chairman King have been required to carry such a loose organization through nearly to its goal. The superb draftsmanship and fabulous industry of Jacob Weinstein of the Philadelphia Bar have raised the standard of form to a point rarely approached by American legislative proposals. In the latter part of the Conference's work many flaws have been detected and cured by the keen and patient detailed criticism of Referee Adair of Pittsburgh.

The National Bankruptcy Conference arose out of and was forged in the heat of the debate leading up to the introduction and defeat of the Thacher Bill and the subsequent introduction and enactment of the Chandler Bill in 1938. The Conference was not so much at, but was the hinge-point of change during these momentous changes in bankruptcy legislation.

Rothschild On New State Bar Division

Atty. Lowell E. Rothschild of Tucson was one of five lawyers named to a newly created bankruptcy law section at the Arizona Bar Assn. convention here yesterday.

The section was created by the Bar's board of governors. Members of the section were formed in a provisional committee to draw up proposed bylaws and to make plans for an organizational meeting at the 1959 convention.

Advocates of the action pointed out that bankruptcies filed in Arizona have increased from 113 in 1952 to 531 in 1957.

In addition to Rothschild, appointed to the committee are Stanley A. Jerman, Phoenix, the Arizona referee in bankruptcy; Lester Penternan and Anthony O. Jones, Phoenix, and Ralph Brandt, Yuma.

THE ARIZONA LAW INSTITUTE
and
THE STATE BAR SECTION ON BANKRUPTCY

announce

A BANKRUPTCY SEMINAR

Date
Saturday Morning
December 17, 1966

Place
Courtroom No. 2
Federal Bldg., Phoenix

9:00 - 10:00 Re-showing of the film, Anatomy of a Bankruptcy - produced by the California Continuing Education of the Bar.

10:00 - 11:00 Lecture Presentations:

Proper Preparation of Schedules - LOWELL ROTHSCHILD, partner in the law firm of Mesch, Marquez & Rothschild, Tucson

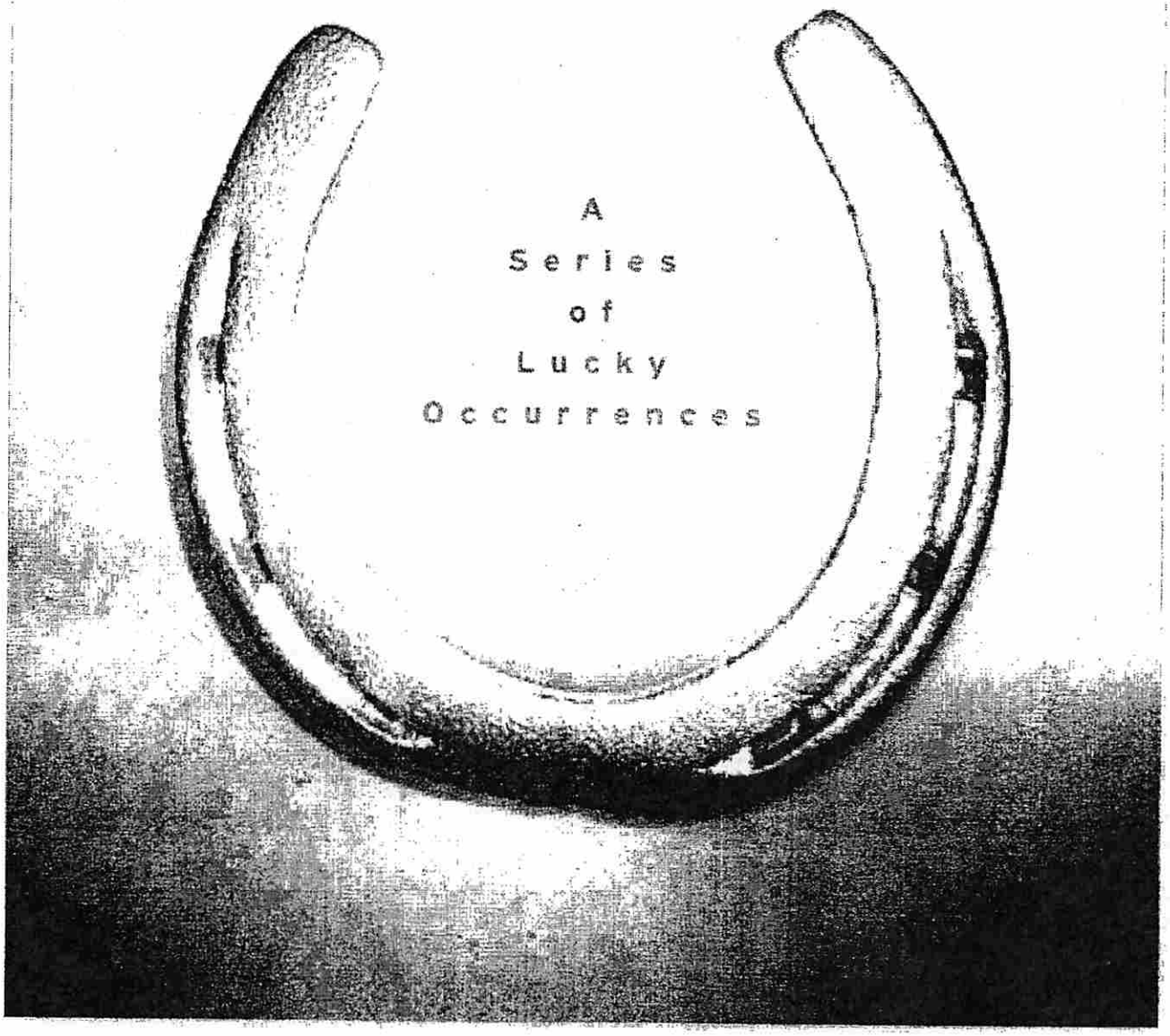
Stay of State Court Proceedings - A. HENDERSON STOCKTON, partner in the law firm of Stockton & Hing, Phoenix

Reclamation Proceedings - FREDERICK K. STEINER, Jr. partner in the law firm of Snell & Wilmer, Phoenix

Judicial Sales and Bankruptcy - LESTER PENTERMAN, partner in the law firm of Penterman & Hamburger, Phoenix

11:00 - 12:00 A Panel Discussion of Bankruptcy Problems
Panel Members - Referees in Bankruptcy:
HUGH M. CALDWELL
JOSEPH U. CRACCHIOLO
VINCENT D. MAGGIORE

ANTHONY O. "TONY" JONES



BY BRIAN L. LEWIS

BRIAN L. LEWIS is a third-year law student in the Indian Law Program at the Sandra Day O'Connor College of Law at Arizona State University. He wrote this article while serving as a law clerk at Lewis and Roca LLP. He thanks Lewis and Roca partner Gerald K. Smith for his direction and assistance on this article.

every time I thought I was out of it, just knocked in the mouth, why, someone I knew would come along and have the answer and get me out of the jam." Anthony O. Jones, or Tony, as his friends call him, has lived a life with a series of what he calls "lucky events." Moreover, he says that he was aided in his life by his informal education that he acquired during the course of his life and professional career.

When asked to name the greatest adversity he had to overcome, he replies "learning to write shorthand and type." Without stopping, he continues, "You know, it was those skills that would aid me the rest of my life. I can't express how much I relied on those skills, skills learned in informal education, for success throughout my legal career." Tony's legal career spanned more than five decades, and, at 98, he is considered one of the state's pre-eminent bankruptcy lawyers.

Tony's career and life have been long and prosperous. His first job was running telegrams for Western Union in 1924. In 1925, he bought his first pair of long trousers and began working with the Arizona Corporation Commission (ACC) as an office boy. "They hired me because they needed a guy who was little enough to climb up and down the 10-foot-high file cabinets all day," recalls Tony. While with the ACC, Tony learned to write in shorthand, type and copy documents using a mimeograph machine. He says that he kept his job with the ACC for 12 years, largely because he was the one who could do all of these things. In fact, he adds, "I never would have gone to, and made it through, law school if I hadn't learned these skills." Luckily for him, he did.

Problem Solving

Tony says, "No one ever asked me about my education—where I went to school—or anything like that. ... They needed help solving a problem and I could do it. Most of the skills I used, I learned by living life." Tony says that his time with the ACC provided a thorough legal and political education. "Keep in mind that the Arizona Corporation Commission in the '20s and '30s was the most powerful state agency in Arizona. It had jurisdiction over almost everything. It covered three branches of government and was called 'the fourth branch of government.'"

"Every couple years, after an election, the Arizona Corporation Commission would be cleaned out and new appointments would be made. After having been there four or five years, I could step into many of the positions in a pinch until they put a new person in there." Tony says that his exposure to the many different departments at the ACC let him "learn by osmosis." He says, "I learned about state government from participating in it." He often had to review complaints before they were filed and include the necessary regulations. In doing so, he was not only exposed to the regulations, but also had to learn why they were necessary.

Another of Tony's responsibilities at the ACC was to transcribe wax cylinders, which stored voice recordings of legal proceedings. While listening and transcribing, Tony picked up a wealth of legal knowledge. This sparked his initial interest in the law and provided him with an understanding of the overall process of the law. When asked what intrigued him about bankruptcy law practice, he replies, "It was all of the things that the Commission had jurisdiction over that got me interested in bankruptcy."

He became the sole clerk of the bankruptcy court in 1936.

"Back in those days there were no bankruptcy judges. Instead, they were called referees, and they would hold proceedings right in their offices."

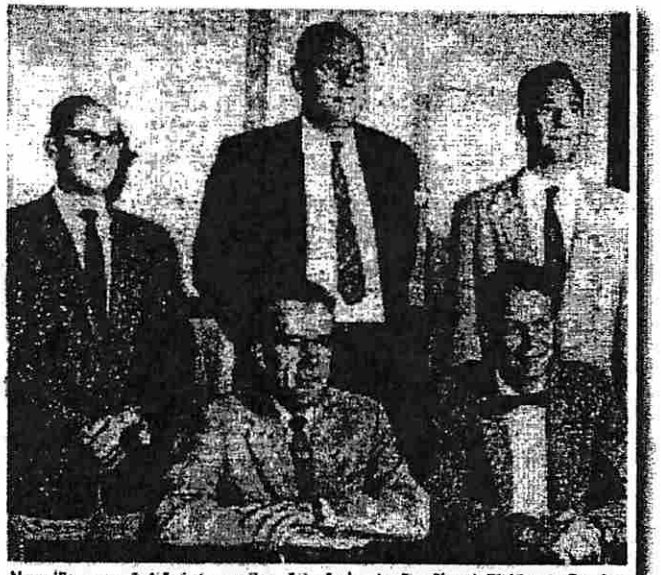
He adds, "There were only about three or four attorneys practicing bankruptcy in all of Arizona at that time. None of the large firms were doing it—and by large, I mean firms that had five or six lawyers."

The practice of law in Arizona was very different in those days. The attorneys could come and go to the referees' office for business as they needed. "It was all very informal, and the most popular people in the referees' offices were their secretaries, because they were the ones that actually handled everything." Tony says that the bankruptcy attorneys brought gifts for the bankruptcy referees' secretaries. No one complained about this practice.

Politics

His interest in the law, specifically bankruptcy law, grew. He was invited to study law in the evenings with Stanley Jerman and Alan Perry, both bankruptcy referees. Jerman replaced Perry as referee in early 1937—they "officed" together. Because of his time with the ACC, Tony knew something about the law, but this study was more in-depth and gave him a greater appreciation for the nuances of the law that were just glossed over in the everyday practice. It was this experience that catapulted Tony into two things that he has spent the years of his life engaged in—politics and the law.

Aside from being a bankruptcy referee, Stanley Jerman was also heavily involved in politics. He had managed legendary Sen. Henry F. Ashurst's campaign in 1934. Jerman thought it would be a good idea for an industrious young man like Tony to work



New officers were installed at a meeting of the Bankruptcy Bar, Phoenix Division, on Tuesday, April 1. They are: seated, left to right: Anthony O. Jones, president, and Ford Dodd, vice president publications. Standing are: Amil J. Ajamie, secretary-treasurer; James S. Riggs, vice president program; and Edgar Hash, vice president publications.

Anthony Jones, President:

Local Bankruptcy Bar Installs New Officers

Anthony O. Jones was installed as the new president of the Bankruptcy Bar Association, Phoenix Division, at a meeting held last Tuesday in the Roundup Room, Y.M.C.A. He succeeds Lester L. Pemberman, who served as president since the Bankruptcy Bar was formed November 19, 1957.

Serving with Jones for the ensuing year are: Ford Dodd, membership vice president; James S. Riggs, program vice president; Edgar Hash, publications vice president; and Amil J. Ajamie, secretary-treasurer.

The annual dues was set at $2.00 per member and presentation of the gavel to Mr. Jones was made by Mr. Pemberman, outgoing president. Other outgoing officers who had served since the Bar was formed are: Neal T. Roberts, who was vice president in charge of publications, and Tom Rood, secretary-treasurer.

SINCE LAST November, the lawyers have met each month at the Y.M.C.A. for regular luncheon meetings and programs covering Schedule A, Schedule B and the State of Affairs of the Bankrupts Petition. These programs are designed to help the bankrupt's lawyer in preparing the petition and pleadings.

The association also plans to provide a permanent form file in the Referee's office for the use of the entire Bar in preparing petitions and pleadings, and to continue holding monthly meetings presenting forums on bankruptcy proceedings and analysis of the latest decisions and Quarterly Referee's Journal.

Arizona Weekly Gazette, Tuesday, April 8, 1958

for the Senator and go back to Washington, D.C. "So, Stanley Jerman told me that Ashurst and his wife were staying at the San Carlos Hotel. He told me to wear my best white suit and white shoes, and to meet them there for lunch. [Jerman] said that he would talk to the Senator and that I should talk to his wife and tell her that I wanted a job in Washington." Tony did, and it worked. "Mrs. Ashurst told me to give her a call first thing when I got to Washington, and she would get me a job. I did, and that was that."

When Tony arrived in Washington, D.C., Franklin Delano Roosevelt had just been re-elected in 1936 and was already looking toward the 1940 election. The Democratic Party was at an apogee across the country, and that was most evident in Washington. Tony went to work for Senator Ashurst, who was the chairman of the Senate Judiciary Committee at the time. Tony was employed as one of the two Clerks of this Committee and was exposed to complex Washington politics right away.

In the prior campaign cycle, Senator Ashurst had campaigned for FDR with a message that the Supreme Court would not be "packed" to get the New Deal agenda implemented. However, the Judiciary's first consideration after FDR was elected was a bill to pack the Supreme Court (prepared by the Justice Department). Ashurst, despite having campaigned to the contrary, introduced the bill and chaired the hearings. However, the Senator was always careful not to take a definite position on the matter. Tony learned quickly that life can be full of changes and that how one responds to these changes makes all the difference in the outcome.

Another legislative landmark Tony had the opportunity to hear debated was the bankruptcy legislation known as the 1938 Chandler Act Amendments. As it turned out, his relationship with Senator Ashurst had a major impact on Tony's career. As pointed out in the Report of the Commission on the Bankruptcy Laws:

> Dissatisfaction with equity receiverships and with bankruptcy in general resulted in further study. In 1932, the Senate established a special committee to investigate receivership and bankruptcy proceedings in the courts of the United States. Although initially to be chaired by Arizona's Senator Ashurst, Senator William G. McAdoo took over as chairman and the hearings became known as the McAdoo hearings.
>
> Legislation was introduced in the Seventy-second Congress in April of 1932 based on the recommendations of the *Thacher Report*. The legislation was opposed by lawyers whose practice involved bankruptcies and reorganizations, primarily on the basis that the proposed legislation (1) changed the Bankruptcy Act of 1898, thereby losing the advantages of over 30 years of court interpretation, and (2) created a central bureau responsible for the administration of the law. At the invitation of the Senate Committee holding hearings on the proposed legislation, a group of

these lawyers drafted new legislation; the group evolved into the National Bankruptcy Conference. The group worked on the amendments for a period of five years.

By the spring of 1936, the sixth draft of amendments was completed and introduced in the House by Congressman Chandler. The draftsmen recast section 12 of the Bankruptcy Act so as to accommodate what they referred to as arrangements, reorganizations, real property arrangements and wage earner amortizations, but this was cumbersome and these subdivisions became separate Chapters X, XI, XII, and XIII of the present Act.[1]

Toward the Law

Tony recalls that he was intrigued by the implications of insolvency for the ever-increasingly complex economy that was developing in the United States, particularly because the economy was experiencing the difficulties of the Great Depression at the time. Stimulated by his study of the law with Mr. Jerman and Mr. Perry in Arizona, Tony enrolled in night classes at National Law School in Washington, D.C.

When asked about his interest in bankruptcy and how that affected his legal education, Tony says, "I was at the end of my time in law school and I decided I would take a bankruptcy class. I had studied it already. And, I had even done some work in it with Ashurst's office. You know what? That was the lowest grade I got in law school." That is truly ironic coming from the lawyer who became known as the "Dean of the Arizona Bankruptcy Bar."

Tony says, "It was a different world then. We didn't have debt when we came out of school. If we came out of law school with $400 of debt, we were deadbeats." It is a different world now, with the average loan debt at approximately $80,000 for law school graduates.

It was a different world then. We didn't have debt when we came out of school. If we came out of law school with $400 of debt, we were deadbeats

Just after Tony graduated from law school, Senator Ashurst sent him back to Arizona to run his 1940 campaign with Sue Murphy. But, before he sent him back, "Ashurst called me into his office and picked up the U.S. Code, which all fit in one book at that time, and told me to read the section on election law real well. That was his signal to me not to do anything funny." The

Bankruptcy Court Called Thankless But Essential

By RICK LANNING

A federal bankruptcy judge warns many retired businessmen to serve as trustees in bankruptcy cases such as Lake Havasu Estates and the Adams Hotel.

Judge Vincent Maggiore praised such trustees as Charles Ballé, former president of Allison Steel, and Fred White, former vice president of Mobil Oil Co., for taking on the responsibility of administering bankrupt estates.

"THIS IS A thankless job, subject to criticism from the press and public," Maggiore said. "In many cases, trustees are under paid or not paid at all."

Ballé, for example, put up $4,000 of his own funds to keep the golf course open at Lake Montezuma, Maggiore said.

"He's still waiting for his money," the judge added.

Even though a bankrupt estate may be worth millions of dollars, it doesn't mean that bills will be paid, he stated.

"JUST BECAUSE an estate is good doesn't mean that it will necessarily generate money," declared Maggiore.

"We have to generate funds before we can do anything."

Some critics of bankruptcy proceedings have accused judges of not doing enough to file criminal charges against persons who break the law while "milking" an estate dry.

MAGGIORE said, "We are not authorized to call on the services of the U.S. Attorney. All we can do is use the funds out of the estate to take action against wrongdoers.

"The FBI will investigate at our request, of course, but all they can do is show that a crime has been committed. Civil matters are another thing. A lot of people don't understand the difference."

He added, a bit irritably, "People think that just because we have control over millions of dollars that this is a slush fund or something."

Maggiore has been critical of Congress for giving bankruptcy judges the responsibility, but not the proper tools, to handle complex bankruptcies.

"IT SEEMS like everybody is willing to abdicate their responsibilities and leave the burden to us to sort out the mess," he said.

"We need more retired business executives, people with high ideals and community responsibility, to help us work out these cases."

He cited Phoenix attorney Anthony (Tony) Jones, who, the judge said, worked over 1000 hours in the Legend City bankruptcy and still hasn't been paid.

"JOHN EVANS has been keeping the Adams Hotel open for the last year during a very trying period," said the judge. "He's doing a great community service, keeping the people employed."

Maggiore says bankruptcy court is a good vehicle to salvage businesses in trouble — but only if the court is approached in time.

"Business owners who see their company going down the tubes are beset with fear," said the judge. "Fear of failure. Fear of the bankruptcy court itself.

"WE WANT TO show them that they don't have anything to fear — that we're here to help them."

Maggiore said he would not be in favor of moving the Lincoln Thrift and U.S. Thrift receiverships into bankruptcy court, as one Phoenix attorney has suggested.

"Lincoln Thrift is being run the way it can be operated under Judge Waters' Court," he said. "No matter where you put the case, there would be administrative costs.

"Anytime you accelerate claims you incur tremendous expenses and that's what a bankruptcy is."

Arizona Weekly Gazette, May 5, 1977

Senator's wife had passed away the year before, and he was not as focused on being re-elected. Tony returned to Arizona with a campaign budget of $26,000, which was not much, even in those days. Senator Ashurst was defeated in the primary by Ernest McFarland. Just like that, Tony's career in politics seemed over.

However, just before heading back to Washington to close out the session, he happened to get into an elevator, and his fortune changed.

> I got in and was surprised to be standing there with McFarland. Well, I happened to know one of the people with him, Floyd Stahl. Floyd introduced me to him. I told him, "I didn't vote for you in the primary, but I'll be supporting you in the general election." The elevator stopped, and we went our separate ways.

Weeks later, Tony received a call from a McFarland staff member, who offered him a job with the campaign. Just like that, Tony's career in politics was resurrected.

As part of his position with the campaign, Tony returned to Arizona to promote McFarland across the state. He also took the bar during that time. He passed and was admitted to practice in October 1941. Ernest McFarland was elected to the Senate. Tony returned with him to Washington to work in his office, as he had for Senator Ashurst.

War & New Challenges

Then, Dec. 7, 1941 dawned, and with it the attack on Pearl Harbor. Tony, like much of the country, decided to serve by enlisting in the armed services. He went to the Navy first, but was denied because the initial examination doctor said he had an enlarged heart. The Army, however, did not seem to think this was the case. So Tony was about to enlist as a private. But then, as he was walking through Washington, he happened to run into a former law school classmate. Her father was a Navy doctor. She told Tony that she would talk with her father, and that Tony should go see him for another examination. Tony did so, and he passed "with flying colors" and enlisted in the Navy.

Tony was placed with the Joint Information Collection Agency, or JICA, and was assigned to serve in China. Tony's journey around the world to get to China would take him from Florida to Belize and Brazil. From Brazil, he traveled to Karachi, Pakistan and then on to India. He was stationed in New Delhi, India for one month, long enough to see the Taj Mahal. He then finally arrived in China, where he was stationed for the next year and a half.

Section On Bankruptcy

The new Section on Bankruptcy completed organization plans and elected its first slate of officers.

Heading the section as president is Lester L. Penterman of Phoenix. Vice president is Lowell E. Rothschild of Tucson, and Anthony O. Jones, Phoenix, was elected secretary-treasurer.

A nine-man council was named to serve as follows:

Penterman

Lester L. Penterman, Phoenix, one year; Lowell E. Rothschild, Tucson, two years; Anthony O. Jones, Phoenix, two years; John C. Ellinwood, Phoenix, one year; Barry De Rose, Globe, three years; Tom Roof, Phoenix, one year; Lawrence Ollason, Tucson, three years; Ralph Brandt, Yuma, two years; and David H. Palmer, Prescott, three years.

Arizona Weekly Gazette, Tuesday, April 14, 1959

While there, Tony learned Mandarin. He did so through total immersion in the language. In his spare time, he ventured out from the base to places where everyone spoke Chinese so that he could listen to them. And his Chinese counterparts tutored him from time to time. After awhile, he was able to go to the homes of local residents and hold conversations. Tony recalls that the Chinese thought very poorly of Navy enlisted men, and that the Chinese were the best bridge players he had ever encountered. He laughs, "I played bridge with them one night, for money. That was the last time I did that. They won every time."

When the war ended, Tony returned to Washington, D.C., to become Senator McFarland's Administrative Assistant, or what is now known as the Chief of Staff. Just after taking the position, Tony's pay was increased substantially from $3,900 a year to $10,000. Tony knew that, making that much money, if he didn't leave Washington soon, he would never return to Arizona. So he expressed to Senator McFarland his desire to return to Arizona. McFarland didn't want to see him go, but Tony was adamant, and the Senator acceded.

The year was 1946, and automobiles were in short supply. Senator McFarland knew Tony needed to get his family from Washington back to Arizona, and he decided to help. He ordered two vehicles—one Chevrolet and one Ford. When the vehicles were ready, the Senator took the Ford and gave Tony the Chevy. Tony drove all the way across the country in that Chevy with his mother-in-law, his wife, their 8-year-old son and infant daughter. They arrived in Arizona in January 1947.

Upon arrival, Tony was appointed a Deputy County Attorney by Maricopa County Attorney Francis J. Donofrio. During the next election cycle in 1948, Tony was elected a precinct committeeperson and a member of the County Executive Committee. He also managed Donofrio's successful reelection campaign for Maricopa County Attorney. Donofrio was appointed to the superior court bench shortly after the election, and Warren McCarthy replaced him. Tony was then appointed by McCarthy as civil deputy.

He had some impressive company: The deputies included John Flynn, Haze Burch, Bob Renaud and Jack Anderson. Tony

—continued on p. 38


Tony Jones in 2008.

Colleagues Recall

Joseph McGarry recalls that Tony was a well-known member of the Democratic Party. In fact, Tony worked for and supported the party from the late 1920s until the 1990s. Moreover, Tony was inducted into the Arizona Democratic Hall of Fame in 1998. McGarry, a partner at Lewis and Roca, also recalls that Tony was regarded by his fellow practitioners as a solid legal representative and knowledgeable practitioner who always gave his clients a great likelihood of having their goals met. McGarry's recollections are echoed by several other practitioners who happened to practice in the era when Tony was the "Dean."

Ronald Cooley, who also practiced bankruptcy law and officed with him from 1967 until his retirement in 1992, recalls that Tony was always willing to help others. Tony was a mentor to Cooley and to Joe Brinig. The three officed together for 25 and 30 years, respectively. Tony served as a colleague and tutor who took an active role in Cooley and Brinig's development as skilled practitioners of the law. Cooley was a litigator, and Brinig practiced bankruptcy law.

Marilyn Schoenike, who has known Tony for more than 40 years, beginning when she was a clerk at the bankruptcy court and later working for Tony, remembers that Tony was always in a positive mood. "In all those years, I cannot remember Tony ever being cross or having a bad day," she says. He "always has a smile and a willingness to help." She recalls that Tony was always very well dressed and went out of his way to be cordial to others during the course of his business. In turn, people were always professional and courteous towards him.

I myself am a bankruptcy attorney who has been in Arizona for some time, and I have several memories of Tony and his exceptional legal career. I had the good fortune to pick up where Tony left off as far as the Bankruptcy Act. In 1972 and 1973 I served as Deputy Director of the Commission on the Bankruptcy Laws of the United States. Just as Tony was present at the birth of the Chandler Act Amendments, I participated in the drafting of the first draft of the 1978 Bankruptcy Code and sat through the deliberations of the Commission on the Bankruptcy Laws.

Although I got much more involved in bankruptcy and got to know Tony much better after my return to Phoenix in the fall of 1973, I had the good fortune to participate in several cases handled by Tony in the 1960s. Perhaps the most well-known case was the attempted reorganization of Legend City. I assisted Joe McGarry in the representation of the secured creditor group. Tony represented the Chapter 10 Trustee, Walter Fulford, and won every battle before the Referee and District Court but lost in the Ninth Circuit. *Adams v. Fulford*, No. 21069 (9th Cir. July 1966) (case and citation unavailable. Brief of Petitioner-Appellant, *In re Legend City*, No. 21069 (9th Cir. July 1966), on file with Lewis and Roca, LLP). The Legend City representation was a financial disaster for Tony, but he never complained.

After my return to Arizona, I gave up my construction and suretyship litigation practice to focus on insolvency matters. I continually had contact with Tony Jones, since he truly was the dean of the bankruptcy bar and represented the trustees in the Arizona cases. I often have observed that Arizona has an excellent bankruptcy bar. Tony was in large part responsible for the collegiality and professionalism of that bar. He set a high standard, and his friendly and congenial approach set the tone for those who practiced bankruptcy in Arizona. But I must add that I never had any idea of Tony's remarkable background. Tony was a very modest person. It was only in the last several years that I got to know Tony on a more personal basis, and it has been a pleasure meeting with him to gather relevant biographical material for this article. Tony, who just turned 98, has a remarkable memory. As evidenced by his recollections included here, Tony has helped many people throughout his life.

Tony believes that his good fortune in life was caused mostly by the help he received from others. He says, "This is most important: I was helped along by many people in my life. I tried to sit down and just write out the names of all of the people that helped me in my life. And I filled out two sheets of a legal pad just writing the names one after the other in small font."

Tony's kindness and cordial nature allowed him to cultivate relationships with others that he came into contact with in the practice of law. He also served as a mentor and aid to many people throughout his life and career. In turn, people were more than willing to reciprocate and help him out of trying times. He says that everything in life just seemed to luckily work out well for him. However, his keen ability to pick up and remember things and put them into practice in his life and his willingness to help others likely caused things turning out so "lucky" for him.

—Gerald K. Smith

—continued from p. 34

also was offered a judgeship by Ernest McFarland, who had been elected Governor. But Tony turned it down because the pay—$21,000—was too low for him to support his family. Tony remained the Deputy County Attorney until 1951. He left and became District Counsel for the Office of Price Stabilization. But his time there was short-lived.

In 1952, Dwight D. Eisenhower was elected President, and many other Republican lawmakers also were elected throughout the country. Arizona was no different. Barry Goldwater took over Ernest McFarland's Senate seat in the same election cycle. Shortly after the 1952 election, the Office of Price Stabilization was shuttered by President Eisenhower. Tony then decided to enter private practice.

Private Practice

He occupied an office in the Fleming building, which was located at the northwest corner of First Avenue and Washington. This was where most of the attorneys in Phoenix officed at the time. Tony's previous experience with the ACC had spurred his interest in bankruptcy. His studies with Perry and Jerman and having been clerk of the bankruptcy court had also helped him down this road. Moreover, his work on the Amendments to the Chandler Act made him more knowledgeable about the bankruptcy code than most bankruptcy referees. Through having been helped along by others, Tony had fortunately been directed into a field of law that needed practitioners and interested him a great deal.

When Tony began private practice in 1952, his overhead was about $300 per month. He did not charge clients hourly fees. Instead, he charged them a flat fee for his service. He recalls that he would "charge $200 for a straight bankruptcy, whether they were voluntary or involuntary petitions." However, he did have rates for consultations and office work. He charged $150 a day or $25 per hour for consultations. If a consultation was under 30 minutes, he charged only $10.

In Arizona, Bankruptcy Law became a State Bar Section in 1959. The Section grew and became better organized year to year. During that time, Tony became known in Arizona's legal circles as a solid bankruptcy practitioner. Moreover, he became the second President of the Phoenix Division of the Bankruptcy Bar Association in 1958, succeeding Lester L. Penterman. In 1959, Tony was elected Secretary-Treasurer of the State Section on Bankruptcy.

In 1958, there were fewer than 10 attorneys representing debtors in Arizona. In that year, only six Chapter 13's were filed in Arizona. By 1963, there were 2,984 bankruptcy cases filed. And, by 1987, there were 10,437. Tony's records show that in August 1989 alone, there were 1,559 cases filed. Tony analogizes the growth in the amount of cases filed, and particularly cases filed in bankruptcy courts, to Daniel Defoe's story of Robinson Crusoe. He says:

> Robinson Crusoe had no rules until Friday came along. Then, rules had to be laid down. They had to allocate the work between them and provide for their joint efforts toward subsistence. This is just like life. The more people that come into an area, the more rules and regulations you must have to keep things orderly.

At the County Attorney's Office, Tony had some impressive company. The deputies included John Flynn, Haze Burch, Bob Renaud and Jack Anderson. Tony also was offered a judgeship by Ernest McFarland. But he turned it down because the pay—$21,000—was too low for him to support his family.

Tony says he learned this simple lesson as a boy and it continues to ring true today. He also observed this phenomenon as the practice of bankruptcy law evolved.

Tony represented debtors, creditors and trustees during his career, and he handled several interesting cases. However, none were as well known as "the Legend City case." Legend City was a theme park that was built on east Van Buren in Phoenix. It was designed to be the Disneyland of Arizona. It thrived for a time but eventually ran into economic troubles. The case was a Chapter 10 corporate reorganization. Tony represented Walter Fulford, the Trustee in the case. While the case made headlines in the state, it would not turn out well for Tony.

Tony worked tirelessly on the case, trying to work the park out of bankruptcy. However, try as they might, the Trustee, Tony and everyone else that was expending their efforts could not make it work. Tony made a decision that he could get paid out of the equipment that was on the ground. But before he could execute on the equipment, a friend of Tony's, who was representing a group of investors in the park, talked him out of it. In the end, Tony worked more than 8,000 hours on the case and was never paid.

"They bamboozled me on that one," he says. "But I guess I got something out of it. Another firm in town that was above my offices said I could have access to their extensive library for all of the work I had done."

Small consolation for a lawyer in his own practice. But use of a library, along with education and experience, can be remarkable tools for a man such as Tony Jones, who has always viewed the positive side, and who continues to give greatly of himself.

endnote

1. H.R. Rep. No. 93-137, pt. 1, at 239-240 (1973).

Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978

Part One: Outside Looking In

by

*The Honorable Geraldine Mund**

> [T]his outrageous bill that passed the Congress, which would make bankruptcy judges the next thing to Article II [*sic*] judges and give them terms of fourteen years (as opposed to their present six), would make them appointable directly by the President rather than accountable to the district courts and would give them contempt powers which they do not now have, is a terrible bill. Not only is the estimated cost of $143 million in the first year more than the present system an outrage to the taxpayers, the whole bill goes - along with the Judicial Tenure Act which passed the Senate but hopefully will be derailed in the House - to denigrate the position in authority of federal district judges, the people who have been the bastion of civil liberties and protectors of individual rights.

Letter from Judge James L. Oaks (Second Circuit Court of Appeals) to Phillip Spector (White House Associate Assistant, Office of Public Liaison), 10/13/78.

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*United States Bankruptcy Judge, Central District of California. This study is a slightly revised version of the thesis that I wrote in support of my master's degree in history from California State University, Northridge. I give great thanks to my committee for their time and guidance: Professors Thomas Maddux, Thomas Devine, and Ronald Davis.

In a recent study, Ralph Mabey found that bankruptcy judges have very high job satisfaction and feel that the distinction between bankruptcy judges and district judges has eased for the better. Ralph R. Mabey, "The Evolving Bankruptcy Bench: How are the 'Units' Faring?" *Boston College Law Review* 47 (December 2005): 105. This is a direct result of the vision, hard work, and great skill of the leadership of the National Conference of Bankruptcy Judges, particularly Judges Conrad Cyr and Joe Lee, and NCBJ's counsel Murray Drabkin. I dedicate this to them. May it inspire the present and future leaders of NCBJ to act with foresight and determination to help the bankruptcy system reach its highest potential of service to the people and the country.

> To put it bluntly, it stems from the desire of those officers who were initially appointed to office as bankruptcy referees and who serve as adjunct aides to District Judges to achieve a higher status, with virtually all but the status of "life tenure" judges - almost like promoting all the Army's Sergeants Major to Captain rank!

Chief Justice Warren Burger, letter to President Jimmy Carter, 10/27/78.

> Insofar as I can ascertain, the only remaining opposition [to the Bankruptcy Act of 1978] is that of the Judicial Conference, 25 judges headed by the Chief Justice. It is my judgment that the principal reason for this emotional opposition is the desire of this small group, and particularly the district court judges, to retain the right of appointment of bankruptcy judges (referees), which they now have, and to have these judges continue (in the language of the Chief Justice) "to serve as adjunct aides to district judges." Every other group of persons concerned with this important subject matter has concluded that this legislation is extremely necessary because of the importance today of both consumer credit and commercial credit.

Memorandum from Robert Lipshutz, Counsel to the President, to President Carter, 10/31/78.

> While they [the Judicial Conference of the United States] argue strenuously that the transformation [of the bankruptcy courts] will be too costly, it seems obvious that the overriding reason for their opposition is the upgrading of the referees to judges, the removal of influence, control and jurisdiction from district judges, and a perceived diminution in the status of the district judges.

Memo from Stu Eizenstat, Assistant to the President for Domestic Affairs and Policy, and Frank White, Domestic Policy Staff Associate Director for Justice and Civil Rights, to President Carter, 11/4/78.

> When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they

gress to grant such wide-ranging authority to judges who were not appointed by the president for life or good behavior. As the House leadership had feared, the Supreme Court plurality ignored the extensive findings by Congress and declared the statute to be unconstitutional - at least when the debtor in bankruptcy attempted to use the bankruptcy court to prosecute an action to collect from a third party in accordance with state law. Chief Justice Burger joined the dissent, voting to uphold a jurisdictional scheme that he personally abhorred. But his assurances to certain members of Congress that the 1978 law would meet constitutional muster failed.[67]

Anticipating a negative outcome, the day before oral argument in *Marathon* Congressman Rodino introduced a bill to create an Article III bankruptcy court, the only guaranteed solution to the constitutional conundrum. With the Supreme Court decision a few months later, the struggle moved back to the Congress. The squabble between the bankruptcy judges and the Article III judiciary replayed itself before the legislators, leading Congressman Harold Sawyer (R-MI) to comment: "I think it's strictly a petty, turf argument. It is kind of a Mickey Mouse mess."[68] Once again, Chief Justice Burger became active in trying to sculpt the law to his liking; this time he was more successful since the Republican Senate had no desire to discuss an Article III solution.

In 1984, Warren Burger got his wish or at least as much of it as was politically possible: the bankruptcy courts became divisions rather than adjuncts of the district courts. Bankruptcy judges were removed from the political appointment process, with appointment by the courts of appeals rather than the president - which is what most of the bankruptcy judges had sought from the very beginning of the reform discussion. Even though the bankruptcy judges lost some of their expected status, there were many changes for the better during the six years between the time that President Carter signed the Bankruptcy Act of 1978 and President Reagan signed the Bankruptcy Amendments and Federal Judgeship Act of 1984.[69] The bankruptcy court had truly become a court, with its own clerk, budget, and facilities. And the referees had largely been accepted by the Article III judges as "brethren," rather than as "adjunct aides to District Judges."[70]

But the new law did not take effect without controversy. In signing the

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[67]For an analysis of the process within the Supreme Court in reaching its decision in Northern Pipeline Construction v. Marathon Pipeline Co. and specifically dealing with the role that Chief Justice Burger played in that case see Geraldine Mund, "A Look Behind the Ruling: The Supreme Court and the Unconstitutionality of the Bankruptcy Act of 1978," *American Bankruptcy Law Journal* 78 (2004): 401.

[68]"The 'Stepchildren' of the Federal Justice System. Bankruptcy Courts: On Brink of Chaos," *The Tennessean*, 1 August 1983, Special Report, p.3.

[69]Pub. L. No. 98-353, 98 Stat. 333 (1984).

[70]Burger to Carter, 27 October 1978 letter.

REDFIELD TOMLINSON BAUM SR.
UNITED STATES BANKRUPTCY JUDGE - ARIZONA

Redfield T. Baum, Sr. was appointed a United States Bankruptcy Judge for the District of Arizona on March 26, 1990. Prior to his appointment, he was a partner and director at the O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears law firm, one of the then largest law firms in Arizona, where he concentrated in commercial law, creditor's rights, bankruptcy, chapter 11 reorganizations, and litigation. From 1973 to 1980, he practiced with and became a partner at the Arizona law firm of Rawlins, Ellis, Burris & Kiewit. He graduated with honors from Arizona State University [B.A. History] in 1970 and from Arizona State University College of Law in 1973. He was commissioned as a second lieutenant in the United States Army in 1970 and became a captain prior to his honorable discharge. He has been on the board of directors of the Sandra Day O'Connor College of Law at Arizona State University Alumni Association for many years.

In 2005, he was appointed the Chief Judge of the Arizona Bankruptcy Court. He has been an active member of the National Conference of Bankruptcy Judges serving on the Board of Governors, the finance, elections, site selection and legislative committees, and runs its annual golf tournament. He has served multiple times as a judge pro tem on the Ninth Circuit Bankruptcy Appellate Panel. He has served on the Ninth Circuit Bankruptcy Judge's education committee and its local rules committee. He was also a member of the Arizona State Federal Judicial Council. He has also served as a visiting judge and settlement judge in other districts in the Ninth Circuit. He helped create and implement the Alternative Dispute Resolution program adopted by the Arizona Bankruptcy Court.

He has served numerous times as an instructor at the National Institute of Trial Advocacy bankruptcy litigation skills annual programs and at the American Bankruptcy Institute Trial Skills program. He was one of the original authors of the Arizona Civil Remedies Book. He also coauthored the chapter on Chapter 11 Cases Involving Professional Sports Franchises in Collier Guide to Chapter 11. He has participated at the American Bankruptcy Institute's annual national program and annual southwest programs on numerous bankruptcy related topics and is a long time member of that organization. He has been a speaker at the annual Chapter 7 and Chapter 13 Bankruptcy Trustees Conferences. Co-taught a course on Comparative International Insolvency at the Master in International Law Program at McGeorge University Law School. He participated in the program "Reducing the Risk": Promoting Mutual Understanding in Insolvency Practices" given in San Jose, Costa Rica in August 1996, which was co-sponsored by the Associacion Costarricense de Derecho Internacional and the American Bankruptcy Institute. He was one of the three members of the U.S. Delegation to the Czech Republic to assist and consult with the Czech Parliament, Supreme Court and others regarding the Czech Republic enacting a new, modern insolvency law, which started in 2001 and is an ongoing program. He spoke at the International Bar Association's annual meeting in the Czech Republic in 2005. Twice selected as one of the ten "Outstanding Bankruptcy Judges" by Turnarounds & Workouts published by the Beard Group, Inc., first in 2000 ["Excellent practical experience in large cases; consensus builder, but makes tough rulings to break deadlocks; great rapport with practioners"] and again in 2011 [Creative judge who expeditiously handled Phoenix Coyotes Chapter 11 case, dealing efficiently with matters of first impression under the bankruptcy code. Organized and digested volumes of extensive legal briefing on all areas of law (including anti-trust) and kept control of

the proceedings so the time table proceeded on track"].. He has spoken extensively in the United States, primarily in the southwest, on a variety of legal topics including commercial law, bankruptcy/reorganizations, foreclosures and litigation presenting to the American Bankruptcy Institute, Arizona State Bar, Maricopa County Bar, Pinal Country Bar, Western Michigan Bankruptcy Bar, Urban Land Institute, California Bankruptcy Forum, Association of Independent Consumer Credit Counseling Agencies, and many others. In 2016, taught International Bankruptcy at Monash University in Prato, Italy.

In 2014, Judge Baum was selected as the Annual Distinguished Alumni Honoree by the Sandra Day O'Connor College of Law at Arizona State University.

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EMPLOYMENT:

September 1, 2008 — Present — **SMITH AND SMITH LAW OFFICES, PLLC**, Tucson, AZ
Partner with son John C. Smith

June 1961 – August 31, 2012 — **LEWIS AND ROCA LLP,** Phoenix, AZ
Of Counsel September 1, 2008 – August 31, 2012
Partner, June 1961 – October 31, 2008

EDUCATION:

NEW YORK UNIVERSITY SCHOOL OF LAW, LLB, 1961
Root-Tilden Scholar
Law Review, Articles and Survey Editor
Dean's List, graduated cum laude, ranked third in graduating class; Order of the Coif
Phi Delta Phi Legal Fraternity
New York University Founders Day Award
Maurice Goodman Memorial Prize for Outstanding Scholarship and Character
Paul D. Kaufman Award for the Law Note of Outstanding Excellence (co-recipient)

KANSAS STATE UNIVERSITY, College of Arts and Science, B.S, major in Government, graduated with High Honors, 1958, Honors - Phi Kappa Phi, Phi Alpha Theta, Honors Program

***SERVICE*:**

Mr. Smith was a member of the Arizona Air National Guard and in 1961 his unit, the 161st Fighter Squadron, was activated at the time of the Berlin crisis. He retired from the U.S. Air Force Reserves with the rank of Captain in 1975.

COURT ADMISSIONS:

Arizona Supreme Court (Admitted 1962)
United States Bankruptcy Court for the District of Alaska (Admitted 1991)
United States District Court for the District of Arizona (Admitted 1962)
United States District Court for the Northern District of Texas (Admitted 1990)
United States Court of Appeals for the Ninth Circuit (Admitted 1972)
United States Supreme Court (Admitted 1970)

SELECTED REPRESENTATIONS:

General counsel for R. Carter Pate, Independent Trustee of the NBH Liquidating Trust under the liquidation plan confirmed in the Nelson Bunker Hunt Chapter 11 case in the Bankruptcy Court in Dallas, Texas.

General counsel for Steven S. Turoff, Independent Trustee of the WHH Liquidating Trust under the liquidation plan confirmed in the William Herbert Hunt Chapter 11 case in the Bankruptcy Court in Dallas, Texas.

Counsel for Kaiser Steel Resources and KSC Recovery. Inc. in lawsuits filed in Denver, Colorado arising out of the 1984 leveraged buyout of Kaiser Steel Corporation, which prior to its demise had been the largest integrated steelmaker on the West Coast.

Counsel for Continental pilots in resisting the ALPA and Continental settlement in *Continental I* and in recovering claims in *Continental I* and *II*.

Counsel for Siemens AG as to its claims and Original Manufacturers Agreement with Storage Tech in the Storage Tech Chapter 11 case in the Bankruptcy Court in Denver, Colorado.

Counsel for MarkAir. Inc. and MarkAir Express, Inc. in their Chapter 11 cases in the Bankruptcy Court in Anchorage for the District of Alaska.

Mr. Smith was general counsel for the Arizona Golf Association for over 21 years.

TRUSTEE:
Plan Trustee under the Liquidation Plan confirmed in the SM Coles LLC Chapter 11 case in the District of Arizona.

Plan Trustee under the Liquidation Plan confirmed in the Boston Chicken, Inc. and 23 affiliates' Chapter 11 cases in the District of Arizona.

Chapter 11 Trustee in the Preservation Corporation and Rene L. Couch Chapter 11 cases in the District of Arizona.

Trustee of the Farmland Dairies, LLC Litigation Trust created by the Plan of Reorganization in the Farmland Dairies Chapter 11 case in the Southern District of New York Bankruptcy Court (affiliate of Parmalat, SPA).

EXPERT WITNESS AND CONSULTANT:
Mr. Smith has been retained as an expert witness in cases involving legal ethics, fiduciary duties of agents and Chapter 11 reorganizations. References will be furnished on request.

PROFESSIONAL ACTIVITIES:
Deputy Director of the Commission on the Bankruptcy Laws of the United States (1972-73)

Committee on Creditors' and Debtors' Rights, State Bar of Arizona (Chair 1969-72)

Lawyer Delegate to the Ninth Circuit (1988-91)

National Bankruptcy Conference (Member since 1970)
- Served on the following Committees:
  - Executive Committee
  - Committee on Taxes and Employment Benefits
  - Committee on Partnerships
  - Committee on Professional Responsibility
  - Committee on Insurance Insolvency

Judicial Conference of the United States
- Advisory Committee on Bankruptcy Rules (Member, 1993-1999)
  - Forms Subcommittee (Member)
  - Litigation Subcommittee (Member)
  - Local Rules Subcommittee (Member)
  - Long Range Planning Subcommittee (Member)
  - Rule 2014 Disclosure Subcommittee (Member and Former Chair)
  - Rule 7062 Subcommittee (Member)
- Subcommittee on Attorney Conduct Rules of the Committee on Rules and Practice of the Judicial Conference (Designated Representative of Advisory Committee on Bankruptcy Rules)
- Special Study Conference on the Federal Rules Governing Attorney Conduct (Participant)

National Bankruptcy Review Commission
- Served on the following Committees:
  - Ethics Working Group
  - Partnership Working Group
  - Tax Working Group

National Conference of Commissioners on Uniform State Laws
Task Force on Bankruptcy Related Matters (Co-Chair)
Permanent Editorial Board for the Uniform Commercial Code-Study Group, Uniform Commercial Code Article 9 (Member, 1989-93)

American Bar Association
Business Law Section
Served on the following Committees:
Ad Hoc Committee on Partnerships in Bankruptcy
Business Bankruptcy Committee
Chapter 11 Subcommittee (Chair)
International Bankruptcy Subcommittee
Joint Task Force with Litigation Section on Bankruptcy Court Structure and Insolvency Jurisdiction and Venue Subcommittee
Professional Ethics in Bankruptcy Cases Subcommittee (Chair, 1989-1996)
SABRE Subcommittee (Chair)
Task Force on Limited Liability Entities in Bankruptcy

American Bankruptcy Institute (Member, 1989-1999)
Board of Directors (Member, 1989-1995)
Committees served on:
Legislation, Bankruptcy Taxation, Individual Debtors, and Business Reorganizations Committee

American College of Bankruptcy (Member since 1989)
Member of the following Committees:
Bankruptcy History Committee
Bankruptcy Review Commission Project Steering Committee (Co-Chair)
Board of Directors (Chair, 1995-1997; Member from 1989-1997)
Board of Regents (Chair, 1989-1995)
Distinguished Service Award Selection Committee (Chair, 1996-2001)
Executive Committee
Foreign Fellows Selection Committee (Member)
Judicial Nominating Committee for the College

American Law Institute (Member since 1989)
Advisor or Member of the following projects:
Members Consultative Group - Restatement (Third), Restatement of the Law Governing Lawyers
Members Consultative Group - Restatement (Third), Restatement of the Law, Suretyship
Members Consultative Group - UCC Article 2 - Sales
Transnational Insolvency Project

Ninth Judicial Circuit Historical Society
Board of Directors (Member since 1988)

International Association of Restructuring, Insolvency & Bankruptcy Professionals (INSOL)
National Host Committee for 1997 Conference (Member)

Turnaround Management Association, Arizona Chapter (Founding Member)

Arizona Bar Association

Maricopa County Bar Association

Pima County Bar Association

***PUBLICATIONS**:*

Author:

Comparison of Uniform Consumer Credit Code, Consumer Credit Protection Act and Existing Arizona Law for Legislative Committee of Arizona State Legislature

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Chapter 11 Reorganization Annual Survey of Bankruptcy Law, Callaghan and Company (1980-1989)

"An Introduction to Partnership Issues in Bankruptcy Cases." Norton Bankruptcy Law and Practice. Clark Boardman Callaghan (1994)

"Disinterestedness," "Executory Contracts," "Reorganizations," "Possible New Procedures," "Administration," "Debtors Eligible for Relief," "Avoidance Actions and Claims of Creditors that Become Property of the Estate," "Prefiling Disclosures"

Fairness to Creditors and Fraud and Criminal Implications of Nondisclosure of Financial Difficulty," Norton Annual Survey of Bankruptcy Law, Clark Boardman Callaghan (1995)

"Insolvency Law for the 21st Century," State Bar of Arizona Bankruptcy Journal (March 1996)

"Conflicts of Interest in Workouts and Bankruptcy Reorganization Cases," 48 So. Carolina L. Rev. 793 (1997)

"Standards for the Employment of Professionals in Bankruptcy Cases: A Response to Professor Zywicki's 'Case for Retaining the Disinterestedness Requirement for Debtor in Possession's Professionals,'" 18 Miss. C. L. Rev. 327 (1998)

Co-Author:

Note, Affirmative Duties Running with the Land, 35 N.Y.U.L. Rev. (1960)

Prof. Frank R. Kennedy and Gerald K. Smith. "Some Issues in Partnership Bankruptcy Cases and Recommendations for Legislative Change," Annual Survey of Bankruptcy Law, Callaghan and Company(1990)

Prof. Frank R. Kennedy and Gerald K. Smith. "Fraudulent Transfers and Obligations: Issues of Current Interest," 43 So. Carolina L. Rev. 709 (1992)

Gerald K. Smith and Prof. Frank R. Kennedy. "Postconfirmation Issues: The Effect of Confirmation and Postconfirmation Proceedings," 44 So. Carolina L. Rev. 621 (1993)

Prof. Frank R. Kennedy and Gerald K. Smith. "Some Suggestions for the Bankruptcy Review Commission," *Annual Survey of Bankruptcy Law* Clark Boardman Callaghan (1995-1996)

Randolph J. Haines and Gerald K. Smith, "The Bankruptcy Reform Act of 1994-Significance for Business Chapter 11 Cases," Norton Bankruptcy Law Adviser (December 1994)

Contributing Author:

Practicing Under the Bankruptcy Reform Act, C.R.R. Publishing Company (1979)

Contributing Editor:

Collier on Bankruptcy, Vol. 12, 1975 (14th edition)

Construction Lien Manual (Arizona portion), published by National Technical Publications

Principal Contributor/Editor:

Norton Bankruptcy Law and Practice (1985-1993)

Coeditor:

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LECTURER:

ALI-ABA Committee on Continuing Professional Education
American Bankruptcy Institute
American Bar Association, Section of Business Law
Alaska State Bar
Arizona State Bar
Bankruptcy Seminars of Iowa, Inc.
California Financial Lawyers Association
Central California Bankruptcy Association
Idaho, Utah, New York and Arizona Bar Associations
International Bar Association
National Conference of Bankruptcy Judges
New York University School of Law
Norton Institutes on Bankruptcy Law

Practising Law Institute
Prentice Hall Law & Business
Professional Education Systems, Inc.
Securities Regulation Institute
South Carolina Law Review Bankruptcy Symposiums
Southeastern Bankruptcy Law Institute
Southern Methodist University School of Law
Southwestern Legal Foundation
The Institute of Continuing Legal Education
University of Arizona School of Law
University of Kentucky College of Law
University of Omaha Law School
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ADJUNCT PROFESSOR:

Arizona State University School of Law, Fall 1999, Bankruptcy Course
University of Arizona, Spring 1994, Debtor Creditor Course

SPECIAL RECOGNITIONS:

The Best Lawyers in America®, by Woodward/White, Aiken, SC, in the categories of bankruptcy and creditor-debtor rights

K&A Restructuring Register: America's Top 100, a peer group selected listing of nationally recognized attorneys and financial advisors currently specializing in reorganization, restructuring, insolvency and bankruptcy matters

The Phoenix Business Journal as the "Best of the Bar" in the areas of Tax/Finance/Bankruptcy
In 2000 received the Distinguished Service Award from the American College of Bankruptcy
Recipient of the Emory Bankruptcy Developments Journal's Lifetime Achievement Award in 2004
Honored as a "Legend of the Law," National Conference of Bankruptcy Judges (2006)
Honored by the Arizona State Bar for service to bankruptcy system and to Bankruptcy Section (2008)
Martindale-Hubbell AV Preeminent Lawyer Rating in 2012.

MCR MESCH CLARK ROTHSCHILD

Lowell E. Rothschild

Lowell E. Rothschild, a senior shareholder and a founding partner of Mesch Clark Rothschild, received his J.D. in 1952 from the University of Arizona College of Law.

Rothschild's practice concentrates on bankruptcy, business reorganization, and estate planning. He has represented debtors, creditors and creditors' committees in a wide range of reorganization activities.

He is a member of the American Bankruptcy Institute, and for more than twenty years he has been listed in the *"Best Lawyers of America."*

He acts as a Judge Pro Tempore, Special Master and Mediator for the Pima County Superior Court for the State of Arizona. Rothschild is a Hearing Officer for the State Bar of Arizona's Disciplinary Committee.

He has been a frequent lecturer on Bankruptcy and Business Reorganization, law practice skills, and law practice management; and has appeared on programs for the American Bar Association; Arizona, California and Washington Bar Associations, and the Pima County Bar Association. Rothschild has presented at the Institute for Continuing Legal Education of the University of Michigan, the National Conference of Bankruptcy Judges, the Arizona State University Graduate School of Business, Professional Education Systems Institute, and the University of Arizona College of Law.

He is a Fellow of the American Bar Association Foundation, a Fellow of the American College of Bankruptcy, a Fellow of the College of Law Practice Management and a Fellow of the Arizona Bar Foundation. He has served as the lawyer representative from the State of Arizona for the United States Ninth Circuit Judicial Conference. Rothschild is a past Chairman of the Law Practice Management Section of the American Bar Association. He was a Project Coordinator of the American Bar Association publication *"Withdrawal, Retirement and Disability,"* and a contributor to the American Bar Association publication *"Beyond the Billable Hour"* and *"Win-Win Billing Strategies."*

He served as a member and Chairman of the Bankruptcy Specialization Committee of the State Bar of Arizona from 1986 to 1995. He is a past president and current board member of the Tucson Airport Authority and a member of the Board of Visitors of the University of Arizona College of Law. In addition, he was a member of the University of Arizona Foundation, the Arizona Board of Medical Examiners, Temple Emanu-El and the Jewish Community Foundation. In 2006, Lowell Rothschild was presented the Alumni Professional Achievement Award by the University of Arizona, and in 2007 the University of Arizona College of Law honored Mr. Rothschild with the Distinguished Alumnus Convocation Award.

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- Corporate Reorganization

Admissions

- State Bar of Arizona
- United States District Court of Arizona
- Ninth Circuit Court of Appeals
- Bar of the United States Supreme Court
- United States Tax Court

Organizations and Recognition

- American College of Bankruptcy, Fellow
- College of Law Practice Management, Fellow
- Arizona Bar Foundation, Fellow
- American Bar Association Foundation, Fellow
- United States Ninth Circuit Judicial Conference, Past Lawyer Representative
- University of Arizona Alumni Professional Achievement Award, 2006
- The University of Arizona College of Law Distinguished Alumnus Convocation
- Award, 2007
- Tucson Airport Authority, Past President and current board member
- Board of Visitors of the University of Arizona College of Law, Member
- University of Arizona Foundation, Member
- Arizona Board of Medical Examiners, past member
- Temple Emanu-El, Past President and current member

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Education

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Writings

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Contributor to the American Bar Association publication "*Beyond the Billable Hour"* and *"Win-Win Billing Strategies."*