

United States Bankruptcy Court

Eastern District of New York

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Chambers

Judge Conrad B. Duberstein
Chief United States Bankruptcy Judge

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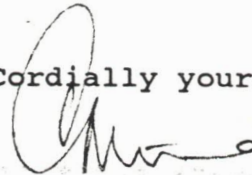
Leonard Rosen, Esq.
299 Park Avenue
New York, New York

Dear Len:

In doing some research I came across the enclosed article which appeared in the July, 1948 issue of the Journal of the National Association of Referees in Bankruptcy, the predecessor to the present American Bankruptcy Law Journal. The article deals with the formation of the National Bankruptcy Conference, of which you are one of its honored members, and I thought it would be of interest to you and your colleagues. Incidentally, my uncle Sam Duberstein was Chairman of the Conference as appears from the enclosed item in the April, 1951 Journal.

Kindest personal regards.

Cordially yours,



CONRAD B. DUBERSTEIN
CHIEF BANKRUPTCY JUDGE

CBD/mp

Enclosures.

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

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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

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. Copyright La Salle Extension University 1939.

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-forgotten 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 10, 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 Swannstrom, 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 diminutive 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.

Exceptions have been carried into what tax claims were a third and that this was not the case. To follow the English bankruptcy law, which decided again any question that may be raised, indicating that such claims, usually at the date of bankruptcy, should be allowed.

And, the one thing that seems to be the general rule, interest should be allowed in bankruptcy in the situations we see in the recent case of *Oppenheimer vs. 186*, C.C.A. 5th (1949), cited by the Referees' JOURNAL, supra, the allowance of interest to the date of payment is not enough is realized.

In writing an article of this sort, the Referee, though a member, should not be critical of his superiors. An article should not come very often, and who

it does not mean to be disrespectful and to make a point. The Court of Appeals in *Oldham* states that its decision in *New York vs. Saper*, and seems to use the negative language of *Vanston Bondholders' Committee vs. Green* —

claims accruing after the petition was filed, if the property was worth more than the sum of

the practice of allowing interest after the date of bankruptcy as a matter of course, is consistent in principle with the cases (citing *Sexton vs. Dreyfus*, Fifth Circuit states —

the fundamental principle of the bankruptcy law which rests designated as liens and pledges, should not be impaired in the administration under the Act manifests no intent to deviate

never, the "fundamental principle" of *Dreyfus*, and reaffirmed in *City of New York* which was carried over from the old system, that interest on both sides stops at the date of bankruptcy is more proper to say that the intent to deviate from this latter

is that the principles announced in *Green* should be limited to the facts of that case. But it is no more consistent with its facts than it is to rely, as stated in *Vanston Bondholders' Committee vs. Green* on different facts — interest on interest in the equitable considerations of the case turns.

the secured creditor equitable should be allowed interest beyond the date of the petition. Conversely, if the secured creditor stood to gain as much as the unsecured creditors, or if the secured creditor acquiesced in the proceedings expressly or by implication, he ought not to be allowed any interest beyond the date of the petition. If there is any undue delay in affecting the sale, that factor must be taken into consideration in determining whether to allow any interest beyond the date of bankruptcy. It will simply be necessary to exercise a sound judicial discretion in each case in weighing the equities. No mechanical rule is available other than the general rule.

To summarize then:

As a general rule interest stops on both secured and unsecured claims at the date of bankruptcy, except where the securities themselves earn interest or dividends, and except where the estate is solvent. The general rule can and should be varied when, but only when, substantial equities require the allowance of interest to a later date.

REFEREE DUBERSTEIN NEW CHAIRMAN OF NATIONAL BANKRUPTCY CONFERENCE



REFEREE
SAMUEL C. DUBERSTEIN
Brooklyn, N. Y.

Referee Samuel C. Duberstein of Brooklyn, N. Y. was elected Chairman of the National Bankruptcy Conference, to succeed Jacob I. Weinstein of Philadelphia, at the session held on February 24, 1951. Peter B. Olney, former referee and past President of our Association, was elected Treasurer.

Referee Duberstein has been an active member of our Association since his appointment in 1945 and has attended our annual conferences regularly since that date. Mr. Weinstein expects to continue his interest in the activities of the National Bankruptcy Conference but was compelled to ease up on his doctor's orders.

We are confident that Referee Duberstein will render valuable service as the new chairman of the National Bankruptcy Conference, and our Association extends to him our congratulations and best wishes.

Lipkin

(Continued from page 39)

if jurisdiction is had of the parties or of the property as set forth in Rule 26(a), that notice could be given to the