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Bankruptcy--Trustees--Attack by Courts on Credit Associations

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party would be estopped by the record to maintain a second suit; so election of remedies would be mere surplusage there. When thus limited and qualified, election of remedies is a neutral doctrine. It is harmless and practically useless; but it is hard to justify any extension of the limitation. Modern ideas of justice are not readily reconcilable to the proposition that a plaintiff must lose a valuable right of action merely because his ignorant or care- less attorney has attempted to pursue a remedy that was not available to him or has bungled what should have been a sufficient rem- edy. So long as the plaintiff is acting in good faith, the law should not place arbitrary and unwarranted restrictions upon his honest efforts to get what is justly due him. If the defendant actually owes something, there is small justification for allowing him to escape payment through some artificial doctrine. On the other hand, if he does not owe anything, he will usually not be prejudiced by having the case tried on its merits.

As already indicated, it seems that West Virginia has not yet saddled herself with this so-called doctrine of election of remedies. Limited to its proper scope, it would not have changed the result in Cameron v. Cameron; for, in bringing the annulment suit, the plaintiff was merely attempting to assert a remedy she did not have. The case, however, afforded an excellent opportunity for the court to take a definite stand as to the application and scope of election of remedies in West Virginia, which was not exploited.

—George W. MoQuain.

Bankruptcy — Trustees — Attack by Courts on Credit Associations. — The Report of the New York Bankruptcy Investigation, usually referred to as the Donovan Report,¹ wrote an important chapter into the story of bankruptcy administration in the United States. Boldly formulated under the auspices of the bench and bar to meet the serious challenges issuing from pre-

¹Issued in March, 1930, by Col. William J. Donovan (formerly Assistant to the Attorney General), acting as counsel for the Association of the Bar of the City of New York, the New York County Lawyers' Association, and

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vious investigations and common rumor, it is at once an indict-
ment and a presentation of a constructive reform program. While
disagreement has been voiced as to some details, the broad prin-
ciples of the Report seem generally acceptable. In fact many of
its recommendations have been incorporated into the proposed
amendments to the Bankruptcy Act now being studied by the
Senate Judiciary Committee.

Among other matters the Donovan Report devoted much at-
tention to the trustee in bankruptcy. The Bankruptcy Act pro-
vided that, subject to the approval of the referee or district judge,
a majority of creditors in number and in amount of provable
claims should elect such a trustee of the bankrupt estate at their
first meeting. But at this crucial point there has been a break-
down in the theory of this democratic creditor control upon which
the whole Act is based. The average bankrupt estate has been so
small and so unproductive of realized assets that creditors, es-
specially business men, have not been eager to give their time to
active participation in the administration; nor have the trustees
been willing to function effectively for the compensation provided
for in the Act.

Into the picture also has come an unanticipated "lawyer con-
trol", especially in metropolitan centers. The trustee, supposedly
the actual administrator and liquidator, — under the theory upon
which the Act of 1898 was predicated — was to consult an at-

the Bronx County Bar Association, in an inquiry into the administration
of bankrupt estates conducted before Judge Thomas D. Thatcher of the District
Cour for the Southern District of New York (since appointed Solicitor Gen-
eral of the United States).

2 Clark, Reform in Bankruptcy Administration (1930) 43 HARV. L. REV.
1189 (an excellent review of the Donovan Report).

Donovan Report (House Committee Print, 71st Cong. 3d Sess. 1931), at
13-20, 26-36, 78-91.

Bankruptcy Act § 44, 30 Stat. 557 (1898), 11 U. S. C. A. § 72 (1936);
General Order 13 (1898), 11 U. S. C. A. § 55 (1926). "Trustees may be
(1) individuals who are respectively competent to perform the duties of that
office, and reside or have an office in the judicial district within which they
are appointed, or (2) corporations authorized by their charters or by law to
act in such capacity and having an office in the judicial district within which
they are appointed." Bankruptcy Act § 45, 30 Stat. 557 (1898), 11 U. S.
C. A. § 73 (1926).

The writer's statements herein are based upon the Donovan Report, supra
n. 3, at 3-5.

6 For the fiscal year ending June 30, 1929, a survey showed an average of
$1,559 in gross assets for every bankrupt estate. Creditors recouped only

(1926); General Order 42 (1926), 11 U. S. C. A. § 53 (1926); Donovan
Report, supra n. 3, at 1-7, 12.
torney only upon strictly legal matters. Although usually lawyers themselves, the trustees in fact have applied for the appointment of an attorney in almost every case. The appointee was often the attorney for the petitioning creditors upon the theory that he was already acquainted with the affairs of the estate. The possibility of embarrassment because of conflicting interests between the estate and any creditors who had received preferences soon became apparent.* Attorneys have effected improper arrangements with collection agencies in splitting fees and granting favors that they might receive information to enable them to obtain bankruptcy business by filing involuntary petitions, or in voluntary cases, a petition for the appointment of a receiver. Thus, the attorney for the creditors might be carried through the proceedings as counsel for the receiver and finally for the trustee through the solicitation of proxies. In an effort to curb such irregular and fraudulent practices in the cities the courts have superimposed such a complicated system of rules and regulations that the trustee at the present time really needs an attorney to meet the technical requirements.

In the face of these conditions it is natural that creditors should have turned to extra-legal means of administering insolvent estates. Reputable, efficient adjustment bureaus have arisen (sponsored by the National Association of Credit Men) which have met with conspicuous success in realizing larger returns for the creditors in settlements outside of court than in bankruptcy. When, therefore, one or more of the creditors persists in seeking administration in the bankruptcy court, rather than

* As to trustees’ duties see Bankruptcy Act § 47, 30 Stat. 557 (1898), 11 U. S. C. A. § 75 (1926). "Attorneys virtually controlled the administration. They would collect the accounts receivable, arrange for the sale of assets, arrange for the appointment of appraisers, examine the bankrupt, draw the receivers’ and trustees’ reports, arrange for the payment of dividends and generally attend to all the details of administration." Donovan Report, supra n. 8, at 16. As to compensation of trustees see ibid, at 17-18, 94. "Many abuses have occurred in the bankruptcy practice, and none is more frequent than that by which the attorney for petitioning creditors becomes counsel for the trustees subsequently appointed. This mingling of interests, frequently conflicting, is generally regarded by courts as working to the detriment of one of the parties and to the undue advantage of another. Experience has shown the wisdom and necessity of separating the function and obligation of counsel by forbidding the employment in different interests of the same person . . . . The danger of giving entire freedom of selection of counsel to the trustee lies in the temptation of the attorney for some creditors when he becomes counsel for the trustees to use his function as representative of all the creditors unjustly to favor or oppose particular creditors or to induce the trustees to do so." The late Chief Justice Taft in Weil v. Neary, 278 U. S. 160, 168, 49 S. Ct. 144, 147 (1928).
outside of court, it is also natural that the same creditors, who would have preferred extra-legal administration, should seek to elect the manager of an approved adjustment bureau as trustee in bankruptcy. As lawyers, certain referees in bankruptcy have sometimes been embarrassed, perhaps, in exercising their power to pass upon such selections as encroach upon the lawyer’s previously exclusive domain. But if, in the present “patched-up system of court and lawyer control”, the attorney for the trustee really plays the dominant role and the trusteeship is only the crust of the office as originally conceived, are such encroachments really of much importance? On the other hand, if the trusteeship is to be restored to a position of active responsibility in solving a business problem, should not a competent adjustment bureau (such as those on the approved list of the National Association of Credit Men) receive proper recognition through its manager?

The exact limitations of the referee’s power to approve or disapprove the trustee-elect are not clear. In practice it has been wielded in various conflicting fashions. The Donovan report shows that, in some districts aside from any consideration of integrity, men are disapproved who are believed to be incompetent, dilatory, careless, or who owe their election to solicitation. In other districts mere solicitation of claims and proxy control of trustee elections will not disqualify since that is often the only means of preventing the estate from falling into the hands of improper persons. Other referees rarely or never refuse to confirm the selection of the creditors. Several recent cases reveal, however, what seems to be an unfortunate tendency on the part of referees, namely, to veto the election of an adjustment bureau manager as a trustee in bankruptcy.

In Re Leader Mercantile Company, Vernor Hall, manager of the North Texas Adjustment and Credit Interchange Bureau,

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8 Billig, What Price Bankruptcy: A Plea for Friendly Adjustment (1929) 14 CORN. L. Q. 413, 426, 438. Even in bankruptcy an adjustment bureau may be useful since its manager may (1) represent a group of creditors, or (2) act as receiver or trustee, and may be instrumental in curbing abusive practices so common in bankruptcy administration.

9 This is the recommendation of the Donovan Report, supra n. 3.

10 Donovan Report, supra n. 3, at 87-88.

11 29 F. (2d) 570 (D. C., N. D. Tex., 1928), aff’d, 36 F. (2d) 745 (C. C. A. 5th, 1929), certiorari denied, Graham Brown Shoe Co. v. Holliday, 291 U. S. 760, 50 S. Ct. 411 (1929). Vernor Hall, the rejected trustee, was an expert witness in the Donovan Inquiry. His position as bureau manager was the primary reason for the veto. In re Scott, infra n. 19, at 91.
a voluntary association of local creditors specializing in the liquidation of insolvent estates and on the approved list of the National Association of Credit Men, received a majority in number and amount of the creditors' votes for trustee at their first meeting. The referee immediately disapproved this selection, referring solely to Hall's activities in soliciting claims which, however, did not reflect in any way upon his personal integrity. Hall, who apparently controlled the claims of the creditors voting for him, declined to take any further part in the proceedings, and when the meeting reconvened after a ten minute adjournment, another trustee was selected by those creditors voting. The court passed upon the validity of the referee's veto power generally and upheld the referee's exercise of discretion in refusing to confirm Hall's election upon the grounds (1) that he received a fixed salary and in the past had turned over his fees as trustee to the bureau; (2) that he had in the past delegated some of his duties to employees of the bureau; (3) that he had solicited proxies which he voted for himself; (4) that he sought to have the bankrupt make a general assignment for the benefit of creditors; and

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24 A trustee should be free from all entangling alliances or associations. In re Lewensohn, 98 Fed. 576 (D. C., S. D. N. Y., 1899). The decisions are unanimous that a trustee will be disapproved whose selection was brought about by the bankrupt or by others in the bankrupt's interest. In re Bloomberg, 46 Fed. (2d) 535 (D. C. D. Minn., 1931); In re White; In re Continental Bldg. & Loan Assn.; In re McGill, all supra n. 13. But a stockholder and officer of a bankrupt corporation is not necessarily incompetent to act as its trustee. In re Merritt Constn. Co., supra n. 13. Although reprehensible like the practice of chasing hearse and ambulances, the selection of a trustee by a majority of the creditors through solicitation of proxies will not be disturbed, even though he occupied the same suite of offices with the bankrupt's attorney where it does not appear that the selection was brought about in the bankrupt's interest. In re Fischer, 198 Fed. 104 (D. C., M. D. Pa., 1911). An attorney may vote unsolicited proxies but cannot vote claims coming to him through the instrumentality of the bankrupt, and his nominee for trustee may qualify. In re Lloyd, 148 Fed. 92 (D. C., E. D. Wis., 1906). The Donovan Report, supra n. 3, at 30, recommends limiting the right to solicit proxies to creditors and permitting attorneys to represent only their regular clients. Young, Bankruptcy Ruling on Solicitation of Votes for the Trusteeship (1931) 16 Mass. L Q. 12.

25 Contra: In re Blue Ridge Packing Co., 125 Fed. 619 (D. C., M. D. Pa., 1903) (One who advised voluntary assignment, which constituted act of bankruptcy, may serve as trustee. The fact that he had an office with the attorney for certain stockholders of the bankrupt corporation whose claims as creditors were to be contested, that these persons were his former clients and put their claims into his associate's hands at his suggestion, and that the trustee's
(5) that he might not be disinterested because his employer represented local creditors. The briefs indicated bitter feeling between the referee and the rejected trustee.

In Garrison v. Pilliod Cabinet Co. the executive manager of the Wichita Association of Credit Men had already obtained a trust mortgage, in effect a common law assignment, of the assets of the estate subsequently thrown into bankruptcy. Despite the successful efforts of the National Association of Credit Men on behalf of the local manager, the court sustained the referee’s action in rejecting the votes cast for him and approving those cast for his opponent. While the mere solicitation of claims by a prior assignee is not a disqualification, a presumption exists against the propriety of his selection as trustee which was not rebutted. Conflicting interests might be centered in him, a position inconsistent with a trustee’s duties to the creditors generally, for he would have to account to himself as to his previous dealings with the property and he might be committed in favor of creditors with invalid or preferential claims.

In Re Scott frankly shows the lawyer’s attitude toward the credit association. A single creditor attended the meeting through its proxy, the collection manager of the Grand Rapids Credit Men’s Association, who named its secretary as trustee. The association actively solicited claims for the admitted purpose of voting them for one of its agents, taking over his fees. It owed a special duty to certain creditors from whom it received additional fees, and such duties frequently conflicted with those of a trustee. While not questioning the qualifications, character and personal responsibility of the trustee-elect, the referee objected because as a matter of public policy the practice of the association

election was aided by these persons is sufficient to make his selection improper but merely calls for close scrutiny).

20 "It rarely happens that some particular ones of the creditors do not take the leading part in both suggesting the name of a proposed trustee and in working to bring about his election. A trustee so elected is not disqualified because he may be on terms of great intimacy with the creditors seeking his appointment." In re Foley, 1 F. (2d) 568, 570 (D. C., S. D. Cal., 1924).

21 Donovan Report, supra n. 3, at 89.


affected the proper functioning of the bankruptcy court. He was sustained upon the grounds (1) that the appropriation of the trustee's fees by the association removes a strong incentive to his efficient administration; (2) that such solicitation is reprehensible; (3) that there is a conflict of interests; and (4) that any activities by one not a creditor beyond merely filing claims, such as examining the bankrupt and participating in the trustee's election, constitutes unlawful practice of law.  

Since neither courts nor referees are in agreement as to the exact grounds for disqualifying a trustee, these decisions simply represent an attack upon credit associations as such. The associations were concededly reputable and efficient, and their continued good reputation would depend upon impartial and effective conduct. Notwithstanding all possible objections to their functioning in bankruptcy, bureaus approved by the National Association of Credit Men have often won the confidence of all creditors in the field of friendly adjustment despite their closer relationship with the creditors who initiated the proceedings with them. Delegating perfunctory duties to clerks and soliciting proxies are common practices, which sometimes achieve desirable results.

In re Scott suggests that the evils in bankruptcy administration should be met directly by reform measures rather than by giving credit associations, however efficient, an entering wedge. But such attempts by credit associations should at least aid materially in focusing the attention of the legal profession upon the problem. One reform, suggested by the Donovan report, is the licensing of qualified trustees, especially in the larger centers, one of whom would be appointed at the outset and could be displaced only by the voluntary action of a substantial number of creditors. If trustees are to be business specialists, certainly the

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21 Supra n. 19, at 93.

22 Trustees would only be licensed in the principal urban localities. At their first meeting, a quorum of at least 25 per cent. in number being represented, the creditors could elect a substitute trustee from among those licensed. Licensed trustees might be individuals or corporations (as the Bankruptcy Act, § 45, 11 U. S. C. A. § 73 (1926) already provides). The individuals might be attorneys, business men, accountants as in England, or representatives of trade or credit organizations. The corporations might be banking insti-
past record of many associations should commend them for appointment to a list of eligibles. In fact one of the proposed amendments to the Bankruptcy Act would give the credit associations just such recognition.22

—Bernard Sclove.

CONSTITUTIONAL LAW — ZONING BOARD OF APPEALS — DISPENSING POWER. — The power of a board of appeals to vary the application of a zoning ordinance was recently upheld by the Ohio Supreme Court as not involving an unconstitutional delegation of legislative powers. The ordinance, as is usual, provided for relaxation of the strict letter of any provision in case of practical difficulty or unnecessary hardship.1 Defendant was refused a permit to remodel his building to be used as a sanitarium, although it was in existence before the ordinance was adopted. The board of appeals ordered the granting of the permit, finding that the building was of substantial, unique, and special construction, and that the intended use would not cause annoyance to occupants of adjoining buildings. No conforming use of the land would have been remunerative. Plaintiff then obtained an injunction against the issuance of the permit and the remodeling of the building but the court of appeals reversed the decree and dismissed the petition. No bill of exceptions was taken in the appellate court, and no special findings made. Therefore, the Supreme Court in affirming the court of appeals decision had only to pass on the naked legal question of whether the ordinance was an unconstitutional delegation of legislative power. L. and M. Investment Co. v. Cutler.2

1Zoning Ordinance of the City of Cleveland, 1281-23(b):

“Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the provisions of this subdivision, the board of appeals shall have the power in a specific case to vary the application of any such provision in harmony with the general purpose and intent of the subdivision so that the public health, safety, morals and general welfare may be secured and substantial justice done.”

2180 N. E. 379 (Ohio 1932).