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Bankruptcy Study

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by

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. . . During World War II a relative of mine who lived in Knoxville, Tenn., told of a tremendous project near his town. It seemed not to be a military project because there were no uniforms in evidence, but the influx of people and materials and the pace of activity suggested that there must be some connection with the great national effort we were engaged in. But there were no signs, no newspaper publicity, and indeed no kind of report to appease the curiosity of the residents of the area. The mystery was much heightened by the fact that while much was shipped into this center of great activity, nothing was being shipped out. The speculation was ended on August 6, 1945, the day the bomb was dropped on Hiroshima. The place in Tennessee was the Clinton Engineer Works, Oak Ridge, where the bomb had been manufactured in large part.

There may be some superficial similarity in the operations of the Manhattan Project and of the Advisory Committee on Bankruptcy Rules. We—the Committee and I as its reporter—have been working for several years now with a considerable input but no comparable output.

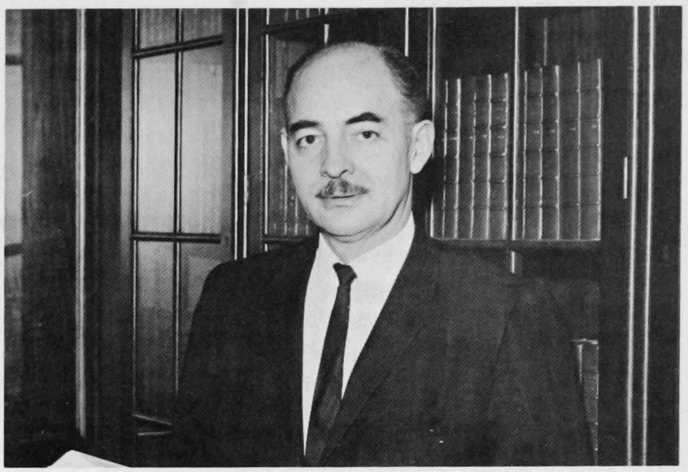
And our operations, while not classified, have not been reported on generally.

Let me hasten now to assure you that the Committee is not fashioning an atomic bomb to be dropped on the bankruptcy courts. It has trained its sights on certain enemies that it has recognized—expense, delay, technicality, and perversion of the purposes and processes of the Bankruptcy Act. The Supreme Court indicated recently in *Katchen v. Landy* that this is shooting in the right direction. The Committee does not suppose that the recommendations which it will make and report to the bench and bar will draw unanimous approval. Indeed if the Committee were animated by a purpose to avoid controversial proposals, not only would it surely shirk the responsibility implicit in the charge it has received from Congress and the Judicial Conference, but it would be sure to suffer disappointment of any hope for universal applause. Progress can seldom be achieved without some cost and at least temporary disadvantage to those required to change their ways. We anticipate the possibility of some minor explosions when the Committee's recommendations land on desks across the land, but we also hope that the expressions of approval, if they do not rise to the level of a roar, at least provide needed assurance that the bench and bar generally believe the proposals workable and worthy of adoption.

The Committee itself is made up of 12 members, including three federal judges: Circuit Judge Phillip Forman of the Third Circuit is its wise and judicious chairman; District Judge Roy Shelbourne of Louisville, Kentucky, and District Judge Edward Gignoux of Portland, Maine; three referees in bankruptcy: Judge Asa Herzog of New York, Judge Estes Snedecor of Oregon, and Judge Elmore Whitehurst of Texas; Edwin Covey, formerly chief of the Bankruptcy Division of AOUSC, now Adjunct Professor of Law at Georgetown University; three practitioners with extensive practice in bankruptcy courts: Norman Nachman of Chicago, Charles Seligson of New York, who is now pretty busy as the trustee for Ira Haupt & Co., the biggest partnership bankruptcy in history, I am sure, and George Treister of Los Angeles, the bankruptcy capital of the world; and two law professors —Stefan Riesenfeld of the University of California at Berkeley and Stanley Joslin of Emory University in Atlanta. I have as an assistant Professor Morris Shanker of Western Reserve University School of Law, who had a number of years of excellent experience in the bankruptcy court in Cleveland.

So we have diversity in geography and in other important respects. Specialists give expertise; generalists give perspective, neutralize bias. Most members came originally to the Committee, I think it fair to say, with a fairly firm conviction that bankruptcy practice and procedure in his court, or the court where he practiced, are the only acceptable model. It was a revelation to some that there is or could be another way in civilized society. The Committee sessions have been a highly educational experience for all concerned.

Since the establishment of the Committee in 1960, 12 meetings have been held in Washington of between two



and four days in duration. In addition there are special meetings of subcommittees which have sometimes extended over three days' time. Attendance and devotion to duty have been exemplary. To the best of my recollection we have never had more than one or possibly two absentees from any meeting.

In addition we have had the benefit of the wisdom and experience of the Chairman of the Committee on Rules of Practice and Procedure, Circuit Judge Albert Maris, who maintains close involvement in what is going on; Professor James William Moore of Yale University, editor in chief of both Moore's Federal Practice and Collier on Bankruptcy and counsel for the trustee for the New Haven Railroad; Professor Charles Alan Wright, who is known to you as the author of the handbook on Federal Courts and the revising editor of Barron & Holtzoff's work on Federal Practice; and Royal Jackson, Chief of the Bankruptcy Division of the United States Courts, often with one or two of his assistants. At least two and frequently all four of these highly knowledgeable people are in attendance and participate in our deliberations.

The Advisory Committee on Bankruptcy Rules is, of course, one of the six committees established pursuant to 28 U.S.C. §331. During the first four and one-half years of its existence, however, the Advisory Committee on Bankruptcy Rules was engaged in formulating proposals for amendments of the General Orders and Official Forms in Bankruptcy. The General Orders and Official Forms were promulgated by the Supreme Court pursuant to former section 30 of the Bankruptcy Act. This section, originally enacted in 1898 and unchanged until repealed, had been construed by the Court to authorize the prescription only of those rules, forms, and orders as to procedure necessary for carrying the Bankruptcy Act into effect, and not to authorize additions to its substantive provisions. One Supreme Court case, Meek v. Centre County Banking Co., 268 U.S. 426, 434 (1925), invalidated old General Order 8 and old Official Form No. 2 because "without statutory warrant." The fact that the rule and form were in fact a very much needed one and quite helpful in dealing with insolvent partnerships did not save them.

During the first year of its existence the Advisory Committee prepared revisions of the General Orders and

Official Forms to bring them into harmony with recent legislation and with current and approved practice. These amendments, involving nearly 50 general orders and official forms, became effective in July, 1961.

The desirability of broadening the rule-making power in bankruptcy to that already applicable in the areas of civil, criminal, and admiralty practice was recognized by the Committee at its first meeting, and the bill which eventually became 28 U.S.C. §2075 was introduced at the instigation of the Bankruptcy Rules Committee five years ago on Wednesday of this week. The bill passed the House forthwith, but a proposal to enhance the powers of the Supreme Court in any respect was apparently regarded with some suspicion in the Senate Judiciary Committee. So it didn't go through until in some mysterious and magical way it passed muster in the Senate Committee in October of 1964 and was enacted pronto.

The very considerable body of rules and forms which had been prepared by the Committee within the enforced limitations imposed by the Bankruptcy Act now required reconsideration in the light of a new dispensation. It has developed during the process of re-examination thus far that some rules and forms will be little changed; others, however, have been scratched and a new approach undertaken.

It is to be noted that although section 30 of the Bankruptcy Act is repealed, there is no repeal or invalidation of previously prescribed rules, forms, or orders. Existing general orders and official forms thus remain in effect unless and until the Supreme Court itself abrogates them in the exercise of the new power given by 28 U.S.C. §2075. While the Supreme Court promulgated the general orders and forms, including the amendments of 1961, without submission to Congress, they can no longer be amended except in accordance with the procedure prescribed by the third paragraph of section 2075, or by Congressional enactment itself. In the meantime procedural provisions of the Bankruptcy Act including those enacted by Congress since October 3, 1964, are entirely valid and effective.

The Bankruptcy Rules statute is patterned in its phraseology on the statutes conferring rule-making authority in the other areas where the Court promulgates rules. The experience gained in the rule-making process over the course of the last 30 years is thus highly relevant. In a general way one may say that the Bankruptcy Rules will bear the same relation to the Bankruptcy Act as the Federal Civil Rules bear to the Judicial Code. There are two aspects of the Bankruptcy Act, however, which differentiate it from the Judicial Code: 1) The Act includes a body of private substantive law with many interrelated procedural provisions; 2) The Act assigns extensive administrative functions to the courts of bankruptcy so created.

It has been recommended to the Committee in the published literature and otherwise that the objective ought to be to integrate bankruptcy practice into the Federal Rules of Civil Procedure as the admiralty practice has been, and the Committee has considered a set of drafts of amendments of the Civil Rules of Procedure which undertakes to merge bankruptcy practice into those rules. The ideal of a single set of rules within the covers of a portable, paper-back book which would guide counsel through the mazes of any federal court and the processes of federal civil litigation has a powerful attraction. Assuming the ideal is as attainable as any ideal is, there are nonetheless two difficulties: 1) Referees and bankruptcy practitioners will not wish to sacrifice the clear advantages of expedition and economy now sanctioned by the general orders and the Bankruptcy Act merely for the sake of achieving a conformity with civil practice in other kinds of proceedings; 2) members of the bench and bar, on the other hand, will generally not wish to see the Federal Rules cluttered with exceptions and additions to deal with particular needs and problems that are pertinent only to bankruptcy practice. The rule-making process is of course more complicated when it is necessary for different Advisory Committees to agree on the form as well as the substance of changes in the rules. That these difficulties are not insuperable and may be well worth the effort required to resolve them is demonstrated by the monumental accomplishment represented by the amendments which become effective on July 1, effecting a substantial unification of admiralty with federal civil procedure. It still remains to be seen whether a like unification is feasible in bankruptcy. The Committee later this month will examine an alternative approach.

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As I have intimated, the Committee proposes to go well beyond a mere reduction of the procedural provisions of the Bankruptcy Act and the General Orders to the format of rules. There have been as a matter of fact no rules or guides of national scope covering the rule-to-show-cause practice, reclamation proceedings, turnover proceedings, and determination of counterclaims, and *Ketchen* v. *Landy*—recently handed down by the Supreme Court—gives a green light to a rather extensive jurisdiction in the bankruptcy court over counterclaims. The Committee has given extended consideration to proposed rules authorizing mail service in bankruptcy

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cases, extraterritorial service of process beyond that now authorized, fairly liberal provision for transfer not only of cases but of summary proceedings before the referee within cases, and stringent controls of solicitation and voting of proxies. . . .

The size of the rules project is formidable. The Bankruptcy Act has several hundred sections, and some sections, *e.g.,* section 77, run for many pages. A broad view of the Committee's responsibility might lead to the drafting of rules which would leave only a skeleton of the present Act in force. In particular the provisions of the reorganization and rehabilitation sections are largely procedural in nature rather than substantive and might conceivably be superseded for the most part by rules. . . .