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WHERE THERE'S A WILL THERE'S A WAY

SOME REFLECTIONS ON NATION-WIDE SERVICE OF BANKRUPTCY PROCESS

ARTHUR JOHN KEEFFE, JOHN J. HOREY, KENNETH N. JOLLY
AND BARBER B. CONABLE, JR.

The world is flat. Such was the conclusion reached by thinkers a few thousand years ago. Since a cursory glance at the horizon lent substance to this conclusion it soon came to be gospel. It was accepted and repeated by ancient geographers, and cartographers drew flat maps with elaborate precipices over which the unwary sailor would disappear. Not until Magellan sailed a circular course around a flat earth did the idea disappear.

Courts and writers today repeat, on faith alone, the words of others before them who have said service of Chapter X process is limited to the territorial boundaries of the district court. They seem to feel that there exists at that boundary another bottomless precipice beyond which such process dare not venture. To reorganize nation-wide corporations nation-wide process is needed. We believe there is a sound legal basis for such process today.

I. LEGAL BASIS FOR NATION-WIDE PROCESS

Chapter X of the Bankruptcy Act was designed to provide a faster, cheaper, and more effective system for the rehabilitation of tottering corporate financial structures than was provided under 77B or the equity receivership.¹ When the House Judiciary Committee was conducting hearings on the present Bankruptcy Act, Representative Chandler, sponsor of the bill, said:

"Now, let me say this, Mr. Chairman, the major portions of the first 11 sections are easily understood by reading the committee print. . . ."

One of these "easily understood" sections referred to by Mr. Chandler is Section 2(a)(15) which provides:

"The courts of bankruptcy . . . are hereby invested . . . with jurisdiction . . . to—(15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this title. . . ."³

One of the "provisions of this Act" is that the court shall "cause the estates

¹H. R. REP. No. 1409, 75th Cong., 1st Sess. 3 (1937).

²Hearings before Committee on Judiciary on H. R. 6439, 75th Cong., 1st Sess. 16 (1937).

³52 STAT. 842 (1938), 11 U. S. C. A. § 11a (15) (Supp. 1946).

of bankrupts to be collected, reduced to money and distributed and determine controversies in relation thereto."⁴ If this is to be done quickly, cheaply, and effectively it should be done by one court. And a common sense interpretation of Section 2(a)(15) seems to give a court power to issue nationwide process when necessary to "collect and distribute the estate of a bankrupt." Inasmuch as service of process is unrestricted, by the wording of the Act, such an interpretation is reasonable.

The Supreme Court has not as yet expressly decided the question,⁵ but the lower federal courts, with a single exception,⁶ have held process limited to the territorial boundaries of the district court. The reason generally given is that the language of the Act is not explicit enough to warrant a departure from the traditional geographical limitation of process.⁷

II. THE AUSTRIAN CASE

The recent decision of *Williams v. Austrian*⁸ points out that the Supreme Court is willing to reexamine, in the light of practical need and Congressional intent, the provisions of the Bankruptcy Act.

Austrian brought an action in the Southern District of New York for the recovery of corporate assets in his capacity as trustee of a Virginia corporation in reorganization in the District Court in Virginia. Austrian was appointed by the Virginia court and to that court owed his authority to proceed against the defendants, officers and directors of the corporation, accused of defrauding the debtor corporation. The defendants, with the exception of those not served, were residents of the Southern District of New York. Jurisdiction was based, not on diversity of citizenship, but on the provisions of Section 2 (a) (7) of the Bankruptcy Act, which creates courts of bankruptcy and vests them with original jurisdiction ". . . to cause the estates of

⁴52 STAT. 842 (1938), 11 U. S. C. A. § 11 (7) (Supp. 1946).

⁵*Williams v. Austrian*, 331 U. S. 642, 659, 67 Sup. Ct. 1443, 1452 (1947).

⁶"It is asserted by the defendants that the defendants are 'adverse claimants', that defendants have not consented to this suit, and, under these circumstances, the jurisdiction of the court must be limited to the issuance of process within its local territorial jurisdiction, within the authority of *Schumacher v. Beeler*. . . . There seems to be no case in which this precise question has been passed upon since sections 77A and 77B were added to the Bankruptcy Law. If it were necessary to decide that question here, it would seem that the jurisdiction of the court must now necessarily extend to such a suit, beyond the limits of section 23 of the Bankruptcy Act (11 U. S. C. A. § 46), unless the purpose of Congress in enacting the reorganization provision is rendered futile." *Thomas v. Winslow*, 11 F. Supp. 839, 841 (W. D. N. Y. 1935).

⁷MOORE'S BANKRUPTCY MANUAL 498 (1939); FINLETTER, THE LAW OF BANKRUPTCY REORGANIZATION 175 (1939), citing *Robertson v. Railroad Labor Board*, 268 U. S. 619, 622, 45 Sup. Ct. 621, 622 (1925).

⁸331 U. S. 642, 67 Sup. Ct. 1443 (1947).

bankrupts to be collected . . . and to determine controversies in relation thereto. . . ."⁹ The defendants' motion to dismiss the complaint for want of jurisdiction was granted by the District Court.¹⁰ The reversal of the Circuit Court of Appeals¹¹ was affirmed by the Supreme Court.¹² This decision resolved doubts which had arisen as a result of the exclusion of Section 23 from the jurisdiction provisions of Chapter X. Section 23, which determines jurisdiction to entertain plenary suits in liquidating bankruptcy, limits the receiver's actions "only to the courts where the bankrupt might have brought or prosecuted them." It was held that Section 2 of the Bankruptcy Act is a broad grant of jurisdiction, summary and plenary, and that Section 23 is a limiting rather than a granting section.¹³ Earlier cases to the contrary were rejected¹⁴ and the decision was based on a case decided in 1875¹⁵ under the 1867 Bankruptcy Act.¹⁶

In the absence of an express statement of Congressional intent the Court chose the interpretation which best conformed to the general purposes of Chapter X.¹⁷ Since the purpose of Congress in altering 77B was to enhance the functions of the trustee, little fault can be found with the Court's holding that it was not the intention to limit the trustee in his choice of forum.

This decision is commendable. The reorganization trustee, with title to

⁹52 STAT. 842 (1938), 11 U. S. C. A. § 11 (7) (Supp. 1946).

¹⁰67 F. Supp. 223 (S. D. N. Y. 1946). This decision rested heavily on *Bardes v. Hawarden Bank*, 178 U. S. 524, 20 Sup. Ct. 1000 (1900), and *Schumacher v. Beeler*, 293 U. S. 367, 55 Sup. Ct. 230 (1934), and consequently reached the conclusion that § 23 was not a limitation on any old powers of the district court, but rather a new grant of jurisdiction. It was thought that more than the language of § 102 of the Act, eliminating § 23 from Chapter X proceedings, was needed to accomplish so great a change in a jurisdictional provision.

¹¹159 F. 2d 67 (C. C. A. 2d 1946).

¹²331 U. S. 642, 67 Sup. Ct. 1443 (1947).

¹³" . . . Congress intended by the elimination of § 23 to establish the jurisdiction of federal courts to hear plenary suits brought by a reorganization trustee, even though diversity or other usual ground for federal jurisdiction is lacking." 331 U. S. 642, 657, 67 Sup. Ct. 1443, 1450 (1947). "In any event, the construction of § 2, standing alone and without regard for the influence of § 23, as being confined to summary matters rested to a great extent upon a reading of *Lathrop v. Drake*, *supra*, with which, as has been indicated, we cannot agree." 331 U. S. 642, 650, 67 Sup. Ct. 1443, 1447 (1947).

¹⁴*Bardes v. Hawarden Bank*, 178 U. S. 524, 20 Sup. Ct. 1000 (1900); *Schumacher v. Beeler*, 293 U. S. 367, 55 Sup. Ct. 230 (1934).

¹⁵*Lathrop v. Drake*, 91 U. S. 516 (1875). See also *Sherman v. Bingham*, 21 Fed. Cas. 1270, No. 12,762 (D. Mass. 1872), which expressly based upon the statutory predecessor of § 2 the jurisdiction of the district courts to hear plenary suits.

¹⁶14 STAT. 517 (1867). § 1 of this 1867 Act is substantially the same as § 2 of the present Act.

¹⁷"The bill seeks to accomplish the following general purposes: . . . (2) To increase efficiency in administration. (3) To make clearer the provisions relative to the jurisdiction of the bankruptcy courts. (4) To improve the procedural sections of the Act. . . . (10) . . . In general, to modernize and bring up to date the bankruptcy law of our country. H. R. REP. No. 1409, 75th Cong., 1st Sess. 3 (1937).

the property and intimately acquainted with the facts, is the ideal person to prosecute claims of the debtor.

III. PRIOR LAW AND PRESENT NEEDS

The next step in the development of a satisfactory reorganization procedure should be to allow the trustee to prosecute such claims in the district where appointed. So far this has not been allowed.¹⁸ The leading case denying the trustee this power is *In re Standard Gas & Electric Company*.¹⁹ There, the plaintiff trustee filed a complaint in the District Court of Delaware against fifty-six defendants. It was alleged that the defendants combined to gain control of Standard Gas and used such control for their own profit at the expense of the corporation. Service of process was made on three defendants, residents of Delaware, in Delaware. Service on the other fifty-three defendants, non-residents, was made outside the state. All defendants appeared specially and moved to quash the service on the ground of lack of jurisdiction. The plaintiff argued that the action was authorized by Section 77B(a)²⁰ of the Bankruptcy Act, which gave the Court "exclusive jurisdiction of the debtor and its property wherever located." The service was quashed. It was held that since, under Section 23(b) of the Bankruptcy Act, the corporation could not have sued the resident defendants in the district court, the trustee could not. In regard to the non-residents the court said that the cause of action while "property in a broad sense" could only be prosecuted by a plenary suit and that extra-territorial service of process was unauthorized in plenary suits.

Since the decision of the *Standard Gas* case, Congress expressly eliminated Section 23 from reorganization proceedings.²¹ Thus, today, resident defendants, in a plenary suit by a reorganization trustee, are deprived of the jurisdictional objections upheld in the *Standard Gas* case.²²

Even if we assume that jurisdiction of the debtor's property does not allow extra-territorial service of process in plenary suits by reorganization trustees, the question remains, does not Section 2(a)(15) specifically authorize such service? This question was not raised or decided in the *Standard Gas* case. Section 2(a)(15) authorizes courts of bankruptcy to

¹⁸*In re Eastern Bankers Corporation*, CCH BANKR. LAW SERV. (3d ed.) ¶ 53,967 (D. C. N. J. 1942); *Clarke v. Fitch*, CCH BANKR. LAW SERV. (3d ed.) ¶ 53,805 (S. D. N. Y. 1942); *In re Standard Gas and Electric Co.*, 119 F. 2d 658 (C. C. A. 3d 1941); *Bovay v. Byilesby & Co.*, 88 F. 2d 990 (C. C. A. 5th 1937).

¹⁹See note 18 *supra*.

²⁰49 STAT. 965 (1935), 11 U. S. C. A. § 207 (1935).

²¹52 STAT. 883 (1938), 11 U. S. C. A. 502 (1946).

²²*Williams v. Austrian*, 331 U. S. 642, 67 Sup. Ct. 1443 (1947).

"make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this title: . . ." ²³ The principal case interpreting this section is *Continental Illinois National Bank & Trust Company v. Chicago Rock Island and Pacific Railroad*.²⁴ It was held that a reorganization court could issue an extra-territorial injunction to prevent the sale of the debtor railroad's bonds held by the defendant banks as security for loans made to the debtor. The Court discussed at length both Sections 2(a)(15) and the provisions of Section 77 which give the reorganization court "exclusive jurisdiction of the debtor and its property wherever located."²⁵

It would seem the Court felt that Section 2(a)(15) alone would support such an injunction. The language of the Court is interesting:

"The bankruptcy court, in granting the injunction, was well within its power, either as a virtual court of equity, or under the broad provisions of § 2(15) of the Bankruptcy Act or of § 262 of the Judicial Code."²⁶

It should be noted that Section 2(a)(15) is applicable in railroad reorganizations (Section 77) as well as in other reorganizations. Furthermore, the *Rock Island* proceeding was summary rather than plenary in nature. The express statutory authorization for nation-wide process in railroad reorganization was added to Section 77 after the *Rock Island* decision.²⁷

Later cases have explained the *Rock Island* case on the basis that the reorganization court's injunction was founded on jurisdiction over the property of the debtor, regarding the equity of redemption in the security as property. The "property concept" has been tortured to bring cases within such an interpretation although the interpretation itself has been questioned.²⁸

²³52 STAT. 843 (1938), 11 U. S. C. A. 11a (15) (Supp. 1946).

²⁴294 U. S. 648, 55 Sup. Ct. 595 (1935).

²⁵"Moreover, by § 2(15) of the Bankruptcy Act . . . courts of bankruptcy are invested with such authority in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, including the power to 'make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act'. . . . But a proceeding under § 77 is not an ordinary proceeding in bankruptcy. It is a special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised. And to prevent the attainment of that object is to defeat the very end the accomplishment of which was the sole aim of the section, and thereby to render its provisions futile." 294 U. S. 648, 676, 55 Sup. Ct. 595, 606 (1935).

²⁶294 U. S. 648, 676, 55 Sup. Ct. 595, 606 (1935).

²⁷49 STAT. 911 (1935), 11 U. S. C. A. 205a (1937). See also *Thompson v. Terminal Shares*, 104 F. 2d 1 (C. C. A. 8th, 1939), discussed in note 55 *infra*.

²⁸Note 49 *YALE L. J.* 568 (1940). Cf. *Thomas v. Winslow*, 11 F. Supp. 839 (W. D. N. Y. 1935) for the furthest extension of the property concept. Here the right of a debtor to the return of wrongfully taken money was called "property" within the

Certainly some of the language in the *Rock Island* case seems indicative of an intention to broaden and liberalize the reorganization court's power to issue process extra-territorially.²⁹

Judges and text-writers have said for centuries that equity acts *in personam*. If this is true, how can an extra-territorial injunction be explained unless it is admitted that it is but a form of *in personam* process? It is impossible to distinguish, on principle at least, between an injunction and another form of process such as a summons going outside the territorial boundaries of the district.

As yet the Supreme Court has not decided whether *in personam* process in a plenary suit can be served outside the territorial limits of the judicial district. Although the question has been twice raised, the answer has been postponed. In the *Rock Island* case the Court said:

"It may be that in an ordinary bankruptcy proceeding the issue of an injunction in the circumstances here presented would not be sustained. As to that it is not necessary to express an opinion."³⁰

Later in *Williams v. Austrian*:

"Allowing the primary court to hear these suits will not change this situation, if it is true that the process of a reorganization court does not run nationwide in plenary cases."³¹

Undoubtedly, extra-territorial service of process would be constitutional. Mr. Justice Brandeis, in *Robertson v. Railroad Labor Board*, wrote:

"Congress has power . . . to provide that the process of every district court shall run into every part of the United States."³²

IV. REASONS FOR NATION-WIDE PROCESS

The legal basis for extra-territorial service of process is clear. It is not a question of legal power but a question of policy.³³ In essence, the problem

meaning of § 77b in order to bring an obviously plenary action within the scope of the court's summary jurisdiction.

²⁹"The usefulness of the section would be greatly minimized and in some instances destroyed if that court were powerless to send its process into any State when necessary to effectuate the purposes of the law." 294 U. S. 648, 683, 55 Sup. Ct. 595, 609 (1935).

³⁰294 U. S. 648, 676, 55 Sup. Ct. 595, 606 (1935).

³¹331 U. S. 642, 660, 67 Sup. Ct. 1443, 1452 (1947).

³²268 U. S. 619, 622, 45 Sup. Ct. 621, 622 (1925), *citing Toland v. Sprague*, 12 Pet. 300, 328 (U. S. 1838); *United States v. Union Pac. R.R.*, 98 U. S. 569, 604 (1878); *see also United States v. Congress Construction Co.*, 222 U. S. 199, 203, 32 Sup. Ct. 44, 46 (1911); *First National Bank of Canton v. Williams*, 252 U. S. 504, 510, 40 Sup. Ct. 372, 373 (1920); *Continental Ill. Bank & Trust Co. v. Chicago, Rock Island & Pac. R.R. Co.*, 294 U. S. 648, 683, 55 Sup. Ct. 595, 609 (1935).

³³Keeffe and Cotter, *Service of Process in Suits Against Directors: A Barrier to Justice*, 27 CORNELL L. Q. 74, 78 (1941).

is this—is there sufficient need for such service to outweigh the policy objections advanced?

The facts of the *Standard Gas*³⁴ case vividly illustrate that a statutory interpretation denying such service frustrates corporate reorganization. There, the trustee was faced with the dilemma of prosecuting a claim for several million dollars against fifty-six directors residing in ten different states. He attempted to join all the directors in one suit in the reorganization court. He was unsuccessful. The court held that out-of-state service of process on the fifty-three non-resident directors was unauthorized. As a result, ten separate suits in as many different states were necessary. Certainly, the desirability of one rather than ten separate suits is not open to question.

Ancillary suits, resulting in excessive costs and long delays in the formulation of a plan of reorganization, were largely responsible for the enactment of Chapter X in 1938.³⁵ Congress intended to provide a faster and cheaper system of corporate reorganization.³⁶

Before a plan of reorganization can be promulgated, the assets of the debtor must be determined with a fair degree of accuracy.³⁷ No "fair" plan can be drawn where the inclusion or exclusion of several million dollars of assets is still undecided. Reason and justice demand that this question be decided as quickly and cheaply as possible. That one suit in one court rather than ten suits in ten courts is more feasible is obvious.³⁸ Certainly Chapter X should not needlessly be interpreted to make reorganizations as inefficient as they were under the old and unwieldy equity receivership method which this Section was enacted to replace. Extra-territorial service of process is the answer.

Text-writers and judges have based their policy objections to extra-territorial process on the supposed hardships to defendants.³⁹ The tenor of the usual objection is that it would be inequitable to compel parties to come into the reorganization court to defend suits brought by the trustee and that in some cases it may be cheaper for them to suffer default judgments

³⁴119 F. 2d 658 (C. C. A. 3d 1941).

³⁵See note 17 *supra*.

³⁶FINLETTER, *THE LAW OF BANKRUPTCY REORGANIZATION* 176 (1939).

³⁷52 STAT. 879 (1938), 11 U. S. C. A. 621 (1946).

³⁸"It is . . . generally vital to the success of a reorganization that all the debtor's property be included, that the continuation of the debtor's business be not unduly hampered by dissipation of the property to particular creditors, or by the separate administration of the estate in numerous forums." 6 COLLIER, *BANKRUPTCY* 585 (14th Ed. 1947).

³⁹FINLETTER, *THE LAW OF BANKRUPTCY REORGANIZATION* 175 (1939); Notes, 49 HARV. L. REV. 797, 801 (1936), 49 YALE L. J. 568, 573 (1940), 89 U. PA. L. REV. 960, 965 (1941).

than to defend suits far from their residences.⁴⁰ However, it is hard to engender sympathy for the fifty-six directors in the *Standard Gas* case, some of whom were alleged to have used their control to profit themselves to the damage of the corporation, along with the others who contributed thereto by their negligence. The hardship, if any, would seem to be on the trustee who is forced to journey to several states armed with voluminous corporate records and a crowd of experts to interpret and explain them. Many of the cases prosecuted by the trustee involve, as in the *Standard Gas* case, claims for millions of dollars.⁴¹

It is hard to distinguish on principle between the reorganization of a nation-wide corporation and a railroad. As has been pointed out:

"The requirement that all suits *against* railroads which are undergoing reorganization must be brought in the reorganization court regardless of the residence of the plaintiff would seem to impose equal hardship. Yet no serious objections seem to have been made to it."⁴²

Upon examination the supposed hardship to the defendant, against whom a small claim is asserted, is more feared than actual. Extra-territorial service of process need not be interpreted as mandatory. Where inconvenience to the out-of-state defendant outweighs the benefits derived from centralized administration and the elimination of ancillary proceedings, such process need not issue.⁴³ Section 118 of Chapter X provides:

"The judge may transfer a proceeding under this chapter to a court of bankruptcy in any other district, regardless of the location of the principal assets of the debtor or its principal place of business, if the interests of the parties will be best served by such transfer."⁴⁴

As the law is interpreted today there is no clear cut definition of jurisdiction.⁴⁵ Where jurisdiction exists is unpredictable. Litigation involving solely jurisdictional questions abounds, delaying both the prosecution of claims and completed reorganizations.⁴⁶ The reorganization court determines

⁴⁰Note, 49 YALE L. J. 568, 573 (1940).

⁴¹*Williams v. Austrian*, 331 U. S. 642, 67 Sup. Ct. 1443 (1947) (\$39,000,000); *Continental Ill. National Bank & Trust Co. v. Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, 55 Sup. Ct. 595 (1935) (sale of \$56,100,000 collateral to pay a debt of \$17,800,000 enjoined); *Thompson v. Terminal Shares*, 104 F. 2d 1 (C. C. A. 8th 1939) (\$3,200,000).

⁴²Note, 49 YALE L. J. 568, 573 (1940), citing Gerdes, *Jurisdiction of the Court in Proceedings under Section 77B*, 4 BROOKLYN L. REV. 237, 288 (1935) and cases there cited.

⁴³See note 38 *supra*.

⁴⁴52 STAT. 885 (1938), 11 U. S. C. A. § 518 (1946).

⁴⁵*Williams v. Austrian*, 331 U. S. 642, 67 Sup. Ct. 1443 (1947); 52 STAT. 843 (1938), 11 U. S. C. A. § 11a (15) (Supp. 1946); 52 STAT. 854 (1938), 11 U. S. C. A. § 46b (Supp. 1946).

⁴⁶*Williams v. Austrian*, 331 U. S. 642, 67 Sup. Ct. 1443 (1947); *In re Eastern*

whether a summary or plenary suit is appropriate by sending the defendant notice of the pending suit. The defendant then must answer and convince the court that his claim is substantial, otherwise the suit proceeds in a summary manner.⁴⁷ This determination alone often involves a consideration of the merits of the claim. Thus, the defendant is forced to litigate his claim, superficially at least, before he establishes a right to a plenary suit in his home district. Who will argue that this procedure is more expeditious than determining the entire controversy in the first instance in the primary court? Extra-territorial process issuable by the primary court would eliminate appeals from jurisdictional determinations and expedite corporate reorganizations.

The courts, apparently recognizing the need for extra-territorial service, have tortured the property concept to support summary jurisdiction, in their desire to avoid the necessity of separate and distinct plenary suits.⁴⁸ Such intellectual dishonesty leads to greater confusion with each use of a device of this nature.

The appearance of extra-territorial process on the stage of bankruptcy would create somewhat less interest than the appearance of an inhabitant of Mars. Such process is not unknown. As one commentator has said:

"Whenever Congress has felt that there was good reason to permit the service of process elsewhere it has by special enactment done so. Three outstanding examples of the exercise of this power of Congress are the Interpleader Act, the Securities and Exchange Act, and the 1936 amendment to the federal venue statute. And in addition to these statutes there are many others."⁴⁹

V. NATION-WIDE PROCESS IN LIQUIDATING BANKRUPTCY

The same practical considerations which demand extra-territorial service of process in reorganization proceedings are equally applicable to liquidating bankruptcy. Whatever adds to or preserves the assets available for distribution to creditors is desirable. Fewer ancillary suits in fewer courts, with the resultant decrease in liquidation expenses, add to the amount available for the liquidating dividend.

Bankers Corporation, CCH BANKR. LAW SERV. (3d ed.) ¶ 53,967 (D. C. N. J. 1942); Clarke v. Fitch, CCH BANKR. LAW SERV. (3d ed.) ¶ 53,805 (S. D. N. Y. 1942); *In re Standard Gas & Electric Co.*, 119 F. 2d 658 (C. C. A. 3d 1941); *Thompson v. Terminal Shares*, 104 F. 2d 1 (C. C. A. 8th 1939).

⁴⁷Gerdes, *Jurisdiction of the Court in Proceedings Under Section 77B*, 4 BROOKLYN L. REV. 237, 268 (1935).

⁴⁸See *supra* note 28.

⁴⁹Keeffe and Cotter, *Service of Process in Suits Against Directors: A Barrier to Justice*, 27 CORNELL L. Q. 74, 78 (1941).

Admittedly there is more serious statutory objection to extra-territorial service of process in liquidating bankruptcy than in reorganization proceedings. Section 23b, expressly excluded from the provision of the reorganization chapter, is applicable in liquidating bankruptcy. This section provides:

"b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67, and 70 of this Act."⁵⁰

This section on the surface has the effect of limiting the liquidating trustee to the state courts, since suits may be brought only where the bankrupt might have brought or prosecuted them. However, the exceptions provided rob this section of much of its vitality. The three exceptions are (1) avoiding preferences (Section 60), (2) avoiding lien attachments (Section 67), and (3) avoiding fraudulent conveyances (Section 70). It is difficult to imagine any considerable volume of litigation by trustees in bankruptcy not coming within one of these three exceptions.

It is interesting to note that for the purposes of these three exceptions the statute provides:

". . . where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and *any* court of bankruptcy shall have concurrent jurisdiction."⁵¹ (Italics added.)

A literal reading of the provision "any court of bankruptcy" would vest in the liquidation court jurisdiction of plenary suits. This section was construed in *Bardes v. Hawarden Bank*⁵² as merely eliminating any venue objection which might be raised by a defendant when sued in a federal court. The word *any* has been needlessly disregarded. Furthermore, the validity of this case seems open to question today as a result of the *Williams v. Austrian* decision. As Mr. Justice Frankfurter, dissenting in the *Austrian* case, wrote:

"Indeed, the foundation of the decision of the court below [affirmed in the majority opinion] and of the argument at the bar of this Court is the claim that the construction placed on the jurisdictional Act of 1898 by the *Bardes* and *Schumacher* cases was erroneous and to be rejected without compunction. . . ."⁵³

⁵⁰52 STAT. 854 (1938), 11 U. S. C. A. § 46b (Supp. 1946).

⁵¹52 STAT. 870 (1938), 11 U. S. C. A. § 96b (1943); 52 STAT. 878 (1938), 11 U. S. C. A. § 107e (Supp. 1946); 52 STAT. 882 (1938), 11 U. S. C. A. § 110e (Supp. 1946).

⁵²178 U. S. 524, 20 Sup. Ct. 1000 (1900).

⁵³331 U. S. 642, 668, 67 Sup. Ct. 1443, 1456 (1947).

The problem of bankruptcy jurisdiction is no different than that discussed by Matthew Bacon when he said:

"By an equitable Construction, a Case not within the Letter of a Statute is sometimes holden to be within the Meaning, because it is within the Mischief for which a Remedy is provided. The Reason for such Construction is that the Law-maker could not set down every Case in express Terms. In order to form a right Judgment whether a Case be within the Equity of a Statute, it is a good Way to suppose the Law-maker present; and that you have asked him this Question, Did you intend to comprehend this Case? Then you must give yourself such Answer as you imagine he being an upright Man, would have given. If this be, that he did mean to comprehend it, you may safely hold the Case to be within the Equity of the Statute: For while you do no more than he would have done, you do not act contrary to the Statute, but in Conformity thereto."⁵⁴

CONCLUSION

As long as our present economic system continues, the need for a bankruptcy and reorganization procedure will exist. It is businesses and businessmen that go bankrupt, not the courts. The bankruptcy procedure, therefore, must fulfill the needs of the business world. There is no room in such a system for a slavish adherence to outmoded legal doctrines.

Congress with complete power over bankruptcies has delegated to the federal courts the responsibility of supervising the machinery it has provided in the Bankruptcy Act. Congress intended an efficient machine. Yet the courts, refusing to recognize the mandate of Congress, have held to the ancient doctrine of process only within their territorial boundaries and needlessly give the Act a narrow interpretation.⁵⁵ A broad interpretation allowing extra-territorial service of process where expedient would fulfill a practical need that exists for a more efficient system of reorganization and bankruptcy. A New York court summarized our position succinctly:

"Such a construction ought to be put upon a statute as will best answer the intention which the makers had in view, for *qui haeret in litera, haeret in cortice*."⁵⁶

⁵⁴BACON'S ABRIDGMENT *649.

⁵⁵No better example of such blind adherence can be found than *Thompson v. Terminal Shares*, 104 F. 2d 1 (C. C. A. 8th 1939). Congress had amended § 77 to provide, "Process of the court shall extend to and be valid when served in any judicial district." Here, a reorganization trustee, in an *in personam* action, sought to set aside four allegedly invalid contracts of the debtor. The defendants, non-residents, were served with process beyond the territorial limits of the reorganization court. The court refused to uphold such service, in spite of the *Rock Island* case. The main reason given for the holding was § 23, which the court felt prohibited extra-territorial service of process in plenary suits. The amendment to § 77 was thought to add nothing to the *Rock Island* case, which the court casually explained on the basis of the exclusive jurisdiction over the debtor's property, wherever located.

⁵⁶*Riggs v. Palmer*, 115 N. Y. 506, 510, 22 N. E. 188, 189 (1890).