

## NOTES

BANKRUPTCY: BANK WHICH IN GOOD FAITH AND WITHOUT NOTICE HONORS CLIENT'S CHECK AFTER HE IS ADJUDICATED BANKRUPT NOT LIABLE TO TRUSTEE FOR DEPLETION OF THE BANKRUPT'S ESTATE

*Relying on contractual and equitable principles to overcome fairly explicit statutory language, the United States Supreme Court in Bank of Marin v. England refused to hold the bank liable for funds of a depositor which had been dispersed without notice of the latter's voluntary filing of a petition in bankruptcy. While the decision promotes the security of commercial transactions in which checks are chosen as the form of payment, the Court's analysis is not without deficiencies. This note, in addition to attempting a more palatable justification for the holding with reliance in part upon countervailing provisions of the Bankruptcy Act, also presents suggestions for legislative reformation which would achieve, without complication, the result promoted by the Marin majority.*

SECTION 70 (d) of the Bankruptcy Act provides that good faith transfers of the property of a bankrupt after a petition in bankruptcy has been filed will be valid against the trustee if the transaction is effectuated either before adjudication or before a receiver takes possession of the bankrupt's property, whichever occurs first.<sup>1</sup> However, the Supreme Court has recently held that the payment by a

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<sup>1</sup> Section 70 (d): "After bankruptcy and either before adjudication or before a receiver takes possession of the property of the bankrupt, whichever first occurs—

(1) A transfer of any of the property of the bankrupt . . . made to a person acting in good faith shall be valid against the trustee if made for a present fair equivalent value . . .

(2) A person indebted to the bankrupt . . . may, if acting in good faith, pay such indebtedness . . . to the bankrupt or upon his order, with the same effect as if the bankruptcy were not pending;

(3) A person having actual knowledge of such pending bankruptcy shall be deemed not to act in good faith . . .

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(5) . . . Except as otherwise provided in this subdivision . . . no transfer by or in behalf of the bankrupt after the date of bankruptcy shall be valid against the trustee: *Provided, however,* That nothing in this Act shall impair the negotiability of currency or negotiable instruments." Bankruptcy Act § 70 (d), 11 U.S.C. § 110 (d) (1964). Adjudication is defined as "a determination, whether by a decree or by operation of law, that a person is a bankrupt." Bankruptcy Act § 1 (2), 11 U.S.C. § 1 (2) (1964). When used in a temporal sense, the term "bankruptcy" means the date upon which the petition was filed. Bankruptcy Act § 1 (13), 11 U.S.C. § 1 (13) (1964).

bank of a bankrupt depositor's check, without notice of the bankruptcy proceedings, will not subject the bank to liability to the trustee despite the fact that the depositor had been adjudicated bankrupt prior to the payment.<sup>2</sup>

In *Bank of Marin v. England*,<sup>3</sup> petitioner-bank honored checks of a corporate depositor after the depositor had filed a voluntary petition in bankruptcy, the bank having had no notice of the bankruptcy proceedings. Under section 18 (f) of the Bankruptcy Act,<sup>4</sup> the voluntary filing operated automatically as an adjudication of bankruptcy. In an action by the trustee against the bank and the payee of the checks, the Ninth Circuit held that the bank was jointly liable with the payee on the ground that the payment occurred after adjudication and, therefore, protection of the bank was expressly foreclosed by section 70 (d).<sup>5</sup> On certiorari, the Supreme Court reversed the court of appeals. The Court found, in the absence of an effective revocation of the bank's contractual duty to honor all checks duly tendered, that the bank had a valid defense against the depositor's claim of improper payment.<sup>6</sup> Therefore, the Court reasoned, the bank was protected against a suit by the trustee, since the trustee is subject to the same claims and defenses that might have been asserted against the bankrupt.<sup>7</sup> Alternatively, the Court asserted that equitable principles should be given consideration in the resolution of bankruptcy disputes and that it would be inequitable to hold the bank liable for funds of a depositor which it had dispersed with no notice of pending bankruptcy proceedings.<sup>8</sup>

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<sup>2</sup> 385 U.S. 99 (1966).

<sup>3</sup> *Id.*

<sup>4</sup> Bankruptcy Act § 18 (f), 11 U.S.C. § 41 (f) (1964).

<sup>5</sup> *Bank of Marin v. England*, 352 F.2d 186 (9th Cir. 1965), noted in 15 KAN. L. REV. 100 (1966), 65 MICH. L. REV. 195 (1966), 41 N.Y.U.L. REV. 430 (1966), and 52 VA. L. REV. 528 (1966).

The referee, ruling that the bank's lack of knowledge was immaterial, held that the bank and the payee of the checks were jointly liable. 352 F.2d at 188. The district court affirmed the referee's determination. *Id.*

<sup>6</sup> 385 U.S. at 101-02.

<sup>7</sup> *Id.*; see *Zartman v. First Nat'l Bank*, 216 U.S. 134 (1910); *Commercial Credit Co. v. Davidson*, 112 F.2d 54 (5th Cir. 1940); *State v. A. D. Ingalls, Inc.*, 105 N.H. 244, 197 A.2d 214 (1964).

<sup>8</sup> 385 U.S. at 103. In addition, the Court stated that the trustee would normally be able to recover from the payee, a more equitable result than imposing liability upon the bank. See note 47 *infra* and accompanying text. The payee of the checks had in fact already paid the entire joint judgment and had filed a claim for contribution against the bank. 385 U.S. at 101. Thus, at the time the instant case was decided, there was no risk that a decision in favor of the bank would result in a depletion of

Section 70 (a) of the Bankruptcy Act of 1898 provided that, as of the date of adjudication, the trustee would be vested with the title of the bankrupt to certain specifically delineated types of property.<sup>9</sup> This provision was intended to permit all bona fide transactions involving the debtor's property which occurred before adjudication to proceed as though no petition had been filed.<sup>10</sup> However, the possibility of dissipation of the assets of the estate during the interval between the filing of the petition and the adjudication caused many courts to resort to the precept that the filing of the petition was a *caveat* to the world and, in effect, an attachment in favor of the trustee.<sup>11</sup> Similarly, in an effort to reconcile the apparent inconsistency of several of the provisions of section 70 (a),<sup>12</sup> it was held that while title did not vest in the trustee until adjudication, the title, when so vested, "related back" to the property of the bankrupt as of the date of filing.<sup>13</sup>

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the assets available to creditors. See note 47 *infra*. Furthermore, to impose liability upon the bank would have subjected it to potentially conflicting obligations. See notes 48 & 49 *infra* and accompanying text.

<sup>9</sup> Bankruptcy Act § 70 (a), ch. 541, 30 Stat. 565 (1898), as amended, 11 U.S.C. § 110 (a) (1964).

<sup>10</sup> *In re Mertens*, 144 F. 818, 823 (2d Cir. 1906), *aff'd sub nom.* *Hiscock v. Varick Bank*, 206 U.S. 28 (1907). Although in retrospect it appears somewhat anomalous, the argument was made in the early years following the adoption of the 1898 Act that title was conferred upon the trustee as of the date of adjudication because the Act of 1867, which set the filing of the petition as the date of cleavage, created uncertainty as to the validity of bona fide transfers between the date of filing and the adjudication. See *id.*; *In re Zotti*, 186 F. 84 (2d Cir.), *cert. denied*, 223 U.S. 718 (1911).

<sup>11</sup> See, e.g., *May v. Henderson*, 268 U.S. 111, 117-18 (1925); *In re Fuller*, 294 F. 71, 73 (2d Cir. 1923); *In re Retail Stores Delivery Corp.*, 11 F. Supp. 658, 660 (S.D.N.Y. 1935); see 4 W. COLLIER, BANKRUPTCY ¶ 70.66[2] (14th ed. 1964) [hereinafter cited as COLLIER]; McLaughlin, *Aspects of the Chandler Bill to Amend the Bankruptcy Act*, 4 U. CHI. L. REV. 369, 382 (1937). The concept of a "caveat" to all the world apparently originated in *Bank v. Sherman*, 101 U.S. 403, 406 (1875). See also *Mueller v. Nugent*, 184 U.S. 1, 14 (1902).

<sup>12</sup> Although the introductory words of section 70 (a) provided that the trustee would be vested by operation of law with the title of the bankrupt as of the date of adjudication, section 70 (a) (5) provided that the trustee would acquire title to all "property which prior to the filing of the petition he [the bankrupt] could by any means have transferred . . ." Bankruptcy Act § 70 (a) (5), ch. 541, 30 Stat. 566 (1898), as amended, 11 U.S.C. § 110 (a) (5) (1964). The latter provision appeared to set the date of filing as the critical date for the adjustment of property rights. In addition, there was apparent conflict between the provisions of section 70 (a) and the other sections of the Act. See 4 COLLIER ¶ 70.05[3].

<sup>13</sup> See *Everett v. Judson*, 228 U.S. 474, 478-79 (1913); *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U.S. 300, 307-08 (1911); 4 COLLIER ¶ 70.05[3]; J. WEINSTEIN, *THE BANKRUPTCY LAW OF 1938*, at 155 (1938). The resulting effect of the *caveat* rule and the "relation back" doctrine was aptly described by Professor McLaughlin: "Upon the whole, it seems fair to say that . . . the Bankruptcy Act of 1898 really means precisely that 'the title of the bankrupt shall vest in the trustee at the time of the petition,' in

Where the property of the debtor was transferred subsequent to the initiation of the proceedings but before adjudication, the courts were inclined to retreat from both the *caveat* rule and the "relation back" doctrine, however, if the transfer was for a present fair consideration and in good faith.<sup>14</sup> These bona fide transactions were made valid against the trustee primarily to encourage third persons to deal with the debtor during this interval and thereby allow him to carry on his normal business affairs pending adjudication, thus preventing unfounded involuntary petitions from ruining a solvent debtor.<sup>15</sup> Moreover, it was realized that the filing of a petition usually gave no actual notice to persons dealing with the bankrupt and protection was consequently extended on the ground that it would be inequitable to impose liability upon an innocent party who had received no notice of the proceedings.<sup>16</sup> Nevertheless, it was undisputed that all transactions eventuating *after adjudication* would be invalid against the trustee, regardless of the equities.<sup>17</sup>

Under this protected transactions doctrine, the pre-adjudication payment by a bank of the check of a bankrupt depositor, without notice and in the normal course of business, was generally held to be valid against the trustee.<sup>18</sup> Otherwise, the courts reasoned, the bank would be forced to undertake the virtually impossible task of keeping itself informed of the filing of bankruptcy petitions against any of

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contradiction to the express provision' found in one clause of the Act [the introductory clause of section 70 (a)]." McLaughlin, *supra* note 11, at 383 (author's footnotes omitted).

<sup>14</sup> *E.g.*, *Hersh v. United States*, 68 F.2d 799 (9th Cir. 1934); *Citizens' Union Nat'l Bank v. Johnson*, 286 F. 527 (6th Cir. 1923) (per curiam); *In re Mertens*, 144 F. 818 (2d Cir. 1906), *aff'd sub nom. Hiscock v. Varick Bank*, 206 U.S. 28 (1907); *In re Retail Stores Delivery Corp.*, 11 F. Supp. 658 (S.D.N.Y. 1935).

<sup>15</sup> *See In re Mertens*, 144 F. 818, 823 (2d Cir. 1906); McLaughlin, *supra* note 11, at 384.

<sup>16</sup> *See In re Zotti*, 186 F. 84, 85, 87 (2d Cir.), *cert. denied*, 223 U.S. 718 (1911); *In re Retail Stores Delivery Corp.*, 11 F. Supp. 658, 659 (S.D.N.Y. 1935) (dictum).

<sup>17</sup> 4 COLLIER ¶ 70.66[2]. *But cf. In re Howe*, 235 F. 908, 910 (D. Mass. 1916).

<sup>18</sup> *E.g.*, *Citizens' Union Nat'l Bank v. Johnson*, 286 F. 527 (6th Cir. 1923) (per curiam); *In re Zotti*, 186 F. 84 (2d Cir.), *cert. denied*, 233 U.S. 718 (1911). In *Stevens v. Bank of Manhattan Trust Co.*, 11 F. Supp. 409 (S.D.N.Y. 1931), *aff'd*, 66 F.2d 502 (2d Cir. 1933), the district court held that even though the bank had knowledge of the filing of the petition, this was not sufficient to impose liability upon the bank when it was nonetheless acting in good faith. *But see In re Zotti*, *supra* at 85. Similarly, the payment by a bank which had notice of bankruptcy proceedings pending against the drawer was held valid against the trustee where the bank did not know, nor have reason to know, that the account upon which the checks were drawn was part of the bankruptcy estate. *In re Retail Stores Delivery Corp.*, 11 F. Supp. 658 (S.D.N.Y. 1935).

its depositors in any competent jurisdiction.<sup>19</sup> Still, this application of the protected transactions doctrine was inherently inconsistent with the *caveat* and "relation back" rules. Indeed, in almost any bankruptcy case, there was a high degree of uncertainty as to which approach the court might choose to follow.<sup>20</sup>

This confusion and uncertainty led to the amendment of section 70 by the Chandler Act of 1938.<sup>21</sup> Pursuant to this legislation, section 70 (a) was amended to provide that the trustee would be vested by operation of law with the title of the bankrupt to certain specifically delineated classes of property as of the date of the filing of the petition.<sup>22</sup> Similarly, in order to eliminate the uncertainty as to which, if any, transfers of a bankrupt's property were protected against recovery by the trustee,<sup>23</sup> the present section 70 (d)<sup>24</sup> was added to the existing law:

After bankruptcy and either *before adjudication or before a receiver takes possession* of the property of the bankrupt, whichever first occurs—

(1) A transfer of any of the property of the bankrupt, other than real estate, made to a person acting in good faith shall be valid against the trustee if made for a present fair equivalent value . . .

(2) A person indebted to the bankrupt . . . may, if acting in good faith, pay such indebtedness . . . to the bankrupt or upon his order, with the same effect as if the bankruptcy were not pending . . .<sup>25</sup>

As is apparent, section 70 (d) (2) is essentially a codification of judge-made law prior to the adoption of the Chandler Act.<sup>26</sup> A literal reading of the amendment indicates that all protection ceases at the

<sup>19</sup> *Citizens' Union Nat'l Bank v. Johnson*, 286 F. 527, 528 (6th Cir. 1923) (per curiam).

<sup>20</sup> 4 COLLIER ¶ 70.66[2]; J. WEINSTEIN, *supra* note 13, at 160-61. The situation was described as "conducive to confusion and uncertainty, with potentialities for argument, 'bluffing,' litigation, expense and delay . . ." McLaughlin, *Amendment of the Bankruptcy Act*, 40 HARV. L. REV. 583, 615 (1927).

<sup>21</sup> 52 Stat. 840 (1938), as amended, 11 U.S.C. §§ 1-1255 (1964).

<sup>22</sup> Bankruptcy Act § 70 (a), 11 U.S.C. § 110 (a) (1964).

<sup>23</sup> H.R. REP. NO. 1409, 75th Cong., 1st Sess. 35 (1937); *Lake v. New York Life Ins. Co.*, 218 F.2d 394, 398 (4th Cir.), *cert. denied*, 349 U.S. 917 (1955).

<sup>24</sup> Bankruptcy Act § 70 (d), 11 U.S.C. § 110 (d) (1964).

<sup>25</sup> *Id.* (emphasis added). Real estate is expressly excluded from subsection (1) because it was felt that the recording statutes would furnish sufficient notice of any pending bankruptcies. J. WEINSTEIN, *supra* note 13, at 161. Likewise, transfers of realty are excluded by implication from the provisions of subsection (2). 4 COLLIER ¶ 70.68[5].

<sup>26</sup> See notes 14 & 18 *supra* and accompanying text.

date of adjudication or on the date the receiver takes possession, whichever occurs first. Furthermore, the section defines the exact limits within which transactions will be protected, thus making it unnecessary, and seemingly inappropriate, for the courts to continue their previous ad hoc approach.<sup>27</sup>

The apparent specificity and unequivocal nature of sections 70 (d) (1) and (2) may be diluted, however, by section 70 (d) (5):

. . . Except as otherwise provided in this subdivision . . . no transfer by or in behalf of the bankrupt after the date of bankruptcy shall be valid against the trustee: *Provided, however,* That nothing in this Act shall impair the negotiability of . . . negotiable instruments.<sup>28</sup>

Applying this section to a situation very analogous to that in *Marin*, the court in *Rosenthal v. Guaranty Bank & Trust Company*<sup>29</sup> held that the negotiability proviso relieved a bank of liability where it honored the checks of a bankrupt depositor *after adjudication*,<sup>30</sup> in good faith and without notice of the pending proceedings, since negotiability is impaired whenever a bank is uncertain that it can pay a check free of any defenses that might be raised.<sup>31</sup>

A few years after the *Rosenthal* decision, Congress amended

<sup>27</sup> See 4 COLLIER ¶ 70.67. The status of the law of protected transactions after the Chandler Act was summarized in *Lake v. New York Life Ins. Co.*, 218 F.2d 394, 399 (4th Cir.), cert. denied, 349 U.S. 917 (1955): "Whether the line which has been drawn [70 (d)] is the best possible solution of the problem [balancing the interests of the creditors against those of the innocent third person] is not for the courts to say. The line has in fact been drawn by competent authority and it is no longer necessary for the courts to make the attempt, which has not been conspicuously successful in the past, to decide cases on the facts . . . and to draw a fine distinction between transactions which should be protected and those which should not."

<sup>28</sup> Bankruptcy Act § 70 (d) (5), 11 U.S.C. § 110 (d) (5) (1964). Weinstein, at least as of 1938, felt that subsection (5) served to clarify the scope of section 70 (d) rather than to dilute its specificity in any manner. See J. WEINSTEIN, *supra* note 13, at 161.

<sup>29</sup> 139 F. Supp. 730 (W.D. La. 1956).

<sup>30</sup> Pursuant to Bankruptcy Act § 102, 11 U.S.C. § 502 (1964), the court held that the date of an approval of a petition for reorganization under Chapter X would be taken as the date of adjudication. 139 F. Supp. at 736.

<sup>31</sup> *Id.* at 734. Although this case would appear to be an apposite precedent to be considered by the Supreme Court in *Marin*, it was not discussed by Mr. Justice Douglas in the majority opinion. However, the court cited *Rosenthal* at the end of its statement of the facts, but with no accompanying analysis or explanation. Mr. Justice Harlan, however, discussed *Rosenthal* in a footnote to his dissenting opinion. 385 U.S. at 104 n.2. He dismissed the precedential value of the case on the grounds that presentment and payment of a check was not a negotiation and that "other constructions [of the negotiability proviso] are more consonant with the balance of § 70 (d)." *Id.* See notes 51-57 *infra* and accompanying text.

section 18 of the Bankruptcy Act to provide that the filing of a voluntary petition would "operate as an adjudication with the same force and effect as a decree of adjudication."<sup>32</sup> In the absence of reliance upon the negotiability proviso, the amendment seemed clearly to remove any possibility of protected bona fide transactions under section 70 (d) in the case of voluntary bankruptcies, since any interval which might have existed between the filing of the petition and the adjudication was eliminated.<sup>33</sup> Furthermore, one of the primary reasons for the existence of a system of protected transactions—to prevent a solvent debtor from being economically destroyed by an unfounded involuntary petition<sup>34</sup>—is inapposite to voluntary proceedings. Nevertheless, in *Marin* the Supreme Court held that the payment by a bank of a depositor's check, after the depositor had filed a voluntary petition in bankruptcy, was valid against the trustee.

In *Marin* the Court ignored the negotiability proviso,<sup>35</sup> even though the question was raised by the briefs,<sup>36</sup> and instead reasoned that under the bank's contract with the depositor, it had the authority and the duty to honor properly drawn checks. In order for this authority to be revoked, reasonable notice under the circumstances had to be given.<sup>37</sup> Thus, since the trustee succeeded to only such rights as the bankrupt possessed<sup>38</sup> and, therefore, was subject to any defenses which could have been interposed against the bankrupt, the trustee was likewise required to give the bank notice before a revoca-

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<sup>32</sup> Bankruptcy Act § 18 (f), 11 U.S.C. § 41 (f) (1964). This amendment represented no major change in the practical administration of bankruptcy estates since it was not uncommon before the amendment was passed for the filing of the voluntary petition and the adjudication to take place on the same day. See, e.g., *Ripp v. Fleming*, 242 F.2d 849, 850 (7th Cir. 1957). In fact, the adjudication of a voluntary petition had already become a virtually automatic process. W. LAUBE, *BANKRUPTCY ACT A34* (Collier Pamphlet ed. 1966). Some courts, moreover, apparently presumed that the adjudication of a voluntary bankrupt immediately followed the filing of the petition. See *In re Howe*, 235 F. 908 (D. Mass. 1916), *aff'd sub nom. Edison Elec. Illuminating Co. v. Tibbetts*, 241 F. 468 (1st Cir. 1917) (per curiam).

<sup>33</sup> The petitioner-bank in *Marin* argued that because § 18 (f) had eliminated any interval that might exist between the filing of a voluntary petition and the adjudication, § 70 (d) was no longer applicable to voluntary bankruptcies and thus pre-Chandler Act law was governing. Brief for Petitioner at 16-18. However, this argument would not seem to be particularly beneficial to the bank's claim since, as noted previously, under the decisions prior to the Chandler Act no protection was extended to post-adjudication transfers. See note 17 *supra* and accompanying text.

<sup>34</sup> See note 15 *supra* and accompanying text.

<sup>35</sup> See note 31 *supra* and accompanying text.

<sup>36</sup> See Brief for Petitioner at 26-31; Brief for Respondent at 8-10.

<sup>37</sup> 385 U.S. at 101-02.

<sup>38</sup> Cases cited note 7 *supra*.

tion of the authority to pay would be effective.<sup>39</sup> However, as asserted in the dissenting opinion,<sup>40</sup> the rule that a trustee acquires no greater rights than were possessed by the bankrupt is always subject to the express exceptions created by the statute,<sup>41</sup> and section 70 expressly forecloses the protection of any transfer after adjudication, regardless of whether the party seeking protection had notice of the proceedings.<sup>42</sup> Therefore, even though under the common law of negotiable instruments a stop payment order by the bankrupt depositor will not revoke the drawee-bank's authority to pay in the absence of reasonable notice to the bank,<sup>43</sup> it does not necessarily follow that the trustee will be required to give a similar notice.

The Court apparently required this notice not only as a matter of contract or negotiable instruments law, but in addition placed the requirement on constitutional grounds. Each of the pertinent cases cited in the majority opinion<sup>44</sup> held that before a person can be deprived of property by a judicial proceeding, due process of law requires that he be given notice reasonably calculated under the circumstances to apprise him of the pendency of the action and to afford him an opportunity to be heard. These cases are clearly distinguishable from *Marin*, however, since they involved deprivation of property from the parties held entitled to the notice. In *Marin*, on the other hand, the bankruptcy proceeding in no way deprived the bank of its property.<sup>45</sup> Furthermore, if the Court consciously intended to rest its decision, at least alternatively, on the due

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<sup>39</sup> 385 U.S. at 101-02.

<sup>40</sup> 385 U.S. at 105 (Harlan, J., dissenting).

<sup>41</sup> 4 COLLIER ¶ 70.04; McLaughlin, *Aspects of the Chandler Bill to Amend the Bankruptcy Act*, 4 U. CHI. L. REV. 369, 384 (1937). For example, the trustee may set aside preferential transfers of the bankrupt's property within four months before the filing of the petition whereas the bankrupt himself cannot do so. Bankruptcy Act § 60, 11 U.S.C. § 96 (1964).

<sup>42</sup> See notes 24-27 *supra* and accompanying text.

<sup>43</sup> See, e.g., *Harlan Nat'l Bank v. Carbon Glow Coal Co.*, 289 S.W.2d 200 (Ky. 1956); H. BAILEY, *THE LAW OF BANK CHECKS* § 13.1 (3d ed. 1962).

<sup>44</sup> *Schroder v. City of New York*, 371 U.S. 208 (1962); *Walker v. City of Hutchinson*, 352 U.S. 112 (1956); *City of New York v. New York, N.H., & H.R.R.*, 344 U.S. 293 (1953); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

<sup>45</sup> The bank argued that if the bankruptcy proceeding was to be given the effect of shifting its obligation from the depositor to the trustee in bankruptcy, it would thereby be deprived of its contractual right to honor the checks of the depositor and, hence, would be entitled to notice under *Mullane* and companion cases. Brief for Petitioner at 13. The fallacy of this argument is that it assumes the very question to be decided—whether the bankruptcy adjudication, in the absence of notice, will shift the bank's obligation from the depositor to the trustee.

process argument, the effect was to hold section 70 unconstitutional since there is no requirement in that section that notice be given to those in possession of the bankrupt's property. From the remainder of the opinion, however, this does not appear to have been the Court's intention. Thus the reliance upon the due process cases is seemingly misplaced.

Perhaps realizing the vulnerability of the contract rationale, the Court based its decision alternatively upon the proposition that equity principles should be given consideration in the exercise of bankruptcy jurisdiction and that it would be inequitable to impose liability upon the bank where it had no notice or knowledge of the bankruptcy.<sup>46</sup> In addition, the Court asserted that the trustee would often be able to recover from the payee of the checks. Forcing recovery in this manner would, in the Court's view, be more equitable than holding the bank liable since the payee would merely be returned to his original status as a general creditor.<sup>47</sup>

There are other justifications for placing the burden of loss upon the general creditors of the bankrupt rather than upon the bank in situations similar to that presented in the *Marin* case. First, to impose liability upon the bank would subject it to potentially conflicting duties—the duty to honor properly drawn checks<sup>48</sup> and the duty to conserve the assets of any depositor who has been adjudicated bankrupt—without any requirement that it be advised as to which obligation was to be paramount in a given instance. Further-

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<sup>46</sup> 385 U.S. at 103.

<sup>47</sup> 385 U.S. at 103. The Court suggested that the trustee's action against the payee would be based upon the theory of a preferential transfer or some other voidable transaction. However, the sections in the Act which deal with such transfers, § 60 (preferential transfers) and § 67 (fraudulent transfers), apply only to transactions occurring within the four-month period before the filing of the petition. Actually, the ground for the trustee's claim would be that, pursuant to § 70 (a), title to the bankrupt's property, including rights of action, vested in the trustee by operation of law as of the date of the filing of the petition.

The probable liability of the payee would seem to be important to the Court's decision since it would prevent the other creditors from being injured by the trustee's inability to proceed against the bank. There may be instances, however, where the trustee will not be able to recover from the payee. For example, the payee may abscond with the funds, thereby injuring the other creditors if the trustee is not permitted to recover from the bank. That such a possibility exists weakens the Court's decision to some extent by eliminating one of the justifications for exonerating the bank.

<sup>48</sup> *Weaver v. Bank of America Nat'l Trust & Savings Ass'n*, 59 Cal. 2d 428, 380 P.2d 644 (1963); *Milledgeville Banking Co. v. Carr*, 104 Ga. App. 610, 122 S.E.2d 284 (1961); W. BRITTON, *BILLS AND NOTES* § 182 (2d ed. 1961).

more, it would appear to be much more feasible for either the trustee or the bankrupt to notify the bank than for the bank to keep apprised of bankruptcy proceedings affecting all its depositors.<sup>49</sup>

Although these factors justify the result in *Marin*, they may also serve to extend this post-adjudication protection only to banks. Several differences between the relationship of a bank to its depositors and the ordinary debtor-creditor relationship would support a distinction. For example, the ordinary debtor, unlike a bank operating checking accounts, usually has neither the right nor the duty to pay the debt to someone other than his creditor, and thus the problem of conflicting duties would seldom arise. Furthermore, while banks have numerous depositors, the ordinary debtor commonly has comparatively few creditors and is, therefore, in a superior position to acquire personal knowledge concerning bankruptcy proceedings pending against those to whom he is indebted.

Regardless of whether *Marin* may be properly limited to banks, the rationale employed by the Court is less than convincing. In view of the introductory language of section 70 (d) restricting protected transactions to those occurring before adjudication or before a receiver takes possession of the bankrupt's property, the Court's rationale, in effect, permits equitable considerations to supersede the express provisions of the statute. More importantly, as emphasized by the dissent,<sup>50</sup> this decision initiates the same type of ad hoc determination, and the resulting confusion and uncertainty, which existed prior to the adoption of the Chandler Act.

There are several preferable ways of achieving the same result reached by the Court and still remain within the provisions of the statute. Certainly one of these means is the application of the negotiability proviso discussed above in connection with *Rosenthal*.<sup>51</sup> The latter case has been severely criticized by commentators on the grounds that presentment of a check and its payment by the drawee

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<sup>49</sup> A close analogy is presented by the law of decedents' estates. Where a depositor dies, and the bank has no knowledge or notice of the death, the payment of a properly drawn check is binding upon the decedent's personal representative. *Glennan v. Rochester Trust & Safe Deposit Co.*, 209 N.Y. 12, 102 N.E. 537 (1913); *W. BRITTON*, *supra* note 48, at § 182. The rationale supporting this result is that normal commercial dealings would be seriously hampered if banks were required to ascertain whether the drawer of a check were still living before it could safely pay the check. *Glennan v. Rochester Trust & Safe Deposit Co.*, *supra*.

<sup>50</sup> 385 U.S. at 110 (Harlan, J., dissenting).

<sup>51</sup> Notes 28-31 *supra* and accompanying text.

is not a negotiation,<sup>52</sup> that the proviso is governed by the introductory words of section 70 (d) and does not extend protection beyond the date of adjudication,<sup>53</sup> and that the *Rosenthal* result permits the assets of the bankruptcy estate to be depleted contrary to the general policies of the Bankruptcy Act.<sup>54</sup> However, in order to give the proviso any independent meaning, it must be construed as an express exception to the other provisions of section 70 (d), and deemed to protect post-adjudication transfers.<sup>55</sup> Any other interpretation would render the proviso mere surplusage since pre-adjudication transfers are already protected, thus eliminating the possibility that negotiability could be impaired in those instances. Similarly, the language of the proviso does not prohibit the impairment of *negotiation*, but rather, the impairment of *negotiability*.<sup>56</sup> Thus, the fact that the presentment and payment of a check is not a negotiation should not be determinative in considering whether the proviso is applicable. Moreover, if banks are held liable for the good faith payment of the checks of bankrupt depositors, the utility of checks in commercial transactions, and hence their negotiability, will be seriously impaired since the bank will have to determine before each check is paid whether there are any bankruptcy proceedings pending against the drawer.<sup>57</sup> Despite the apparent solution which the proviso presents, however, its actual meaning and significance are unnecessarily vague and ambiguous. Thus, if Congress intends the proviso to be applicable to the payment of checks by the drawee and to ex-

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<sup>52</sup> 4 COLLIER ¶ 70.68[1] n.3; Seligson, *Creditors' Rights*, 32 N.Y.U.L. REV. 708, 730-31 (1957). The payment of a check by a drawee bank is not a negotiation. W. BRITTON, *supra* note 48, § 49 at 118.

<sup>53</sup> 70 HARV. L. REV. 548, 549 (1957).

<sup>54</sup> *Id.*

<sup>55</sup> At least one commentator has admitted that the bank in *Rosenthal* would be protected if the payment of a check were one of the types of transactions which the proviso was designed to protect, thus by implication recognizing that the proviso extends protection even to post-adjudication transfers. See Seligson, *supra* note 52, at 730.

<sup>56</sup> In holding that the negotiability proviso did not protect the bank, the court of appeals in *Marin* expressly read the provision as if it prohibited the impairment of *negotiation*. 352 F.2d at 189.

<sup>57</sup> The purpose of negotiability is "to give the holder [of the instrument] the maximum assurance that he will be able to realize on the debt owed him without any defenses being interposed." Note, 64 HARV. L. REV. 958 (1951). Thus, to the extent that the imposition of liability upon the bank causes a delay in the honoring of checks, the payee's assurance that he will be able to collect the check without any defenses being interposed, such as the necessity for delay before the payment of the check, is diminished, and a consequent impairment of negotiability results.

tend post-adjudication protection under certain circumstances, the provision should be amended to render its purview more concise.

Alternatively, support exists for the proposition that the delivery of a check, rather than its payment, is the event signifying the transfer from the drawer to the payee.<sup>58</sup> Although this position is apparently not the majority viewpoint,<sup>59</sup> it is to some extent justifiable as conforming more closely to general commercial practices. The layman probably regards the receipt of a check as the equivalent of an acceptance of cash rather than an extension of credit.<sup>60</sup> If the Court had adopted this view in the instant case, the transfer would have taken place before the petition was filed since all of the checks were delivered prior to that event<sup>61</sup> and thus before the was given title to the bankrupt's property.

In addition to these judicially imposed methods of relieving the bank from liability, the same result could be obtained, and perhaps more suitably, by legislative amendment. There are at least two feasible possibilities. The first is to eliminate the date of adjudication as a cut-off point for those transactions entitled to protection, thus amending the introductory words of section 70 (d) to read: "After bankruptcy and before a receiver takes possession of the property of the bankrupt—." In addition, since adjudication, especially in involuntary proceedings, is sometimes accompanied by a degree of notoriety sufficient to put a reasonable person on notice, it would seem proper to append a new subsection providing that "A person having reasonable cause to believe that a petition in bankruptcy has been filed by or against the bankrupt shall be deemed not to have acted in good faith."<sup>62</sup> The fact that adjudication had

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<sup>58</sup> *E.g.*, *Latrobe v. J. H. Cross Co.*, 29 F.2d 210 (E.D. Pa. 1928). That this argument could be made was noted in *Rosenthal*, 139 F. Supp. at 736 n.1.

<sup>59</sup> *See Note*, 64 HARV. L. REV. 958, 959-60 (1951).

<sup>60</sup> *Id.* at 960.

<sup>61</sup> *See* 352 F.2d at 187-88.

<sup>62</sup> This suggested scheme is very similar to the original amendment proposed by Professor McLaughlin in 1927. His proposed revision provided that "Nothing in this act shall invalidate any transfer to or for account of the bankrupt by any other person, or any transfer for present fair equivalent value by or on behalf of the bankrupt, if both the following conditions are fulfilled: (1) that the transfer is made before the qualification of the receiver or trustee, whichever first qualifies and (2) that the person other than the bankrupt to, for or by whom the transfer is made has not at the time of said transfer knowledge or reasonable cause to believe either that any act of bankruptcy has been, is being, or is about to be committed, or that a petition in bankruptcy has been filed by or against the bankrupt . . ." McLaughlin, *Amendment of the Bankruptcy Act*, 40 HARV. L. REV. 583, 615-16 (1927).

taken place would be one factor in determining whether the party seeking protection had reasonable cause to believe that a petition had been filed.

Although this revision would have protected the bank in *Marin*, it would have certain obvious disadvantages. For example, since in many instances of both voluntary and involuntary bankruptcies bona fide transactions would be valid against the trustee for an expanded interval, a much greater depletion of the assets available to the creditors would be possible than under the present provision. Furthermore, in his attempt to invalidate post-adjudication transfers, the trustee would face a substantial burden in proving "reasonable cause to believe." Finally, since the trustee could invalidate even pre-adjudication transfers with a showing that the person seeking protection had reasonable cause to believe that a petition had been filed, the courts would probably be burdened with an increased volume of litigation in this area.

The addition of a special provision to section 70 (d) for voluntary petitions presents an alternative scheme of statutory revision which would have operated to exculpate the bank in the instant case. Essentially this amendment would provide:

In case of voluntary bankruptcies, a transfer which would otherwise be valid against the trustee but for the fact that it occurred after adjudication (*i.e.*, after the filing of the petition), will not cease to be protected if it occurs before a receiver takes possession of the bankrupt's property.

This revision not only has the advantage of simplicity but also the additional virtue of not requiring a major restructuring of section 70 (d). Similarly, it has no effect upon involuntary bankruptcies; and, therefore, the potential depletion of assets would be less significant than under the first suggested revision. In addition, the amendment avoids the introduction of any new element into the law of protected transactions which would tend to increase substantially the volume of bankruptcy litigation.

The wide acceptance of checks in commercial transactions makes evident the desirability of protection for the bank in *Marin*. However, the Court's disregard for fairly explicit statutory language may introduce uncertainty into the application of other provisions of the Bankruptcy Act. Further, the significant congressional concern for

regulation of the distribution of bankruptcy estates, as evidenced by the existence of pervasive federal legislation since the latter part of the nineteenth century, reduces the possibility of an unresponsive legislature. Therefore, the *Marin* alteration of the present statutory scheme, as well as future diversion from Code specifications, would appear to be more properly left to legislative amendment.