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means of fulfilling the juvenile court philosophy is to introduce at least minimal standards of substantive *and* procedural due process into juvenile proceedings. Due process, used not merely as a defensive, protective reaction against the procedural arbitrariness of the juvenile system but rather as an affirmative tool, can be a positive force because in perfecting the entire system of justice it cannot help but perfect individualized justice for the child. Juvenile law must not only be framed in wisdom but also properly administered, and principles of due process must be the viable element in that proper administration.

SARAH D. MORRIS

BANKRUPTCY — NOTICE TO DRAWEE BANK — JOINT LIABILITY WITH PAYEE

Bank of Marin v. England, 385 U.S. 99 (1966).

Whether a bank should be held jointly liable with a payee for honoring a bankrupt's check after the filing of a voluntary bankruptcy petition but before adjudication of bankruptcy raises several interesting questions. Complications arise when the bank has no knowledge of the bankruptcy action. The United States Supreme Court recently dealt with this enigma in *Bank of Marin v. England*.[1]

The *Marin* case arose out of the following circumstances. Marin Seafoods delivered five checks to Eureka Fisheries between August 27 and September 17, 1963. On September 26, 1963, Seafoods filed a voluntary petition in bankruptcy. Six days later, Fisheries presented the checks to the Bank of Marin which handled Seafoods' commercial account. On the same day, John M. England was appointed trustee for Seafoods. Since the bank had no notice of the

[1] 385 U.S. 99 (1966). The case initially posed an interesting standing question since judgment had already been satisfied by the payee prior to the bank's appeal. However, the issue was quickly disposed of when the Court found that the bank was a proper party since it was still liable in contribution to the payee. Hence, the controversy presented was not moot but rather valid within the meaning of the Constitution. *Id.* at 101.

Mr. Justice Fortas, in a separate dissenting opinion, argued that no real controversy was presented to the Court. He contended that the trustee had no real interest since he merely sought costs and that the bank's interest was negligible as a result of the payee's prior payment of the judgment. In essence, Fortas believed that the trustee had conspired with the bank to have an interesting question of law determined by the Court, thereby resulting in the lack of a true adversary proceeding. *Id.* at 111-12. (dissenting opinion).

filing in bankruptcy, it honored the checks upon presentment, and on the following day, the bank was notified by mail of the bankruptcy proceedings. The trustee instituted an action to require the bank to pay a sum equal to the checks and, in the alternative, sought relief from Eureka. The referee's determination of joint liability was affirmed by both the district and appellate courts.[2] In reversing, the Supreme Court was faced with the task of analyzing the Bankruptcy Act.[3]

Before discussing the Supreme Court's reasoning in support of the bank's claim of non-liability, an understanding of the relevant bankruptcy provisions is essential. The Bankruptcy Act of 1898 contained numerous ambiguities, particularly those involving the point in time at which title to property vested in the trustee. Under this act, title was vested in the trustee at the time of his appointment or upon adjudication of bankruptcy,[4] often leaving large time gaps between the filing of the petition and the appointment of the trustee or adjudication. During the interim, the insolvent party who retained title to his property, was able to transact business.[5]

The courts resolved the time-lag defect in the statute by developing two theories: relation back and constructive notice. Under the former, the courts ruled that once the trustee was appointed, title related back to the filing of the petition.[6] In the latter, the filing of a petition was said to be a caveat of the bankruptcy proceeding to the creditors and the entire world.[7] The courts, however,

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[2] Bank of Marin v. England, 352 F.2d 186, 187-88 (9th Cir. 1965), *rev'd*, 385 U.S. 99 (1966).

[3] 30 Stat. 544 (1898), as amended, 11 U.S.C. §§ 1-1255 (1964).

[4] Bankruptcy Act § 70(a), 30 Stat. 565 (1898). The act provided:

> The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is property which is exempt....

[5] The depletion of the bankrupt's assets reduced the creditors' probabilities of recovering on the debt if the insolvent party was subsequently adjudicated bankrupt. Creditors who knew of the insolvent's financial condition were free to fight for preferential treatment by securing liens on the debt due them. Finally, damage was also done to the insolvent where an unwarranted involuntary petition was filed since the confidence of others in dealing with him was destroyed. 385 U.S. at 106-08 (dissenting opinion); 4 COLLIER, BANKRUPTCY ¶ 70.03(5) (14th ed. 1964). Wilde, *The Chandler Act*, 14 IND. L.J. 93, 133 (1938).

[6] See Everett v. Judson, 228 U.S. 474, 476-79 (1913); 4 COLLIER, *op. cit. supra* note 5, ¶ 70.66; *Hearings Before the House Committee on the Judiciary*, 75th Cong., 1st Sess. 210-11 (1937) (statement by Mr. McLaughlin); McLaughlin, *Aspects of the Chandler Bill To Amend the Bankruptcy Act*, 4 U. CHI. L. REV. 369, 382 (1937).

[7] *Ibid.* In the often-cited case of Mueller v. Nugent, 184 U.S. 1 (1902), the Court said that a filing of a petition was a "*caveat* to all the world, and in effect an attachment and injunction." *Id.* at 14.

seemed to recognize the precarious position of the bank where suit was brought when it had honored the payee's check without notice of a subsequent filing of the petition. Instead of employing the relation-back or constructive notice theories, the courts generally found it more expedient to find the payee liable since the payee, and not the bank, would profit from immediate payment by avoiding the complications of filing a creditor's claim in bankruptcy.[8]

The Chandler Act of 1938,[9] the most recent major amendment, eliminated some of the earlier problems by codifying the relation-back theory. Section 70(a) provides that title vests in the trustee immediately upon the filing in bankruptcy.[10] If the transfer occurs between filing and the appointment of the trustee, certain exceptions to this rule are set forth in section 70(d).[11] Ostensibly, any transfer after adjudication is invalid. Thus, unless the fact pattern in *Marin* falls within an exception of 70(d), the bank must be liable to the trustee. This is the position taken by Mr. Justice Harlan in his dissenting opinion.[12]

The dissent's theory is strengthened by section 18(f)[13] of the Bankruptcy Act which provides that the filing of a *voluntary* petition, as in *Marin*, is the equivalent of an immediate adjudication of

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8 Citizen's Union Nat'l Bank v. Johnson, 286 Fed. 527 (6th Cir. 1923), where the court stated, in discussing caveat and relation back:

> Its effect would be that the bank could not protect itself against liability to a trustee in bankruptcy subsequently appointed on account of payments made in good faith in the regular course of business and in the ignorance of the bankruptcy proceedings — except through the impossible course of keeping itself advised, not only daily, but momentarily, of the filing of petitions for adjudication of bankruptcy . . . . In our opinion the bankruptcy works no such result. *Id.* at 528.

See *In re* Zotti, 186 Fed. 84, 87 (2d Cir. 1911), where the court said that the caveat doctrine was never meant to apply to a bank which honored checks without notice of filing. See also Cunningham v. Lexington Trust Co., 259 Mass. 181, 156 N.E. 1 (1927). *Contra, In re* Howe, 235 Fed. 908 (D. Mass. 1916). Although often cited to affirm the relation back theory, this case was a suit against the payee. The court agreed that as between the bank and trustee, the bank might be protected by the agreement "under which deposits are customarily made." *Id.* at 910.

9 52 Stat. 840 (1938).

10 Bankruptcy Act § 70(a), 52 Stat. 879 (1938), as amended, 11 U.S.C. § 110(a) (1964). See McLaughlin, *supra* note 6, at 375-83; *Hearings Before the House Committee on the Judiciary, supra* note 6, at 210.

11 Bankruptcy Act § 70(d), 52 Stat. 881 (1938), as amended, 11 U.S.C. § 110(d) (1964), which governs transactions occurring "after bankruptcy and either before adjudication or before a receiver takes possession of the property of the bankrupt, whichever first occurs."

12 385 U.S. at 105, 108-09.

13 Bankruptcy Act § 18(f), 73 Stat. 109 (1959), 11 U.S.C. § 41(f) (1964). The section explicitly states that "the filing of a voluntary petition . . . shall operate as an adjudication with the same force and effect as a decree of adjudication."

bankruptcy, thus foreclosing the application of the exception provisions of section 70(d) which apply only to the interim between filing and adjudication. To substantiate his belief that no provision of 70(d) was directed at the voluntary petitioner, Mr. Justice Harlan argued that section 70(a) was enacted to protect debtors from unfounded *involuntary* petitions which would have the unfortunate effect of destroying their credit.[14] The net result is that any transfer after the filing of a voluntary petition must necessarily be invalid; hence, the dissent would have found the bank liable. This argument is strong and difficult to circumvent.

By avoiding statutory interpretation, the majority opinion in *Marin* failed to meet the dissent's argument head on, reasoning instead that the bank and the bankrupt are in a contractual debtor-creditor relationship[15] which runs until the bank is notified to refrain from honoring the drawer's checks.[16] Thus, the bank's obligation is terminated only when the trustee, the possessor of the bankrupt's rights,[17] notifies the bank of the bankruptcy proceeding.[18] The dissent's argument relative to the strict construction and application of sections 70(d) and 18(f) were dismissed as being superseded by equitable considerations.[19]

While the majority reached a just solution, its reasoning is, at best, weak. In the only case on point since 1938, *Rosenthal v. Guaranty Bank & Trust Co.*,[20] local Louisiana newspapers had run banner headlines about the bankruptcy of the local company's Maryland parent. Unlike the Supreme Court in *Marin*, the *Rosenthal* court relied on exception section 70(d)(3)[21] which permits a bona fide good faith transfer after filing even where there is actual notice of bankruptcy if it is believed that the petition is ill founded. The court found that newspaper publication, since not always complete and accurate, was not adequate notice.[22] Reliance was also placed on section 70(d)(5)[23] which invalidates any act that hinders the

14 385 U.S. at 104, 108-09 (dissenting opinion).

15 *Id.* at 101.

16 *Ibid.*

17 Zartman v. First Nat'l Bank, 216 U.S. 134, 138 (1910); Hewit v. Berlin Mach. Works, 194 U.S. 296, 302 (1904).

18 385 U.S. at 102.

19 *Id.* at 103.

20 139 F. Supp. 730 (W.D. La. 1956).

21 Bankruptcy Act § 70(d)(3), 52 Stat. 881 (1938), as amended, 11 U.S.C. § 110 (d)(3) (1964).

22 139 F. Supp. at 735.

23 Bankruptcy Act § 70(d)(5), 52 Stat. 881 (1938), 11 U.S.C. § 110(d)(5) (1964).

negotiability of currency or negotiable instruments. The *Rosenthal* court found that this provision was meant to apply to banks in such situations,[24] whereas the *Marin* dissent found the provision inapplicable since their understanding of the Uniform Commercial Code presupposes that a transfer is only valid upon presentment, and this would occur after the voluntary petitioner has been adjudicated bankrupt by his filing. Furthermore, the dissent argued that a presentment is not a negotiation.[25]

With scanty precedent to rely on, the *Marin* Court was forced to strengthen its decision through a due process argument. Property in the possession of the bank, the Court implied, could not be taken without violating the due process clause of the fifth amendment unless notice was first given.[26] The test to be applied, as found in *Mullane v. Central Hanover Bank & Trust Co.*,[27] is that notice must be "reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action."[28] Why the Court was forced to go beyond the Bankruptcy Act to fathom a due process guarantee seems strange indeed. It would appear highly unlikely that the drafters overlooked or intentionally failed to provide for such an important constitutional requirement.

In fact, the drafters of the act did require notice in two bankruptcy provisions. The first calls for publication of notice to creditors within ten days after the trustee is appointed.[29] The second, and more important, is the exception provision 70(d)(3).[30] Yet it is readily evident that the first provision fails as a basis for protecting the payee and only by a very liberal construction, as in *Rosenthal*, could section 70(d)(3) afford the intended bar to liability.

Seemingly, a stronger presentation may effectively be made for a due process requirement which is more closely aligned to the Bankruptcy Act, although not expressly found within it. This would necessitate a distinctively different interpretation of the vol-

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24 139 F. Supp. at 736.

25 385 U.S. at 104 & n.2.

26 *Id.* at 102.

27 339 U.S. 306 (1950). Here the court found that a New York statute which provided for notice by publication was inadequate as to trust-fund beneficiaries whose whereabouts were unknown when the trustee intended to settle accounts.

28 *Id.* at 314. The *Marin* court cites this passage, 385 U.S. at 102.

29 Bankruptcy Act § 58(a), 52 Stat. 867 (1938), as amended, 11 U.S.C. § 94(a) (1964).

30 Bankruptcy Act § 70(d)(3), 52 Stat. 881 (1938), 11 U.S.C. § 110(d)(3) (1964).

untary filing section 18(f)[31] and of the negotiability provisions in section 70(d)(5).[32] The sole congressional purpose behind amending section 18(f) in 1959 was to "eliminate the administrative burden upon district judges imposed by the present requirements for adjudication and reference in bankruptcy cases,"[33] thereby eliminating the formality and congestion caused by requiring judges to sign the voluntary petition. The apparent purpose of this section, was therefore in no way related to the problem of vested title as had been section 70(a).[34] This conclusion is bolstered by the fact that section 18(f) is located within the chapter on the creation of the bankruptcy courts and their jurisdiction.

Congress may well have assumed that no problems would arise where the petition was filed voluntarily. Alternatively, Congress may have intended the exception section 70(d) to apply to voluntary as well as involuntary proceedings should any problems arise, thus obviating enactment of an identical provision in 18(f). In fact, section 70(a), by its very language, makes no reference to either voluntary or involuntary petitions, hence leaving an avenue open for application of the equitable results found in section 70(d). If the *Marin* dissent is correct in asserting that section 70(a) was meant to apply to involuntary petitions only, why then was Congress not explicit in drafting the act? Indeed, section 18(f) may be of questionable constitutional validity since its full effect is to delegate a non-delegable judicial function to an administrative officer.

Assuming that section 70(a) has applicational validity to the voluntary filer, exception section 70(d)(3) which deals with notice could then be utilized. More importantly, section 70(d)(5), which prohibits the impairment of the "negotiability of currency or negotiable instruments,"[35] could be applied. Since federal law does not encompass the law of negotiable instruments, it is quite likely that the courts would look to the Uniform Commercial Code which has

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[31] Bankruptcy Act § 18(f), 73 Stat. 109 (1959), 11 U.S.C. § 41(f) (1964).

[32] Bankruptcy Act § 70(d)(5), 52 Stat. 881 (1938), 11 U.S.C. § 110(d)(5) (1964).

[33] 2 UNITED STATES CODE CONGRESSIONAL & ADMINISTRATIVE NEWS 1571 (1959).

[34] This section states:

> The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of *the petition* initiating a proceeding under this title. Bankruptcy Act § 70(a), 52 Stat. 879 (1938), as amended, 11 U.S.C. § 110(a) (1964). (Emphasis added.)

[35] Bankruptcy Act § 70(d)(5), 52 Stat. 882 (1938), as amended, 11 U.S.C. § 110 (d)(5) (1964).

been adopted by most of the states. Under the Code, the initial issuance of a negotiable instrument, or the issuance of a check from a drawer to a payee, is a delivery to a holder[36] and not a negotiation. Similarly, presentment by the payee to the drawee bank is not a negotiation, a negotiation being a special kind of transfer by a holder.[37] Thus, in a technical sense, the *Marin* dissent is correct in asserting that the transaction involved was not a negotiation. However, the *Marin* fact situation does involve a negotiable instrument. It is submitted that section 70(d)(5) was meant to apply to all transactions concerning negotiable instruments and not merely those concerning technical "negotiation," since its underlying policy appears to be to promote circulation. Failure to protect a transaction involving only a drawer, payee, and drawee defeats that purpose.

The Uniform Commercial Code, in covering the entire spectrum of negotiable instruments, regulates the relationship between the bank and its customer. The *Marin* Court might have considered two important sections which govern notice. Section 4-403 permits a customer to stop payment if he gives the bank a reasonable opportunity to act. In conjunction with the above, section 4-303, which the Code comment indicates has direct application to a drawer when he has filed a bankruptcy petition, provides:

> (1) Any knowledge . . . [or] notice . . . to terminate . . . [or] suspend . . . the bank's . . . duty to pay an item . . . comes too late to so terminate . . . [or] suspend . . . such . . . duty if the knowledge . . . [or] notice . . . is received or served and a reasonable time for the bank to act thereon expires or . . . after the bank has done any of the following:
> (a) accepted or certified the item.[38]

In the final analysis, there are many problems in the Bankruptcy Act yet to be solved by Congress.[39] Although the courts can seek justice for all parties by adjudicating these controversies in an

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[36] UNIFORM COMMERCIAL CODE § 3-102(a) [hereinafter cited as UCC].

[37] UCC § 3-504 (presentment); UCC § 3-202 (negotiation).

[38] UCC § 4-303.

[39] Many other problems concerning the Bankruptcy Act have arisen over the years, especially in regard to creditor preferences. Other difficulties arise when the parties find themselves in situations like that of the bank in *Marin*. For example, there may be an employer who, without notice, has payed wages to his employee. Likewise, the insurance company may pay the beneficiaries, after which the trustee may seek to recover funds. For an interesting note on legislation proposed by the insurance lobby, see 65 MICH. L. REV. 195, 200 n.33 (1966).