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Bankruptcy--Bank Paying Depositor's Check After His Adjudication in Bankruptcy is Liable to Trustee for Amount of Check--*Bank of Marin v. England*

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RECENT DEVELOPMENTS

BANKRUPTCY—Bank Paying Depositor's Check After His Adjudication in Bankruptcy Is Liable to Trustee for Amount of Check—*Bank of Marin v. England**

Prior to filing a voluntary petition in bankruptcy, which is an automatic adjudication of bankruptcy,[1] depositor delivered five checks to Eureka Fisheries drawn upon depositor's account in appellant Bank of Marin. Six days after the filing, Eureka Fisheries presented the checks to appellant and received payment. Appellee, depositor's trustee in bankruptcy, did not notify appellant of the bankruptcy proceedings until after appellant had honored the checks. An order was sought by appellee from the referee in bankruptcy requiring appellant, or in the alternative Eureka Fisheries, to return the amount of the honored checks to the bankrupt's estate. The referee issued the requested order, and his ruling that appellant and Eureka Fisheries were jointly liable was affirmed by the bankruptcy court. On appeal to the Ninth Circuit, *held*, affirmed. After an adjudication in bankruptcy, a bank has no authorization to pay any checks drawn by a bankrupt depositor, since, upon adjudication, all of the bankrupt's property vests by operation of law in the trustee;[2] when checks are honored after adjudication, a bank is liable to restore the sum paid out of the bankrupt's account even if the bank did not receive notice of the adjudication.[3]

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* 352 F.2d 186 (9th Cir. 1965), *cert. granted*, 383 U.S. 906 (1966) [hereinafter cited as principal case].

1. "The filing of a voluntary petition under chapters 1 to 7 of this title, other than a petition filed in behalf of a partnership by less than all of the partners, shall operate as an adjudication with the same force and effect as a decree of adjudication." Bankruptcy Act § 18(f), as amended, 73 Stat. 109 (1959), 11 U.S.C. § 41(f) (1964). " 'Adjudication' shall mean a determination, whether by decree or by operation of law, that a person is bankrupt." Bankruptcy Act § 1(2), as amended, 73 Stat. 109 (1959), 11 U.S.C. § 1(2) (1964).

The provision that filing is an automatic adjudication is not a significant change in the law. Previously it was necessary for a judge to make a formal order of adjudication but as a practical matter this generally followed automatically upon the filing. *E.g.*, *In re* Howe, 235 Fed. 908, 909 (D. Mass 1916), *aff'd sub nom.* Edison Electric Illuminating Co. v. Tibbetts, 241 Fed. 468 (1st Cir. 1917) (per curiam). The amendment eliminated the administrative burden involved in requiring an adjudication by a judge. 2 COLLIER, BANKRUPTCY ¶ 18.01[3.6] (14th ed. 1964); S. REP. No. 320, 86th Cong., 1st Sess. (1959).

2. The trustee of the estate of a bankrupt . . . shall . . . 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 . . . to all of the following kinds of property wherever located . . . . (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered.

Bankruptcy Act § 70(a), as amended, 52 Stat. 879 (1938), as amended, 11 U.S.C. § 110(a) (1964).

3. Although in the principal case the bank was held jointly liable with Eureka Fisheries, Eureka paid the entire claim to the trustee and filed a claim for contribution against the bank. The rights between these parties had not been determined at the time of the decision in the principal case. Principal case at 188, 193 n.12.

Aside from the principal case, the only other reported case dealing with the liability under the Bankruptcy Act of 1898 of a bank which honored checks of a depositor after adjudication is *Rosenthal v. Guaranty Bank & Trust Co.*,[4] in which the court held that "a bank is not liable when in good faith and *without actual knowledge* of the bankruptcy it honors the bankrupt's check in the regular course of its business . . . ."[5] The *Rosenthal* court relied on a proviso to section 70(d)(5) of the Bankruptcy Act which stated: "That nothing in this title shall impair the negotiability of currency or negotiable instruments."[6] The court said that one of the purposes of this previously uninterpreted provision was to protect banks in post-adjudication transactions.[7] The basis for this interpretation of legislative intent, however, was not indicated; in fact, the finding was made in spite of the section's introductory language which indicates that it applies only to transactions after bankruptcy but *before* adjudication.[8] The court in the principal case rejected the *Rosenthal* interpretation; reliance on the "negotiability" clause was deemed unwarranted in light of this introductory language, and because the presentation of a check by a payee for payment by a drawee bank is not considered a negotiation.[9]

In addition to its attempted use of the *Rosenthal* decision as controlling authority, appellant bank suggested that the trustee should be barred from recovery on a theory of laches or estoppel because of his failure to give appellant notice of depositor's bankruptcy before the checks were honored. The Bankruptcy Act places a duty on the trustee to gather the property of the bankrupt "as expeditiously as is compatible with the best interests of the parties in interest."[10] The trustee has been held liable for losses incurred by the estate through his negligence[11] and he has been denied recovery of interest on funds which he had advanced to pay expenses when he had improp-

4. 139 F. Supp. 730 (W.D. La. 1956).

5. *Id.* at 736. (Emphasis added.)

6. Bankruptcy Act § 70(d)(5), added by 52 Stat. 881 (1938), 11 U.S.C. § 110(d)(5) (1964): "Except as otherwise provided in this subdivision and in subdivision g of section 44 of this title, 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 title shall impair the negotiability of currency or negotiable instruments."

7. Rosenthal v. Guaranty Bank & Trust Co., 139 F. Supp. 730, 736 (W.D. La. 1956).

8. Bankruptcy Act § 70(d), added by 52 Stat. 881 (1938), 11 U.S.C. § 110(d) (1964): "After bankruptcy and either before adjudication or before a receiver takes possession of the property of the bankrupt . . . ."

9. Principal case at 189. It should further be noted that the following cases, cited in *Rosenthal* for the proposition that a bank paying checks in good faith without knowledge of pending bankruptcy proceedings, were all cases involving a payment by a bank before adjudication. Citizens Union Nat'l Bank v. Johnson, 286 Fed. 527, 31 A.L.R. 256 (6th Cir. 1923); Stevens v. Bank of Manhattan Trust Co., 11 F. Supp. 409 (S.D.N.Y. 1931); Cunningham v. Lexington Trust Co., 259 Mass. 181, 156 N.E. 1, 54 A.L.R. 751 (1927).

10. Bankruptcy Act § 47(a)(1), 52 Stat. 860 (1938), 11 U.S.C. § 75(a)(1) (1964).

11. *In re* India Wharf Brewery, Inc., 96 F.2d 710 (2d Cir. 1938).

erly delayed in administering the estate.[12] However, no case can be found in which the trustee was precluded from recovering property belonging to the estate of the bankrupt on a theory of estoppel or laches because of either the trustee's delay in securing the property or his failure to give timely notice to interested parties of the adjudication.[13] The assumption that such a defense would be available would seemingly run counter to the provisions of section 70(d) which specifically mention those transactions which are safe from the trustee's attack.[14]

The statutory protection of certain transactions taking place after the filing of a petition in bankruptcy was necessitated by the inconsistent judicial interpretations of the language of the Bankruptcy Act of 1898.[15] In its original form the Act provided that "the trustee of the estate of a bankrupt . . . shall . . . be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt."[16] In their desire to prevent depletion of the bankrupt's estate before the adjudication, courts expanded the scope

12. Brown v. Leo, 34 F.2d 127 (2d Cir. 1929).

13. If such a defense is available to appellant, the question still remains as to whether appellee's failure in the principal case to notify appellant within six days of the filing of the petition is such an unreasonable delay as to bar recovery. The court in the principal case did not deal with this question. It should also be pointed out that a trustee in bankruptcy could never give notice prior to an adjudication since he is not appointed until the first meeting of the creditors after the adjudication. Bankruptcy Act § 44(a), 52 Stat. 860 (1938), as amended, 11 U.S.C. §§ 72(a) (1964).

14. Principal case at 191. Other defenses proved equally unavailing to the appellant. A claim that it was protected by a California statute allowing a bank to cash checks in disregard of adverse claims to bank deposits until a court order was issued prohibiting such payment was held inapplicable since the claim of the trustee in bankruptcy is not an adverse claim within the meaning of the statute. Appellant's other arguments, that it was deprived of property without due process of law since it had not received notice of the bankruptcy proceedings and that it was required to make a double payment of a debt, were also rejected. *Id.* at 192-93. These constitutional arguments have not been directly considered by the Supreme Court in the context of a situation such as the one presented in the principal case, and the decisions in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) and Hanover Nat'l Bank v. Moyses, 186 U.S. 181 (1902), cited by appellant in support of his arguments are distinguishable. *Moyses* dealt with the right of a creditor to reasonable notice of bankruptcy proceedings while *Mullane* considered the rights of trust beneficiaries to notice of proceedings dealing with the trustee's settlement of accounts. In both of these proceedings the parties held to be entitled to notice had rights and interests in the funds which were the subject of the proceedings and were entitled to their day in court to assert and protect those rights and interests. In the principal case, the bank was merely a debtor of the bankrupt and as such had no comparable interest. The principal case would thus seem to fall clearly within the rule of Mueller v. Nugent, 184 U.S. 1 (1902), that title to a bankrupt's property vests in the bankruptcy trustee and is under the control of the bankruptcy court. The *Mueller* court did not concern itself as to whether notice to a bankrupt's debtors was necessary.

15. Lake v. New York Life Ins. Co., 218 F.2d 394, 398, (4th Cir.), *cert. denied*, 349 U.S. 917 (1955); 4 COLLIER, *op. cit. supra* note 1, ¶ 70.66; WEINSTEIN, THE BANKRUPTCY LAW OF 1938 161 (1938); H.R. REP. No. 1409, 75th Cong., 1st Sess. 35 (1937); *Hearings on Revision of the Bankruptcy Act Before the House Committee on the Judiciary*, 75th Cong., 1st Sess., ser. 9, at 211-12 (1937).

16. Bankruptcy Act, ch. 541, § 70(a), 30 Stat. 565 (1898).

of the provision and held that the trustee's title, though vesting upon adjudication, related back so as to embrace all of the property the bankrupt had at the time the petition in bankruptcy was filed.[17] The filing of the petition was deemed "a *caveat* to all the world, and in effect an attachment and injunction."[18] If this interpretation were carried to its logical extreme, all transfers of a bankrupt's property subsequent to the *filing* of a petition in bankruptcy would have to be invalidated. Obviously this would produce harsh results where a party dealt with the bankrupt in good faith and without knowledge of the filing. Moreover, it would be extremely difficult for a party against whom a petition has been filed to conduct even those business operations which would not deplete the estate since others would be reluctant to deal with him in light of the potential invalidity of all property transfers. The courts recognized these inequities, and, in an attempt to protect bona fide transactions taking place between filing and adjudication, began to retreat from the unwavering use of the filing date as the cut-off point.[19]

The courts, however, failed to establish a clear pattern of exceptions and the resulting uncertainty led to the passage of the Chandler Act in 1938, in which Congress (1) amended the Bankruptcy Act to provide that title to the estate of a bankrupt vests in the trustee on the date on which the petition in bankruptcy is filed,[20] and (2) specifically enumerated the transactions between filing and adjudication which were to be protected.[21] Section 70(d) excepted transactions occurring "after bankruptcy and either before adjudication or before a receiver takes possession of the property of the bankrupt" when a bankrupt's property is transferred in good faith for a "present fair equivalent value."[22] Also, protected were persons who, being indebted to or holding property of the bankrupt, pay such indebtedness or deliver such property in good faith to the bankrupt or to his order.[23] The only provision explicitly exempting transactions occurring *after* adjudication is found in section 21(g) which deals with transfers of real property.[24] Finally, section 70(d) pro-

17. Everett v. Judson, 228 U.S. 474, 478-79 (1913); Acme Harvester Co. v. Beekman Lumber Co., 222 U.S. 300, 307 (1911); State Bank v. Cox, 143 Fed. 91 (7th Cir. 1906); 4 COLLIER, *op. cit. supra* note 1, ¶ 70.66; MACLACHLAN, BANKRUPTCY 169 (1956).

18. Mueller v. Nugent, 184 U.S. 1, 14 (1902).

19. Cunningham v. Merchant's Nat'l Bank, 4 F.2d 25 (1st Cir. 1925); Citizens Union Nat'l Bank v. Johnson, 286 Fed. 527 (6th Cir. 1923); *In re* Zotti, 186 Fed. 84 (2d Cir. 1911); 4 COLLIER, *op. cit. supra* note 1, ¶ 70.66; McLaughlin, *Amendment of the Bankruptcy Act*, 40 HARV. L. REV. 583, 612-16 (1927).

20. Bankruptcy Act § 70(a), as amended, 52 Stat. 879 (1938), as amended, 11 U.S.C. § 110(a) (1964). See text of Act at note 2 *supra*.

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

22. Bankruptcy Act § 70(d)(1), added by 52 Stat. 881 (1938), 11 U.S.C. § 110(d)(1) (1964).

23. Bankruptcy Act § 70(d)(2), added by 52 Stat. 881 (1938), 11 U.S.C. § 110(d)(2) (1964).

24. Bankruptcy Act § 21(g), added by 52 Stat. 853 (1938), 11 U.S.C. § 44(g) (1964).

vides that *only* those transactions specifically excepted therein or mentioned in section 21(g) would be valid as against the trustee.[25]

Both before and after the enactment of section 70(d), courts have held that a party can be required to return to the trustee property of a bankrupt received after adjudication.[26] The banks in the principal case and *Rosenthal* did not receive property of the bankrupt, but section 70(d) has been interpreted as placing an absolute ban on all transfers of a bankrupt's property after adjudication, except as specifically exempted.[27] Such an interpretation would seem to support the view taken in the principal case that, although a party has not received property of the bankrupt, if his actions, albeit in good faith, have resulted in the improper removal of property from the bankrupt's estate, he may be liable to the trustee to the extent of the depletion.

If the property is distributed subsequent to removal, the party responsible for the depletion in the bankrupt's estate may be forced to use his own property to replace the removed property even though it is unlikely that he will obtain reimbursement from the bankrupt party or the party to whom the property was distributed. Such a situation occurred in the principal case and the analogous case of *Lake v. New York Life Ins. Co.*[28] In *Lake*, five insurers, without knowledge of the prior filing of a bankruptcy petition and in reliance on the bankrupt's claim of title to life insurance policies, lent the bankrupt approximately $45,000 on the policies, taking assignments of the policies as security.[29] When the trustee in bankruptcy discovered the policies and the loans, he gave the bankrupt an opportunity to exercise his right to retain the policies by paying into the estate their cash surrender values.[30] When the bankrupt refused

25. Bankruptcy Act § 70(d)(5), added by 52 Stat. 881 (1938), 11 U.S.C. § 110(d)(5) (1964). This clause ends with the proviso that the negotiability of currency or negotiable instruments is not to be impaired.

26. Fitzgerald v. W. F. Sebel Co., 295 F.2d 654 (10th Cir. 1961); *In re* Howe, 235 Fed. 908 (D. Mass. 1916), *aff'd sub nom.* Edison Electric Illuminating Co. v. Tibbetts, 241 Fed. 468 (1st Cir. 1917) (per curiam).

27. Feldman v. Capitol Piece Dye Works, Inc., 293 F.2d 889, 892 (2d Cir. 1961); Kohn v. Myers, 266 F.2d 353, 357 (2d Cir. 1959); Lake v. New York Life Ins. Co., 218 F.2d 394, 399 (4th Cir. 1955); 4 COLLIER, *op. cit. supra* note 1, ¶¶ 70.67–.68. One early case under Pennsylvania bankruptcy law held, on facts similar to those in the principal case, a bank liable for payment of a check after the depositor was adjudged bankrupt. Wickersham v. Nicholson, 14 Serg. & R. 118 (Pa. 1826). Pre-Chandler Act cases give no indication that any transactions occurring subsequent to adjudication would be protected. *In re* Howe, 235 Fed. 908 (D. Mass. 1916), *aff'd sub nom.* Edison Electric Illuminating Co. v. Tibbetts, 241 Fed. 468 (1st Cir. 1917) (per curiam). See Citizens Union Nat'l Bank v. Johnson, 286 Fed. 527 (6th Cir. 1923); *In re* Zotti, 186 Fed. 84 (2d Cir. 1911); Stevens v. Bank of Manhattan Trust Co., 11 F. Supp. 409 (S.D.N.Y. 1931).

28. 218 F.2d 394 (4th Cir. 1955).

29. The bankrupt in fact had misrepresented to the insurer that no bankruptcy proceedings were outstanding against him.

30. Bankruptcy Act § 70(a)(5), as amended, 52 Stat. 879 (1938), 11 U.S.C. § 110(a)(5) (1964).

to exercise this right, the trustee sued the insurers for the cash surrender value of the policies, an amount slightly in excess of the amount of the loans. The policies remained physically in the possession of the bankrupt, but the court found that the receiver had taken actual possession of the bankrupt's property before the loan was made, and that the insurers could not rely on section 70(d) to protect their receipt of the assignment of the policies. Although it recognized the plight of the insurers, the court held that the statute invalidated all transfers of property not granted specific protection, and ordered the insurers to pay the cash surrender values of the policies to the trustee. Thus, the insurers were forced to pay both the loans and the cash surrender values—approximately twice the value of the policy—without any assurance that they would be able to recover the loan from the bankrupt.[31] The court did not feel it was competent to answer the question of whether the limited protection set out by Congress was the best solution to the problem of the validity of transactions affecting a bankrupt's property after the filing of a petition in bankruptcy.[32] In *Lake*, as in the principal case, the court felt bound by the statutory limits prescribed by Congress.[33]

The court in *Rosenthal* avoided the above result by placing the bank under the protection of the proviso against the impairment of the negotiability of negotiable instruments.[34] This approach, which was rejected in the principal case,[35] was criticized by commentators since the payment of a check by a drawee bank is not a negotiation, and thus to hold a bank liable for cashing checks of a depositor

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31. Lake v. New York Life Ins. Co., 218 F.2d 394, 399 (4th Cir. 1955). The debt of the bankrupt to the insurer for the loan was presumably not affected by a discharge of the bankrupt policy holder as the loan was obtained by false representations. Bankruptcy Act § 17(a)(2), 52 Stat. 851 (1938), as amended, 11 U.S.C. § 35(a)(2) (1964). Of course, the survival of a right of action after bankruptcy carries no assurances of a recovery.

32. Lake v. New York Life Ins. Co., *supra* note 31, at 399.

33. In 1955 following the decision in *Lake* the insurance industry attempted to have Congress change the Bankruptcy Act so as to protect insurance companies which made payments on policies after adjudication when they had no knowledge of the bankruptcy proceedings. S. 1998, 84th Cong., 1st Sess. (1955) would have amended § 70(a)(5) by adding the following to the end of the clause:

> *And provided further*, That when any insurance company, either before or after the adjudication of bankruptcy, in good faith and without actual knowledge of bankruptcy, makes any payment pursuant to the provisions of a life insurance policy or contract, such payment shall have the same effect so far as such company is concerned as if the bankruptcy were not pending.

S. 1999, 84th Cong., 1st Sess. (1955) would have amended § 70(d)(5) to provide that a good faith payment on a policy by an insurer without actual knowledge of the bankruptcy would be a valid transfer as against the trustee. The National Bankruptcy Conference adopted a resolution opposing the proposed amendments. Resolution No. 28, SUMMARY OF PROCEEDINGS, NATIONAL BANKRUPTCY CONFERENCE, 1956 MEETING, at 12. The amendments were never enacted by the Congress.

34. See notes 6-7 *supra* and accompanying text.

35. See note 9 *supra* and accompanying text.

after his adjudication is not to impair the negotiability of the check.[36] It has been suggested that the "negotiability" clause was included to avoid any implication that the restrictions in the Bankruptcy Act modified the law of negotiable instruments[37] and to protect the rights of a holder in due course of a negotiable instrument.[38] As a drawee bank is not a holder in due course, it would not be within the intended scope of protection.[39] Therefore, the *Rosenthal* interpretation affords banks a special protection which neither the express language of the statute nor its legislative history indicates they were intended to have.[40]

Not only does the *Rosenthal* interpretation lack statutory support, but it might, in fact, have broader implications than was realized by the court which expounded it. If the interpretation which protects the bank in the present situation were accepted, there would not be any valid reason for not applying the same rationale to a situation in which a debt owing to the bankrupt was paid after the adjudication of bankruptcy but was not paid to the bankrupt's estate. The employer who pays wages earned prior to bankruptcy after an adjudication would seemingly be entitled to the same protection that the bank receives under *Rosenthal.* Indeed, the employer would probably have less reason to know of or suspect bankruptcy proceedings than a bank that surveys legal publications which announce such proceedings. However, the language of the Bankruptcy Act does not protect such transactions.

Courts have said that the filing of a petition in bankruptcy is a *caveat* to the whole world, and that all property of the bankrupt is thereafter in *custodia legis*—beyond the power of the bankrupt to transfer.[41] Therefore, once a petition is filed, the bank's obligation to pay the bankrupt's check would be extinguished, for the funds in the bank would be the trustee's funds rather than the bankrupt's.[42]

36. 4 COLLIER, *op. cit. supra* note 1, at 1502 n.3; Seligson, *Creditors Rights,* 32 N.Y.U.L. REV. 708, 730-31 (1957). Payment of a check by a drawee bank is not a negotiation. Fidelity & Deposit Co. v. Marion Nat'l Bank, 116 Ind. App. 453, 64 N.E.2d 583, 589 (1946); BRITTON, BILLS & NOTES 118 (2d ed. 1961).

37. 4 COLLIER, *op. cit. supra* note 1, at 1502.

38. Note, 70 HARV. L. REV. 548, 550 (1957); Note, 64 HARV. L. REV. 958, 965 (1951).

39. Central Bank & Trust Co. v. General Finance Corp., 297 F.2d 126 (5th Cir. 1961).

40. 4 COLLIER, *op. cit. supra* note 1, at 1502 n.3.

41. Mueller v. Nugent, 184 U.S. 1, 4 (1902); Fitzgerald v. W. F. Sebel Co., 295 F.2d 654, 656 (10th Cir. 1961); Lockhart v. Garden City Bank & Trust Co., 116 F.2d 658, 660 (2d Cir. 1940); *In re* Tele-Tone Radio Corp., 133 F. Supp. 739, 744 (D. N.J. 1955). That the bank was not a party to the adjudication proceedings made no difference as the adjudication in bankruptcy is a proceeding in rem and binds all parties in interest whether or not they appear at the proceedings. Myers v. International Trust Co., 263 U.S. 64, 73 (1923); Gratiot County State Bank v. Johnson, 249 U.S. 246, 248 (1919); 2 COLLIER, *op. cit. supra* note 1, ¶ 18.43.

42. Harrison State Bank v. First Nat'l Bank, 116 Neb. 456, 218 N.W. 92 (1928); Guthrie Nat'l Bank v. Gill, 6 Okla. 560, 54 Pac. 434 (1898); BRADY, BANK CHECKS 25 (3d ed. 1962); *The Law of Bank Check—General Principles,* 78 BANKING L.J. 277, 301 (1961); see NADLER, THE LAW OF BANKRUPTCY § 329 (1948).

The bank may argue that this imposes an undue burden, since it is not commercially feasible to verify the financial standing of the drawer of every check as each check is presented for payment. The difficulty is compounded by the fact that a bankruptcy petition filed anywhere in the United States has the same effect in all courts as it has in the court in which it is filed.[43] As compared with the bank's burden, the burden which would be placed on a trustee by requiring him to give notice to the bank of pending bankruptcies appears relatively insignificant. The disparity of these burdens, however, did not persuade the court in the principal case, because the court thought that various legal publications and modern communications allow a bank to keep abreast of bankruptcy proceedings without great inconvenience. Furthermore, the danger of bankruptcies is merely another risk of doing business and whatever cost might be involved can be passed on to the customers. In any event, even if the bank has difficulties in keeping abreast of bankruptcy petitions, the infrequency with which this problem arises, as is evidenced by the fact that the principal case and *Rosenthal* are the only reported cases in which the question arose, seems to indicate that the banks are not terribly threatened by the imposition of this liability.[44]

Consideration must also be given to the process of administering a bankrupt's estate and the objectives sought to be achieved in such a proceeding. In order to prevent depletion of the bankrupt's estate and to distribute the bankrupt's assets equitably among his creditors, the Bankruptcy Act places full control over the estate in the court at a particular point in time.[45] With few exceptions, the point in time is the filing of a petition in bankruptcy.[46] If a court were to extend protection to transactions other than those specifically excepted by the statute, it would subject the bankrupt's estate to further depletion and prevent the trustee from gaining effective control of the estate until he had given specific notice, not required by the statute, to those parties who are likely to deal with the bankrupt's property.[47] Since the trustee is not appointed until after the adjudication of bankruptcy, such notice could never be given before adjudication,[48] and the Congressional mandate as to the point of time for the vesting of property in the trustee would be frustrated to the detriment of the creditors. A bank, such as the one in the principal case, may have been acting in good faith, but when a

43. Principal case at 190.

44. *Id.* at 190-91.

45. Acme Harvester Co. v. Beekman Lumber Co., 222 U.S. 300, 307 (1911); *In re* Ostlind Mfg. Co., 19 F. Supp. 836, 838 (D. Ore. 1937); *In re* Jones, 10 F. Supp. 165, 167 (W.D. Mo. 1935); 4 COLLIER, *op. cit. supra* note 1, ¶ 70.66; MACLACHLAN, *op. cit. supra* note 17, at 346.

46. See notes 21-26 and accompanying text.

47. See Note, 70 HARV. L. REV. 548 (1957).

48. See note 13 *supra.*

choice must be made between the bank and the creditors in determining who should bear the loss from the bank's mistaken payment, both the existing law and policy indicate that a creditor who is not in a position to prevent the payment should be protected.