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Introduction to Symposium

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Bankruptcy is an accepted and important[1] branch of the law, though one that is notorious for its intricacy and complexity. To be sure, its over-all goals are easy to state: relief of the honest but unfortunate debtor from the oppressive burden of his debts; liquidation of the insolvent estate for the benefit of the creditors. Yet, when one descends to the levels of fashioning and correlating the guiding policies and of elaborating the details of their implementation and administration one encounters mounting obstacles and troubles. These difficulties flow from two major sources of conflicts. One of them is produced by the inherent clash of interests which is bound to occur whenever available funds and claims don't match, whenever a shadowy past must be separated from a brighter future. Thus secured and unsecured creditors, the bankrupt and pre-bankruptcy transferees line up in opposing camps and necessitate some adjustment and accommodation of their conflicting interests. The other generator of difficulties lies in the federal structure with its plurality of legal orders and courts which likewise require a fair and prudent reconciliation of divergent policies and competencies. Although bankruptcy, in the words of Justice Felix Frankfurter, is basically a "federal specialty"[2] it does not and cannot operate in a water-

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1. According to the Tables of Bankruptcy Statistics, Ending June 30, 1954 (published by the Administrative Office of the United States Courts) there were 53,136 new bankruptcy cases filed during the fiscal year 1954. 42,723 thereof involved straight bankruptcy proceedings, 41,335 arising upon voluntary petitions. Of the 43,494 cases terminated during the fiscal year 1954, 5,062 were asset cases, 3,925 were nominal asset cases and 23,894 were no asset cases, the remainder arising under the special relief sections and chapters of the act. The 5,062 asset cases closed netted proceeds of $34,623,745. The breakdown of this sum shows the following distribution:

Recipients	*Amounts in $*	
Secured Creditors	9,519,970	(equalling 58.7% of the claims allowed)
Priority Creditors	5,680,352	(equalling 32.1% of the claims allowed)
Unsecured Creditors ..	8,808,752	(equalling 9.6% of the claims allowed)
Exemptions	128,753	
Administrative Expenses	8,856,729	(including 3,705,315 for attorneys' fees)
Other Payments	1,629,189	

2. Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 Corn. L. Q. 499, 507 n. 37.

tight compartment. Rules and concepts of state law frequently—and often subtly and elusively[3]—determine or trench on important bankruptcy consequences, while, conversely, state courts have to adjudicate and determine innumerable bankruptcy questions of varying complexion and complexity. Thus bankruptcy law almost reduces itself to an infinite series of compromises and assumes the appearance of a veritable maze or labyrinth, forbidding to the outsider and mysterious even to the expert.

Though American bankruptcy law is the product of a long history and experience, molded by economic forces, needs and policies, which have imparted amazingly similar features to the bankruptcy laws of all modern commercial nations,[4] the field still bristles with thorny issues which demand the smoothing application of systematic treatment if not the more drastic remedy of legislative surgery. Whenever the law is called to allocate relative priority and status to conflicting interests, the standards of determination more often than not come to rest on arbitrary lines or delusive formulae which from time to time require rechecking or overhauling. Neither "prior in time, prior in right" nor "equality is equity" are panaceas.[5] In fact they act as bromides on more acute analysis. Legislative language is likewise not always the key to the appropriate standard. Draftsmen are not clairvoyant or omniscient and their language and techniques are apt to come to hound them, especially in a field where the equities are not patent and where inconsistencies and defects in statutory formulation cause particular headaches to the profession. A new look at bankruptcy, such as solicited and stimulated by the editors of the Minnesota Law Review, is therefore bound to clarify old problems and to point to needed improvements.

Professor MacLachlan's contribution on the *Protection and Collection of Property by the Trustee in Bankruptcy* not only gives an excellent picture of the practical steps and problems involved, but it serves as a poignant illustration, how the cumulation of a "misleading insinuation," contained in one section of the statute, and of an "inartistic reference," inserted into another, has succeeded in causing uncertainty and confusion about the essence and scope of the function of bankruptcy courts. As Professor MacLachlan shows,

3. See, for an illustration, Mussman and Riesenfeld, *Garnishment and Bankruptcy,* 27 Minn. L. Rev. 1 (1942), focussing on the notion of lien.

4. For details see Riesenfeld, *The Evolution of Modern Bankruptcy Law,* 31 Minn. L. Rev. 401 (1947).

5. For an excellent analysis of the maxim "prior in time, prior in law" as a mere rule of convenience, see Costigan, *The Theory of Chancery in Protecting against the Cestui Que Trust One Who Purchases from a Trustee for Value and Without Notice,* 12 Calif. L. Rev. 356, 364 (1924).

this perplexity crops up under a variety of aspects, which could easily be multiplied. Thus, though subsequent amendments to Rule 73(a) of the federal rules have greatly reduced the practical importance of the question, it is still worth pondering whether or not the reorientation accomplished in *Williams v. Austrian*[6] has pulled the basis from under *Lowenstein v. Reikes*[7] and the cases following it, despite their valiant endorsement by the editors of Collier.[8]

Professor Kennedy's thoughtful essay sheds much, though not exactly rosy, light on the controversial and precarious status of the statutory lien. This problem, long a major headache to policy makers and practitioners alike, has prompted a series of legislative interventions. Yet, as the author points out, "every piece of legislation enacted to take care of old difficulties create[d] new difficulties of its own." The author ventures a new proposal. The old Greek fable of Hydra comes readily to one's mind. Will Professor Kennedy be the Hercules who finally slays the monster?

Referee Friebolin and Professor Smedley devote their attention to important policy questions regarding the forfeiture of the right to a discharge and the proper forum for determining the dischargeability of debts. Since the great bulk of bankruptcy proceedings is of the voluntary and the non-asset type, the social importance of such problems is self-evident. The same consideration is deserved by Referee Kruse's article on the reestablishment of special farmer-debtor relief. Nobody can deny that this is a timely and significant problem.

It goes without saying that any symposium on bankruptcy within the covers of a single law review issue can only be selective and of necessity depends on the special predilections and preoccupations of the individual contributors. No one could expect that all of the most pressing or most difficult or even most recent bankruptcy problems are dealt with. The profession is constantly faced with new and often unexpected puzzles.[9] Certainly the contributions from five experts, different as they are in content, scope and depth, should be food for thought or help in our daily troubles.

6. 331 U. S. 642 (1947). For an analysis of the reasoning and some of the implications of this decision, see also Mussman and Riesenfeld, *Jurisdiction in Bankruptcy*, 13 Law & Contemp. Prob. 88, especially at 99 (1948).

7. 54 F. 2d 481 (2d Cir. 1931).

8. Collier, Bankruptcy § 24.10 (14th ed. 1940). The author of the 1954 Supplement has not felt a need for commenting on that issue.

9. For a recent illustration see Lake v. New York Life Ins. Co., 218 F. 2d 394 (4th Cir. 1954), holding that the life insurance proviso in § 70(a)(5) does not postpone the date when title to the cash surrender value vests in the trustee until the expiration of the thirty day period, thus leaving the protection of the insurance company against double liability to the general rules specified in § 70(d)(2) and (4).