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SOME FUNCTIONAL ASPECTS OF BANKRUPTCY

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The case studies of the fifteen hundred New Jersey and Boston bankrupts which were made during the last two years [FN 1] throw some light upon the functions which the venerable institution of bankruptcy is performing. The present Act was passed in 1898 [FN 2] and, though amended several times, [FN 3] has never been changed fundamentally. During the thirty-three years it has been in force no inventory of its operation has been made. But little attempt has been made to determine its incidences. [FN 4] In fact without independent investigations that would be practically impossible, as no provision is made in the system for the collection of vital statistics of bankruptcy. The only data available are those contained in the annual reports of the attorney-general. They are practically valueless for even an administrative, let alone a functional, study of bankruptcy. [FN 5] They reveal little of the kinds of persons using bankruptcy. No clues are given as to why they are there. No information is set forth showing what treatment they obtain—whether they applied for a discharge, whether the application was contested, whether the discharged was granted or refused and if refused on what ground. Nothing is given showing how the various subdivisions of the discharge section [§ 14 (b)] are working. The deficiencies are as apparent on the administrative side of bankruptcy, not only as respects § 14 but also as respects all other sections of the Act.

Bankruptcy of course has been the subject of much discussion and investigation during the last generation. [FN 6] But most of the energy has been directed (but by no means misdirected) towards detecting fraudulent practices on the part of bankrupts and lawyers, improving and expediting administration, devising methods of reducing expenses and increasing returns to creditors, eliminating the duplication of functions by various officials, providing more effective creditor control, etc. In other words, the efforts have been directed largely towards oiling and greasing the existing machinery without seriously considering the totally different (though perhaps not more important) engineering problem of the social need, use, and function of the particular machinery or its parts.

Of course such latter study would be as broad as the life which bankruptcy touches or affects. Its ramifications through the social and economic order would be almost endless. It might suggest basic statutory and administrative changes in the system. Or it might reveal any number of maladjustments of individuals to society and suggest a method of attack along educational, medical, or social

lines as corrective measures. Again it might show the incidence of some particular statute, and furnish data for an intelligent revision of it, *e. g.*, of a statute permitting assignment of wages, which forces wage earners hard pressed by rapacious creditors to seek bankruptcy as a way out. Or it might reveal that in respect to certain failures bankruptcy was acting as a corrective to other pathological conditions, *e.g.*, those existing in the small loan field, where, in absence of effective legislation, the necessitous borrower is at the mercy of loan sharks who exact such a toll that bankruptcy is the only avenue of escape. [FN 7]

The cases studied in New Jersey and Boston cover as wide a range as the examples given. But for the purposes of this essay a selection of topics has been made from among those relating to the constitution and administration of the Bankruptcy Act itself. The topics selected relate entirely to § 14 of the Act governing the granting and refusing of a discharge. That section provides:

"b. The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard; and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) destroyed, mutilated, falsified, concealed, or failed to keep books of account, or records, from which his financial condition and business transactions might be ascertained; unless the court deem such failure or acts to have been justified under all the circumstances of the case; or (3) obtained money or property on credit, or obtained an extension or renewal of credit, by making or publishing, or causing to be made or published, in any manner whatsoever, a materially false statement in writing respecting his financial condition; or (4) at any time subsequent to the first day of the twelve months immediately preceding the filing of the petition, transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay, or defraud his creditors; or (5) has been granted a discharge in bankruptcy within six years; or (6) in the course of proceedings in bankruptcy, refused to obey any lawful order of or to answer any material question approved by the court; or (7) has failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities: Provided, That if, upon the hearing of an objection to a discharge, the objector shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which, under this paragraph (b), would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt; And provided further, That trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do by the creditors at a meeting of creditors called for that purpose on the application of any creditor."

As evident from the reading of the statute a discharge can be claimed as a matter of right unless there appears one or more of the facts specified as grounds for refusing a discharge. The court has one of two alternatives—to grant or to refuse.

Exemplary of an administrative flexibility, lacking in our system, are the following discharge provisions of the Bankruptcy Act of England:

"(2) On the hearing of the application the Court shall take into consideration a report of the O. R. as to the bankrupt's conduct and affairs (including a report as to the bankrupt's conduct during the proceedings under his bankruptcy), and may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property: Provided that...where in any case any of the facts hereinafter mentioned are proved, the court shall either

"(i) refuse the discharge; or

"(ii) suspend the discharge for such period as the court thinks proper; or

"(iii) suspend the discharge until a dividend of not less than ten shillings in the pound has been paid to the creditors; or

"(iv) require the bankrupt as a condition of his discharge to consent to judgment being entered against him by the O. E. or trustee for any balance or part of any balance of the debts provable under the bankruptcy which is not satisfied at the date of the discharge, such balance or part of any balance of the debts to be paid out of the future earnings or after-acquired property of the bankrupt in such manner and subject to such conditions as the Court may direct; but execution shall not be issued on the judgment without leave of the Court, which leave may be given on proof that the bankrupt has since his discharge acquired property or income available towards payment of his debts:

"Provided that, if at any time after the expiration of two years from the date of any order made under this section the bankrupt satisfies the Court that there is no reasonable probability of his being in a position to comply with the terms of such order, the Court may modify the terms of the order, or of any substituted order, in such manner and upon such conditions as it may think fit.

"(3) The facts herein-before referred to are—

"(a) That the bankrupt's assets are not of a value equal to ten shillings in the pound on the amount of his unsecured liabilities, unless he satisfies the Court that the fact that the assets are not of a value equal to ten shillings in the pound on the amount of his unsecured liabilities has arisen from circumstances for which he cannot justly be held responsible:

"(b) That the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his

business transactions and financial position within the three years immediately preceding his bankruptcy:

"(c) That the bankrupt has continued to trade after knowing himself to be insolvent:

" (d) That the bankrupt has contracted any debt provable in the bankruptcy without having at the time of contracting it any reasonable or probable ground of expectation (proof whereof shall lie on him) of being able to pay it:

"(e) That the bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities:

"(f) That the bankrupt has brought on, or contributed to, his bankruptcy by rash and hazardous speculations, or by unjustifiable extravagance in living, or by gambling, or by culpable neglect of his business affairs:

"(g) That the bankrupt has put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against him:

"(i) That the bankrupt has, within three months preceding the date of the receiving order, when unable to pay his debts as they become due, given an undue preference to any of his creditors:

"(j) That the bankrupt has, within three months preceding the date of the receiving order, incurred liabilities with a view of making his assets equal to ten shillings in the pound on the amount of his unsecured liabilities:

"(k) That the bankrupt has, on any previous occasion, been adjudged bankrupt, or made a composition or arrangement with his creditors:

"(1) That the bankrupt has been guilty of any fraud or fraudulent breach of trust.

"(6) For the purposes of this section, the report of the official receiver shall be prima facie evidence of the statements therein contained.

"(8) The powers of suspending and attaching conditions to a bankrupt's discharge may be exercised concurrently." [FN 8]

Somewhat indicative of the actual operation of the English Act are the following data from the annual reports of the Board of Trade for the years 1924-1929. During that period 5520 discharges were disposed of finally. The dispositions were:

Granted: 140 (2.7%); Refused: 157 (2.8%); Conditional: 1268 (22.9%); Suspended: 3955 (71.6%).

Specifications of the conditions imposed in the 1268 cases are not available. As to the 3955 cases where discharge was suspended the following treatment of the 809 suspended cases for 1929 is representative:

1 day 18
over 1 day, under 1 mo: 61
1 mo. & over, under 1 yr: 428
1 yr. & over, under 2 yr: 156
2 yrs. & over, under 3 yr: 91
3 yrs. & over: 55
Total: 809

As stated above, data showing the disposition of cases under the discharge section of our act are not available from the attorney-general's reports. But in a preliminary announcement of the recent study by the Department of Justice the following facts appear: [FN 9]

In cases filed between September 1, 1926, and March 1, 1929, 85,252 bankrupts were granted a discharge, and 776 were denied a discharge. In the cases closed during the fiscal year ended June 30, 1930 approximately 37,277 bankrupts (non-corporate) were granted a discharge and approximately 319 (non-corporate) were denied one. About 98% of the mercantile bankrupts who asked for a discharge were granted it. In case of non-mercantile bankrupts 99 1/2% received the discharge. In wage-earner cases only .004% were denied the discharge.

The criticism frequently has been made that discharges are granted all too freely. [FN 10] Defects in the present statute have been made apparent. The opposition to a discharge is a matter of private initiative of the creditors and their lethargy is notorious. If there is no opposition the court has no discretion but to grant the discharge. Certainly it seems clear that additional supervision over the dispensing of discharges is needed. Granted, however, that adequate surveillance is furnished and machinery for the control provided, two additional major questions are suggested.

(1) Should further specification of grounds for discharge be made in § 14? (2) Should greater flexibility be given to the administration of § 14 by providing in addition for conditional and suspended discharges?

The data obtained from the 1500 New Jersey and Boston cases may or may not be representative of conditions existing throughout the country. But at least they can serve the function of furnishing a method of attack or approach to the two questions of policy just stated. There follows (1) a description of data relevant to a consideration of those problems; and (2) an interpretation of their import or

significance in light of the substantive and administrative features of § 14 of the Bankruptcy Act.

Accounting Records

The importance to business management of adequate accounting records cannot be denied. The use of an adequate accounting system not only provides the manager with an accurate survey of the past but enables him to evaluate the influence of various factors upon the future course of the business. With this source of data he can undertake to eliminate or minimize unfavorable factors and encourage or foster favorable ones. This use is most sharply outlined in the control of expenses. In case of an unprofitable or nearly unprofitable business it is the vital one. [FN 11] It is obvious that the presence of even the best of accounting systems does not assure either its proper use or the success of the business. On the other hand, the presence of an adequate one may be assumed to be an earmark of progressive and efficient management. Conversely, the presence of an inadequate system or the absence of any system (while perhaps not being an unmistakable earmark of failure) would seem to be indicative of the absence of a management necessary to ensure success.

Adequate accounting records are likewise of great importance to bankruptcy administration. Without them fraudulent practices become even more difficult to detect; the opportunities for successfully concealing and diverting assets increase.

[Table and accompanying two footnotes deleted]

Out of a total of 868 bankrupts—all of whom, according to accepted standards of prudent management, should have kept books—only 24.8% kept adequate systems. Almost a third (32.4%) kept no accounting records whatsoever. As seen from the above tables the wholesalers and manufacturers rated highest but even they fell far short of accepted standards for modern enterprise.

The Boston and New Jersey cases were very much alike in this regard—though in Boston a distinctly metropolitan mercantile group was studied, while in New Jersey the cases came from all over the state, from small as well as large, from rural as well as urban centers. Statistics for other districts are not available. If those conditions are representative, we are witnessing in this country an avalanche of failing businesses which their owners were presumably never in a position to understand or to control intelligently and which come into bankruptcy with but few aids to those whose task it is to collect assets.

It is very questionable if this species of uncontrolled enterprise should be allowed. The activities of commercial houses, of agencies of the government and

of educational institutions, as well as the increasing professionalization of accountants, have not only made knowledge of accounting practice (and theory) easily available but have resulted in the preparation of simple and practical systems of accounting. But the educational program of these various agencies has far to go. Though the situation is an ideal one for creditor control, too many of them are competing for business. As a result the type of supervision and regulation that they might furnish tends to be absent.

Meanwhile the only regulatory provision is contained in § 14 of the Bankruptcy Act, set forth above, providing that the court shall grant a discharge unless the bankrupt has "failed to keep books of account, or records, from which his financial condition and business transactions might be ascertained; unless the court deem such failure or acts to have been justified under all the circumstances of the case." [FN 14] As pointed out above the lethargy of creditors in opposing a discharge is notorious. As a result extremely few discharges are denied. How many are actually denied because of the failure to keep books is not known. But if the cases of fraud were eliminated the number would probably be infinitesimal. In a study made of 1004 bankruptcy cases closed in New Jersey during the fiscal year ended June 30, 1929, no discharge was refused for failure to keep books. [FN 15]

In this connection the English provision set forth above is of interest. One of the instances when the court has the discretion to refuse, suspend, or grant, conditionally or unconditionally, the discharge is in case the bankrupt "has omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his bankruptcy." The English Act also imposes a criminal penalty for failure to keep proper books of account. [FN 16]

Figures for England showing the exact number of bankrupts who kept books satisfying the requirements of the statute are not available. But from the years 1924-1929 inclusive, there were 5685 applications for discharges. [FN 17] In 3175 of those applications (55%) it was reported and not disproved that the bankrupt had not kept proper books of account. It is not known how many discharges were denied, suspended or conditionally granted on that ground alone. In most of the cases where objection was made on that ground other grounds were also present. But as noted above, during those six years, of the 5520 discharges finally disposed of, only 2.1% were granted and 2.8% refused, 22.9% being granted conditionally, and 71.6% being suspended. So in all probability but few discharges were granted where inadequate books were kept.

In this connection the operation of the criminal provision of the English Act is of interest. During the years 1924-1929 inclusive there were 246 convictions for

bankruptcy offenses. Of these 55 or 22% were for failure to keep proper books. These data from England indicate how seriously both in theory and in practice the failure to keep proper accounts is considered.

If the Bankruptcy Act of this country was amended so as to provide for greater supervision of the discharge and to cease depending solely on the initiative of paralyzed creditors, doubtless great improvement would follow.

But even so, it would seem better to strengthen the provision along the lines of the English statute and vest in those who are dispensing discharges discretion to grant, conditionally or unconditionally, suspend or deny them in case such proper books of account are not kept. This would abolish the necessity of grouping all cases categorically into two classes and of denying discharges to one and granting them to the other. Consequently, all degrees of culpability would be recognized, the in-between cases would be provided for, and finer adjustments to the requirements of individual cases could be made. Such provisions theoretically would supply an effective deterrent to unbusinesslike practices presently prevailing. Income tax laws have gone a long way towards forcing business men to order their affairs more efficiently. The Bankruptcy Act might be made to perform a similar function.

The theory of freedom of opportunity which has prevailed in this country has resulted in a minimum of governmental interference in strictly private enterprise. Denial of discharges in bankruptcy has been guarded zealously in the interest of hard-pressed debtors who desire a new lease on life. The fact that this is a country with large natural resources has led to the notion that failures can be afforded; that experimentation in enterprise should be encouraged; that out of the failures may come successes which will result in the promotion and development of our industrial and economic potentialities. That the annual bill which consumers pay for such experimentation is large is not denied. But it is insisted that it is worth the price.

The proposed change in the Bankruptcy Act would offer but slight interference with that experimentation. It would, however, discriminate between controlled and uncontrolled experimentation. The conditions imposed would be slight and for the most part easily met. The insistence on a minimum of efficient management would tend to bring to industry more knowledge, foresight and intelligent planning. In addition it would serve as a preventive of many fraudulent practices difficult to detect if no records are kept. It seems clear that the difference between such controlled and uncontrolled enterprise is one measure of the difference between legitimate and illegitimate experiments.

Automobile Accident Judgments

There were a large number and variety of tort claims listed among the liabilities in both the New Jersey and Boston cases. There was one \$45,000 judgment for alienation of affections; one of \$18,000 for violation of a copyright; one of \$3,000 for gun shot; several against landlords for negligence; a number for conversion; and two for dog bites. One business man failed owing \$1023 and having assets of \$50. The entire amount of his liabilities was made up of a judgment for an assault and battery. It appeared that this sole creditor was a competitor who engaged the bankrupt in a heated argument ending in a fist fight.

By far the greater number of tort claims, however, resulted from automobile accidents. Among the New Jersey bankrupts over 4% (29 out of 598) had among their liabilities automobile accident judgments. The amounts varied from \$60 to \$25,000. The average judgment was \$5,230. Ten were for \$5,000 or over. In fifteen of the cases the judgment was over 75% of all the liabilities. In ten of the cases it was approximately the entire amount of the liabilities. The total amount of all such judgments was \$151,000; the total liabilities, \$1,810,148; the total assets \$23,845. In twelve of the twenty-nine cases there were no assets or assets below \$100. The amount of the judgments in those cases totaled \$53,446 or 35% of the total amount of accident judgments for the entire group of 29. Thus in many of the cases the tort claimant received nothing and at best only nominal dividends.

The 29 cases were made up of five contractors, two retailers, two professional people and twenty laborers, clerks, and salesmen. In all of the instances where the judgment was over 75% of the liabilities the bankrupt was a laborer, clerk, or salesman.

January 1, 1927, was the effective date of the Massachusetts compulsory automobile liability insurance law. Under that law it is necessary to carry a \$5,000-\$10,000 policy or bond covering "bodily injuries." [FN 18] Hence it might be expected that there would be fewer of such claims among the Boston group. Of the 910 Boston cases 26 (2.5%) included among their liabilities such accident judgments. The total amount of all such judgments was \$33,645; the total liabilities \$211,828; and the total assets \$15,178. The average judgment was \$1,217. The range was from \$27 to \$12,290. In 21 of the 26 cases there were no assets or assets under \$100. The amount of judgments in those 21 cases totaled \$33,147 or 99% of the total for the entire group of 26. The 26 cases were comprised of six retailers; six truck and taxi owners; two contractors; one jobber; two professional people; and nine laborers, clerks, and salesmen.

These Boston cases fall within three groups. First are those cases ante-dating the effective date of the compulsory insurance law, *i.e.*, January 1, 1927. There were nine of those cases with total accident judgments of \$25,170; total liabilities of \$90,670 and assets of \$636. The amount of accident judgments in this group

was 75% of the judgments in the entire 26 cases. The judgments in this group ranged from \$27 to \$12,900. The average amount was \$2,796. There were two \$5,000 or over. Most of them were for personal rather than property injury. The nine cases were composed of two laborers and clerks; one contractor; two professional people; three retailers; and one taxi owner.

Second are those cases representing judgments for injuries against which compulsory coverage is not provided by statute. These are property injuries, the statute only requiring coverage against "bodily injuries." Sixteen of the cases fell in this group. The total of all such judgments was \$3,475; the total liabilities, \$116,158; the total assets \$14,542. The average judgment was \$217. The range was from \$41 to \$428. In none of them was the judgment even 50% of the liabilities. In most of them it was a negligible factor in the bankruptcy.

In the third group, where the debtor's liability for the accident exceeded the amount of his insurance coverage, there was only one case. The excess claim was \$5,000, comprising practically all of the liabilities; and the assets were zero. There were a half dozen cases where the judgment had been paid before bankruptcy at great financial sacrifice. In fact in each of those cases the payment of the judgment, costs and attorney's fees was a major contributing cause to bankruptcy. Those payments ranged from \$126 (a laborer) to \$6,000 (a manufacturer). Needless to say those claims were not covered by insurance.

These data not only are interesting in a study of the incidence of the Massachusetts compulsory insurance law. They also give some notion of one of the functions which bankruptcy is performing. In 1898, when the present Act was adopted, the automobile was in its infancy. Today it has risen to a place of major economic and social significance in modern society. It has been the subject of extensive administrative and legislative control. Yet it persists in its annual toll of life, limb and property.

The discharge section of the Act drawn in light of economic and social conditions existing at the close of last century is serving a function which could not be visualized at that time. Industrial accidents and the normal run of torts were common then. But the advent of the automobile gave rise to problems *sui generis*. In the first place, aided and abetted by high pressure salesmanship and instalment buying, the impecunious owner and operator appeared. In the second place, the widespread use and the increasing speed of the machines multiplied many times, to all members of society, the risks of transportation. Furthermore at the passage of the act liability insurance was in its infancy. [FN 19] Not until this century was it sufficiently standardized and advertised so as to be available to buyers generally.

Statistics for other districts showing the extent to which bankruptcy is employed to get rid of such claims are not available. If these data are representative they challenge attention. It may be that one of the advantages of a broad and general discharge provision is that it furnishes a flexibility which permits a continual adjustment of the law to changed conditions despite legislative lag. But it does not follow that such flexibility should be allowed without a continual, new appraisal of the functions being performed. Little attention since 1898 has been given to such aspects of bankruptcy. Accident judgments furnish but one instance of the desirability of reappraisal of functions in light of new conditions.

The answer is by no means clear. The problem has so many ramifications that no direct solution can be offered on the basis of these data without consideration of the many other factors involved. The efforts towards socializing such losses by requiring insurance have to date not resulted in much legislative support, though progress has been made. [FN 20] To wait for the states to act will apparently take considerable time. On the other hand, to deprive suddenly all owners and operators of cars the benefit of the discharge section for all accident claims might be a great hardship. Frequently such accidents result in large judgments impossible to pay. Bankruptcy is the only way out. However, it might well be argued that all owners and operators should be held to the standard of prudent management and not be discharged from such judgments as would be covered by, say, a standard \$5,000-\$10,000 liability policy. It seems reasonable to insist that the cost of such coverage be treated as a part of operating costs. Such indirect method would doubtless speed up the socialization of those losses. Accident victims would become less of a social problem.

Speculation and Gambling

In about 5% of the New Jersey cases (29 out of 600) and 6% of the Boston cases (51 out of 910) the elements of speculation and gambling were present. Included in this group are only those cases where the gambling or speculation was unconnected with and not an ordinary incident of the particular business, trade or vocation in which the bankrupt was engaged. Excluded are real estate operators or speculative builders or contractors and the like whose promotional activities may have an inherent element of speculation.

The New Jersey cases were distributed as follows: wage earners, 7; retailers, 13; manufacturers, 1; wholesalers, 2; professional, 3; real estate, 2; and contractors, 1. The total assets in these cases were \$909,824 and the total liabilities \$1,532,010.

The Boston cases were composed of—wage earners, 22; retailers, 9; wholesalers and importers, 9; professional, 2; real estate, 4; contractors, 3;

brokers, 1; and taxi-owner, 1. The total assets in these cases were \$349,140 and the total liabilities \$1,777,757.

In not every case did speculation or gambling alone bring about insolvency. Frequently there were contributing causes of many kinds. But in all the cases of this group it was apparent that the losses suffered in these ways were major and material contributors to insolvency. In the case of the marginal business they meant the difference between continued operation and liquidation. At times they resulted in wiping out the reserve of a successful business with resultant difficulties on the downward turn of the business cycle. Some cases were pathetic and sad—a life time of frugality and hard work followed by an orgy of speculative craze. But most were hardly to be condoned. Many were aftermaths of the stock market crash in the fall of 1929. And there were a few hangovers from the Florida land boom of six or seven years ago. Short sketches of a few of the most typical cases are set forth below.

No. 0696 was a laborer earning \$35 a week. His wife received \$15 a week for stenographic services. They purchased a home for \$5,700 the carrying charges being about \$75 a month. They secured access to a source of market "tips." They too were wiped out on the stock market crash, losing about \$5,000. They struggled along for a while. On a Saturday they appeared at a retail house and purchased \$75 of goods on credit. On Monday next the petition was filed. In spite of the heavy losses and low income the debts exceeded the liabilities by less than \$2,000, most of which was owed commercial houses.

Case No. 0866 was the bankruptcy of a wholesale and retail food supply house owing \$14,000 with no assets. Most of the debts were owed to fifteen wholesalers, jobbers and manufacturers. The business was seven years old, well established and profitable. The owner became deeply engaged in illegal liquor traffic. The apparently bona fide enterprise was used as a cover for those activities. Soon he was suspected and the losses from raids were heavy. He was prosecuted and convicted and sentenced to jail. The legal expenses were \$25,000, which, combined with unfavorable publicity, loss of time and neglect of the business, sounded the end of the supply house. The sales dropped from about \$100,000 to \$500 a year. The claims of the creditors arose for the most part prior to the inception of the illegal enterprise.

Case No. 702 was the bankruptcy of a \$30 a week salesman whose liabilities were over \$2,000 and whose assets were zero. His salary averaged about \$2,000 a year. He lost \$1,200 on the stock market. There were other losses at poker and craps. Much was spent on parties. \$3,500 was spent on a particular lady. Much money was obtained from relatives some of whom were listed as creditors. However, \$1,000 was owed to retailers and other regular and strictly bona fide, commercial creditors.

No. 0699 was the second bankruptcy of this doctor. Discharged four years ago from his debts, he appeared again with \$66,000 owed and \$25 of assets with which to pay them. His second bankruptcy, as well as his first, was precipitated by real estate speculation. Convinced after his first failure that he could succeed better or as well at construction as at his profession he began his operations anew in the same neighborhood. His second venture was as unsuccessful as his first. His liabilities this time were swelled by a \$45,000 judgment for alienation of affections. But he affirmed that that claim was not pressing and not a cause of his voluntary petition.

Wholesaler No. 0663 had liabilities of \$46,000 and assets of about \$42,000. He was successful as a wholesaler but not adept with second mortgages. Speculation in these lost him \$18,000 in two years and over \$50,000 in the previous five years. Russian and German bonds added another \$5,000. His wholesale business debts were not much over \$20,000. From one concern, however, he purchased during the six weeks preceding bankruptcy \$1,300 of merchandise on credit—almost as much as he had purchased from them during the entire previous year.

There was evidence in case No. 0570 that this importer once had a very successful business but had withdrawn from it for living expenses amounts far in excess of profits. To recoup and to restore to the business the funds thus withdrawn he began to speculate in the stock market and in commodities not in his line of business. His losses were very large. Some from whom he borrowed to speculate were not aware that the advances were to be employed outside of his importing business. He failed with \$146,000 liabilities and assets of \$33,000.

No. 0560 was the case of a wholesaler who over a period of eight years had annual sales averaging between \$30,000 and \$40,000. The business was sound and prosperous. Soon he began developing side activities. Among these were promotions of boxing matches and pictures. Some were successful and the easy money went fast. The business continued to be good but the losses on promotions grew large. There were some expensive difficulties with town authorities. About \$10,000 was lost. The game of poker likewise took its toll. The legitimate business creditors began to press and threaten attachment. So the petition was filed. There were no assets and claims of about \$1,700. Most of this amount was owed to creditors of the wholesale business.

No. 0296 was the case of a \$25 a week salesman, with liabilities of about \$6,000 and no assets. Up to three years ago he made \$60 a week and lived comfortably. Members of his family became sick and the cost of medical care amounted to several thousand dollars. In view of his decreased salary he probably was insolvent several years ago. Nevertheless (or perhaps in view of the fact) he

started playing cards professionally, financing it by borrowing. His losses were about \$4,000 in that short period. His petition was filed to avoid attachment of wages by impatient retailers and lenders.

Case No. 0290 was another salesman earning \$40 a week. He failed for about \$27,000 and had no assets with which to pay. His trouble dated back to 1925 when he put \$11,000 into Florida real estate and contracted to pay \$27,000 more. He lost his \$11,000 and struggled to pay off the balance. Interest ran high and little progress was made. No other debts were owed except on this contract.

No. 0255 was a laundress making \$33 a week. She had accumulated over a period of years \$5,000 in savings. This was used in the fall of 1928 to purchase two well known stocks on margin. In the stock market crash the stocks dropped about forty points each, wiping her out and leaving a balance of \$600 due the broker. Suit was brought for that sum. That claim represented all of her liabilities. Her assets were zero.

No. 0180 was the case of a retailer with assets of \$3,000 and liabilities of \$11,000. He had been in business a year and a half. His business was moderately successful though he was inexperienced in the business and kept no books. He used the assets of the business to purchase horse race lottery tickets. In the year and a half he lost over \$12,000 in cash by such method. His losses were at times as high as \$300 a week. Practically all of his debts were owed to wholesalers, jobbers and manufacturers.

Under the English Act it seems likely that but few of these bankrupts would have been granted an unconditional discharge. Under that Act the court shall either refuse, grant or suspend the discharge or grant it conditionally if it appears "that the bankrupt has brought on, or contributed to, his bankruptcy by rash and hazardous speculations, or by unjustifiable extravagance in living, or by gambling, or by culpable neglect of his business." Furthermore he may be prosecuted for a misdemeanor if, "having been engaged in any trade or business, and having outstanding...any debts contracted in the course and for the purposes of such trade or business, he has, within two years prior to the presentation of the bankruptcy petition, materially contributed to or increased the extent of his insolvency by gambling, or by rash and hazardous speculations, and such gambling or speculations are unconnected with his trade or business." It is further provided that in determining whether any speculations were "rash and hazardous" the "financial position of the accused person at the time when he entered into the speculations" should be taken into consideration. [FN 21]

Of the 5,685 cases dealt with under the English discharge section during the years 1924-1929 inclusive, in 1201 (21%) it was reported and not disproved that there were speculation, gambling, extravagance in living, or culpable neglect of

the business. [FN 22] How many of these cases involved speculation and gambling alone does not appear. Of those 5,685 cases 5,520 were finally disposed of under the discharge section, and as noted above, only 2.7% were granted a discharge. Thus it is probable that discharges in England are being refused, suspended or conditionally granted in a large number of cases involving the elements of speculation and gambling.

The operation of the penal provision noted above is likewise of interest. There were 246 convictions for violations of the Bankruptcy Act in the years 1924-1929 inclusive. 39 or 16% of the convictions were for gambling or speculation. Most of the sentences were imprisonment for short terms.

There are no such provisions, either civil or criminal, in the Bankruptcy Act of this country. Unless other elements were involved, such as concealment of assets, fraudulent conveyances, etc., the discharge could be claimed as a matter of right. There are no statistics available other than the above indicating the prevalence of speculation and gambling in this country among bankrupts. But if the statistics given for New Jersey and Boston are at all representative the problem is of major importance.

A strong case could be made out for refusing an absolute grant of a discharge in such cases, particularly as regards insolvent businesses. It seems unfair to permit a business man to divert his personal or business assets, on which creditors have relied, to other speculative enterprises or to employ them in gambling. To make the creditors take such risks in addition to the normal business risks of which they were aware is to alter radically the conditions surrounding the extension of credit. It is one thing if a creditor of a wholesaler agrees to take his chance of payment on the outcome of a game of craps. It is quite another to force him to take that chance when the credit was extended on the basis of the normal business risks of that particular wholesale house. To allow such entrepreneurs to enlarge so freely their creditors' risks and then to proceed blithely to bankruptcy for the aid and succor of the state seems inequitable. But that they are doing it is clear. That that is one of the functions being performed in this country by bankruptcy calls for a reappraisal of the entire system.

That all of the Boston and New Jersey cases involving speculation and gambling should be denied or discharged would be difficult to support. The facts of particular bankruptcies often give to the cases a turn which suggests ameliorating circumstances. An attempt to treat all cases of speculation and gambling categorically would be absurd. It would seem desirable, however, to provide administrators with discretionary power so as to take cognizance of the variants among the cases. Provisions for conditional or suspended discharge are

peculiarly adapted to such use and would supply the necessary administrative flexibility.

Whether such devices would act as deterrents to such undesirable and unethical practices can hardly be guessed. The large number of English cases involving such factors may raise doubts. However, regardless of such preventive aspects the protection afforded the creditor class would be more than nominal. Whether it should be made a crime to have suffered bankruptcy due to rash and hazardous speculation and gambling may seem more doubtful. Orgies of speculation may be too popular to warrant legislative interference of that kind.

Contracting Debts Without Reasonable Expectation of Ability to Pay Extravagance

As noted previously, the English Act provides for a denial, suspension, conditional or unconditional grant of a discharge not only in case there has been "unjustifiable extravagance in living" but also in case the bankrupt "has contracted any debt provable in bankruptcy without at the time of contracting it any reasonable or probable ground of expectation (proof whereof shall lie on him) of being able to pay it."

No facts are available showing the number of cases in England in which "unjustifiable extravagance in living" appears. Such cases are lumped with speculation and gambling as noted above. But the following data [FN 23] throw some light on the provision penalizing incurrence of debts without "reasonable or probable" expectation of being able to pay. Of the 5,685 applications for discharge in the years 1924-1929 inclusive there were 1,002 cases, where that fact was reported and not disproved. In other words in 17.6% of the cases for that period discharges were dispensed or withheld in light of that fact. What the facts of these 1,002 cases were does not appear. If they were anything like the New Jersey and Boston cases, great difficulty would be experienced in classifying cases under this head.

Looking back on some bankruptcies it would be difficult to determine if at the time most of the claims were incurred the debtor was extravagant or without reasonable grounds of expectation of being able to pay. A subsequent event—illness, medical cost, a divorce, partial unemployment, reduction in salary, increase in cost of living, etc.—frequently occurs and changes and distorts the whole picture. To trace the influence of each factor and to appraise it in relation to the total situation would be almost impossible. Likewise to attribute extravagance in living retrospectively to bankrupts without considering and evaluating a myriad of intervening factors would be unfair.

Eliminating the marginal or doubtful cases there were, of course, many instances of gross and apparently unjustifiable indulgence in credit, in radios, automobiles, fur coats, furniture, etc.—about as many as there were of speculation and gambling. Some of these instances bordered on fraud. Others represented excessive optimism. Some were cases of moronic intelligence and illiteracy. Others bordered on speculation. A few striking examples chosen from among consumer bankrupts follow.

Laborer No. 0258 was hopelessly ignorant and practically illiterate. He had regular employment at \$18 a week. His wife worked occasionally but her financial aid was negligible. An aged relative was totally dependent on him. His annual insurance premiums were \$170 (automobile, life and accident). In 1925 he purchased a house for \$4,500 agreeing to pay \$50 a month. These payments were made irregularly for five years for the most part from rentals. Then he was induced to exchange it for another house costing \$13,000. His equity in the first house was appraised at \$1,000 and he was credited with that. The balance was covered by two mortgages. The bankrupt took only the oral promise of the purchaser to assume the payment of the mortgages on the first house. On the default of the purchaser the bank foreclosed, sold the property for \$1,000 and recovered against the bankrupt on the deficiency. Meanwhile the payments on the second house proved onerous and the taxes were in arrears to about \$300. Added to that was the purchase on instalment of several hundred dollars of furniture and a \$400 automobile. His total monthly payments far exceeded his income.

Salesman No. 0314 had \$150 of assets and \$1,600 of liabilities. His salary was between \$75 and \$50 a week. Half of his obligations were for high class merchandise purchased by him and presented as gifts to a certain lady. It seems that a good part of his salary had been thus diverted for a number of years. The extravagance in living here bordered on fraud.

No. 0572 also was a case of extravagance bordering on fraud. This good looking young lady was on a salary of \$35 per week. Her liabilities were \$2,200 and her assets \$15. Practically all her debts were owed to retailers for clothes, shoes and other articles of ladies' wear. These retailers were among the best shops in Boston. When the debts were incurred there seemed to be little chance that they could be paid. She was very particular to buy a coat of the best quality shortly before the petition was filed. The direct cause of the filing of the petition was said to be an escape from the attachment of wages by creditors tired of waiting.

No. 0046 was a \$45 a week salesman who received a discharge in bankruptcy in 1928 while engaged in the same line of business. On receiving his discharge he purchased quite unjustifiably a car for \$500 on instalment. Very few of his bills incurred following his other bankruptcy were ever paid. He owed rent of \$800—

nearly a year in arrears; retailers, \$1,200; and doctors \$200. His wife and two children lived comfortably. His first bankruptcy had much the same complexion as this one. After his first bankruptcy he did not readjust his scale of living even in face of poor business conditions. He was still profitably employed at the time of this study and making enough to pay current bills and to amortize slowly his indebtedness.

No. 0880 was very similar to the above case. Here the bankrupt was an \$1,800 a year clerk used to a \$7,500 income of three years ago. His standard of living remained on the \$7,500 level. He blamed the "loose credit" practices of Boston department stores.

Photographer No. 0143 failed seven years previously and was not granted his discharge on objection of creditors. He never kept books, knew only a few items of expense and had no notion of his gross or net profits, though he was in business for four years. His assets were \$200 and his liabilities \$5,000. He bought many articles of furniture and household appliances—all on conditional sales. At the time of bankruptcy he owed \$1,300 on such purchases. Further he owed \$1,100 to retailers and most of the balance on a house he contracted to buy. This house was the second he had purchased. The first also was lost on foreclosure. He admitted that both purchases were way beyond his means. This was obviously a case of lavish and extravagant living. There was no direct evidence of fraud, though it did appear that after his first bankruptcy he sought and obtained credit from those who never knew him before.

In devising an administrative procedure to handle such cases of *consumers* there are additional factors to be considered. The prevalence of high pressure salesmanship with seductive means for breaking down sales resistance has not been accompanied by the correlative technique among buyers of building up sales resistance. Subtle methods of advertising, the advent of instalment buying, the growth and development of financial agencies for financing the consumer, all have made the temptation to extravagance overwhelming. Further, the competition among sellers too often has been so notorious that the buyer has been free to pick and choose. Any proposal to prevent the victim of such circumstances and subtle influences from escaping from his dilemma raises serious doubts. To follow the English provision to its full extent would seem unwise. [FN 24]

Analogous cases of improvident and extravagant use of credit from wholesalers, jobbers, manufacturers, etc., frequently appeared among the business groups at the time of entering business. The following case (No. 420) is quite typical of many others.

Five men who had driven laundry wagons for several years decided to go into the laundry business for themselves, even though the competition among laundries was very keen and well known, and even though they had had no experience in business. Each figured that he had a considerable amount of good will resulting from friendly relations with patrons of his former employer. Accordingly a corporation was formed, the amount of paid in capital being \$1500, gathered from the savings of the five men. Thereupon they announced their intention of beginning business. Competition among the supply houses was so keen that all these prospective entrepreneurs needed to do was to wait for the best offer. From one supply house they finally purchased on conditional sale for \$30,000 the necessary machinery, paying practically nothing down. They kept no books or accounting records. Competition was so keen that they lasted but a few months coming into bankruptcy owing almost \$30,000 over their assets. Immediately on filing the petition the stockholders formed another corporation and reentered the laundry business, obtaining additional equipment from other supply houses. The history of the second venture is not known.

Space does not permit in this article to go into a detailed analysis of the capitalization of all the bankrupts at the time of the commencement of the business. A few general comments, however, are in point indicating the extent to which wholesalers, jobbers, manufacturers, commercial banks, etc., are extending credit to enable businesses to begin.

The New Jersey cases were particularly striking. The amount provided by the owner without borrowing was only about 45%. The balance or 55% was furnished entirely by personal loans or by credit from supply houses, wholesalers, jobbers, etc. Of the 278 retailers there were 34 (12.2%) who were entirely financed by others, no capital of their own being staked on the venture.

The Boston cases present a striking contrast. In all of those business firms the amount provided by the owner without borrowing was about 84%. In only 5 out of the 211 retailers (2.3%) was the capital entirely provided by outsiders. Possible explanations for this contrast in the cases will be explored in subsequent articles. *Prima facie* the difference cannot be explained altogether by the fact that the Boston firms were larger, as the average capitalization of the New Jersey firms was \$7,800, of Boston firms \$8,500.

If conditions generally are anything like the New Jersey situation and creditors are making it easy for marginal entrepreneurs to enter business, it would seem unwise to penalize too severely the debtor. So long as the barriers against entering business are down, ill advised and poorly executed undertakings will continue. So long as the prevalent notion of freedom of opportunity prevails (in practice as well as in theory) it seems harsh to impose on the foolish (and sometimes unfortunate) severe penalties for their improvidence. If creditors are

creating or contributing to the situation, they should not be allowed their pound of flesh.

To catch the cases tinged with fraud (both in case of consumers and of those in or entering business) some further specification in the discharge section would be desirable. At present the only provision is that part of § 14 which permits a denial of the discharge if money or property has been obtained on credit "by making or publishing, or causing to be made or published, in any manner whatsoever, a materially false statement in writing respecting his financial condition." But among the cases studied were also a number of instances (some of which have been given above) where consumers, retailers and wholesalers obtained goods, without written representations, at times when it seemed extremely doubtful if they could pay or intended to pay. It is difficult to justify the difference in treatment under § 14 of the Bankruptcy Act between a debtor who puts his false statement in writing and one who by all of his actions and words is clearly out to defraud his creditors by getting something for nothing or a lot for little. As supplementary to the present Act some modified form of the English provision would be desirable.

It is true, of course, that if the English provision were incorporated in *haec verba* into our statute and coupled with a discretionary power to deny, suspend or grant, conditionally or unconditionally, the discharge in such cases, no injustice need be done as cases where the creditors had contributed to the situation by their laxity, generosity and competition could be specially handled. On the whole, however, it would seem more desirable to recognize in the statute basic differences between cases of mere overindulgence in credit and those where the circumstances surrounding the overindulgence indicated, *prima facie*, a fraudulent intent on the part of the debtor or where the extravagance was gross and wholly unjustifiable. In such cases there should be discretion to adjust the penalty to the complexion of the individual case.

Culpable Neglect of Business

This factor alone was clearly discernible in but few cases. It was usually associated with speculation or gambling, some instances of which have been given above. In the isolated instances where it did appear it seemed an undue hardship to make the creditors rather than the debtor pay the piper.

No. 0535 admitted that excessive use of liquor caused the ruin of his business. Due to his gross inattention the business dwindled away. He got to work late and left early. The efforts of his family to run it for him failed. His merchandise creditors had claims of \$1400. He had no non-exempt assets with which to pay them.

The amendment of the statute along the lines of the English Act to provide an administrative discretion in respect to this occasional case seems desirable.

Previous Failures

As seen above, according to § 14 of the Act a discharge shall be refused if it appears that the bankrupt has been granted a discharge within the preceding six years. How many "repeaters" are there? What are their general characteristics?

As indicated below in Tables II and III, there were among the 910 Boston bankrupts 87 individual proprietors, laborers, clerks, salesmen, etc., who had failed previously and eleven "one man" corporations whose stockholder had failed previously. This total of 98 of such bankrupts is 10.8% of the entire number of Boston cases studied.

In all but two of the assignments was the bankrupt released of all of his claims by the creditors, and in only eight of the cases was there a previous bankruptcy without a discharge. In four of the eight cases it appeared that the bankrupt or his lawyer neglected to make application in time; in one that a creditor had opposed successfully the application for discharge on grounds of fraud. In the remaining three the bankrupt had made no application and there were collateral circumstances that indicated the existence of grounds which might have led to its refusal if application were made.

[Tables II and III deleted]

The percentage of previous failures among the New Jersey bankrupts was only 3.3% (20 out of 597). As noted in Tables IV and V below, all of the cases where there was a previous failure were bankruptcies of those engaged in business, no laborers being present. In all cases of previous assignments, which were almost twice the number of previous bankruptcies, the debtor had been released of prior claims. No prior bankruptcies without discharges were found.

[Tables IV and V deleted]

The above tables are interesting not only as showing a surprisingly large percentage of "repeaters" but also as indicating the use of the "one man" corporation. It will be noted that after the first failure the corporate device was employed in ten of the Boston and New Jersey cases. In four of the Boston cases the previous failure of the "one man" corporation was followed by the formation of a new corporation. The longest succession of such corporations was in the case of the wholesaler who had become incorporated three times and failed as often.

Table VI shows the length of time since the previous failure or, if there were two or more prior failures, the time since the last preceding one.

[Table VI deleted]

The mean for the Boston cases was 10.2 and for the New Jersey 9.5. Twenty-nine Boston cases and nine New Jersey cases had a previous failure in six years preceding the present bankruptcy. Those 38 cases constituted 35% (38 out of 106) of all the cases from both districts on which there were data. Those 38 cases were distributed as follows:

[Table deleted]

The other six of the 38 cases were "one man" corporations. In two of the cases the stockholder had received a discharge within the previous six years; in three cases another "one man" corporation owned by the same stockholder had received a discharge; and in one case the stockholder had made an assignment. Under existing rules of law recognizing the validity of the "one man" corporation as a device for securing limited liability [FN 25] the fact that the stockholder or another corporation owned by the stockholder had received a discharge within the six preceding years would not be a bar to a discharge of another subsequently organized corporation. In none of these "one man" corporation cases did any facts appear which would justify a court in disregarding the corporate entity and treating the stockholder as an individual proprietor. [FN 26]

As respects the other twenty cases where a discharge had been received within six years prior to the filing of the petition there are twelve in which the time element alone might not bar another discharge. This is due to the fact that the six year period in § 14 is measured not from the date of the prior discharge to the filing of a second petition but either from the date of the prior discharge to the date of the second, [FN 27] or from the date of the prior discharge to the date of the application for the second, [FN 28] the cases on this point being in conflict. Hence in twelve of the twenty cases it is possible that another discharge could be claimed as a matter of right, at least if application for discharge was made after the six year period, no other grounds for refusal appearing. As a prior assignment is no grounds for refusal of a discharge whether or not a release has been given, it follows that in only eight of the 38 cases does it affirmatively appear that a discharge would be barred by § 14 (b) (5) if creditors objected.

What manner of persons are these "repeaters"? The answer is that they represent all types of bankrupts. To write their case histories would be to write of factors appearing and recurring throughout the entire group of 1,500 bankrupts studied. That will not be attempted here. But for the purpose of considering the functional aspects of § 14 of the Bankruptcy Act these 118 cases might be

grouped in certain general categories. These classifications do not purport to be discriminating in an analysis of causal factors but merely sketch in charcoal certain dominant characteristics. In the first place are the cases of misfortune. Of the entire group of 118 cases, thirteen (or 11%) fell under this category. Of the 38 cases where there had been a previous failure during the last six years two came within this group; and of the twenty cases where a discharge had been granted within the preceding six years there was one. This group includes almost without exception cases where the cost of medical care or the illness of the bankrupt were the main or a major factor in the bankruptcy. The following case is typical:

Mechanic No. 0737—making \$40.00 a week up to the spring of 1931— had received his discharge in bankruptcy twenty years earlier as a plumbing and heating contractor. His first wife died seven years ago, leaving four children and her father and mother. The latter were invalids and from time to time were in a hospital for the insane at his expense. At the time of his first wife's death he agreed to support her mother and father for life in exchange for the dwelling house on which he assumed the mortgage. The children were totally dependent on him until they married a few years ago. The daughters ran the house very uneconomically. The father-in-law died. The debtor remarried. He tried hard but was unable to keep up the payments on the mortgage, to pay doctors' bills and funeral expenses and to meet the bills his dependents had incurred. His wages were attached and he lost his job in May, 1931. He owed \$7,200 with an equity in the house of \$3,900. \$5,000 was owed on the mortgage, \$300, to retailers, to doctors.

Secondly, there are the cases of speculation, gambling and gross extravagance. There were 13 of the 118 cases (11%) in this group. Of the 38 cases of previous failure in the preceding six years there were eight. And of the twenty cases where a discharge was granted within the six preceding years there were four. These cases are fairly represented by the other cases discussed above under speculation, gambling and extravagance. They were of all degrees and kinds. Under extravagance were included only those cases where there was some evidence of fraudulent intent or where the extravagance was gross and wholly unjustifiable.

Thirdly, there are the cases of fraud. Of the 118 cases there were sixteen (14%). Among the 38 cases of previous failures within the preceding six years there were three; and of the twenty cases where a discharge was granted within the preceding six years there were three. The patterns of facts embraced in this category are as varied as human ingenuity. Most of them, however, have been rather standardized over the centuries and though the details vary the type is usually readily recognized. A few examples are:

Manufacturer No. 0840—a "one man" corporation established for twenty years failed owing \$31,000 with assets of \$4,000. The failure was due primarily to diversion of funds by the owner in fox farming which proved unsuccessful. All of the debts owed are for claims in connection with the manufacturing enterprise.

No. 0311 was the case of a retail shoedealer tinged with fraud throughout. In the same line of business he failed twice before—1913 and 1917— each time making an assignment for the benefit of creditors. A few months before bankruptcy he had given a financial statement showing \$8,000 in stock and annual sales of \$31,000. On examination he gave his sales as \$18,000. Shortly after giving the above statement his stock was sold at public auction and purchased by his son for \$1,200. It seemed fairly clear that he sold most of his stock at any price and gave the money to his son so as to buy back the business. It further appeared that during the past few years he had taken money from the business to purchase real estate in his wife's name. His total liabilities were \$9,800, most of which was owed wholesalers. His assets were the \$1,200 of stock.

Retailer No. 0129 owned and operated a furniture store with sales of \$60,000 a year, 20% of which were cash and 80% deferred payment. Credit losses for the past year were estimated at \$24,000 (50%)—enough in itself to cause bankruptcy. Turnover of receivables was 1.3 yearly to sales. This implied ineffective collection. Rent was \$800 a month or 16% of total sales. This too was extremely high. No inventory was ever taken though the business was conducted over three years. Very few books were kept. Business was commenced with \$10,000, all being provided by the owner without borrowing. He had been discharged in bankruptcy eighteen years previously as a partner in another business. His assets schedule were \$52,500 of which 89% were accounts receivable. These assets realized \$7,000. Liabilities were \$112,000. The bankrupt indicated keen competition, business depression, inability to get credit as the cause of failure. Creditors indicated dishonest business methods, lack of capital and too liberal extension of credit. Four months prior to bankruptcy this retailer gave out a statement to creditors that he had assets of \$100,000 and was clearly solvent. In fact he was not. Some property had been acquired in his wife's name. At the time of this study he was managing a store for his wife which she had just opened in her own name.

No. 186 was a "one man" corporation organized with a paid-in capital of \$2,000 engaged in a retail radio business. The sole stockholder had gone through bankruptcy in 1911 while engaged in a similar retail business. At the end of the first six months he issued a financial statement to R. G. Dun & Co. over his own signature, showing a net worth of \$4,000; at the end of the year another showing a net worth of \$5,000 and a few months before bankruptcy another giving assets as \$16,000, liabilities as \$4,500 and the net worth as \$11,500. In a year and a

half after beginning business a petition was filed. The assets then were \$13,000 and the liabilities \$19,000. No possible explanation appears for such radical change in the last few months. It seems that the company was insolvent during the greater part of its existence.

Finally, there was the retailer, No. 66, who was discharged nine years ago, reentered business in a different line two years ago and now turns up in bankruptcy under a different name. His creditors were duped.

The cases in the above three groups represent only the minority. There remain 75 of the total of 118 cases (64%); 24 of the 38 cases where there was a previous failure within the preceding six years; and twelve of the twenty cases where a discharge had been granted in the previous six years. All of the balance of these cases involve apparently honest persons fighting a losing battle against a militant economic order. In an analytical study of the causes of failure they would have to be separated into many classes. They include the morons, the incompetent and the misfits. They embrace cases of insufficient capital, ill-proportioned capital structures, insufficient mark-ups, over extension of credit, poor credit management, poor location, failure to carry insurance, excessive overhead, etc. They represent at best the marginal entrepreneur who under our present order is under but few legal restraints in entering business and very little legal control after entering. Their analysis will be reserved for other articles. No attempt will be made to set forth here even representative cases. Only a few random samples are chosen.

No. 0882 during the last twenty-five years had been in bankruptcy once as a retailer of tobacco, and had failed in a cleaning and pressing business once and as a retail clothier once. This time he had been dabbling in insurance and real estate, earning about \$40.00 a week. His reduced income followed the slump in real estate and he came into bankruptcy this time owing \$8,500 (mostly on mortgages) with assets of \$10 (consisting of an automobile which he had purchased a year earlier for \$35 cash). His trouble was congenital.

No. 0891 was a manufacturer previously organized as a corporation which after one year's existence went into bankruptcy in 1924. A year later he reentered the same business this time as an individual proprietor with a capital of \$1,000 which he provided without borrowing. Due to the previous failure of the corporation he had to pay cash for his materials or a premium for credit. Due to lack of capital he had to buy on credit. To meet his bills payable he was forced to discount his receivables at a high rate. Apparently his business was never on a paying basis. He struggled along, however, for four years with the financial assistance of a generous relative, until the stock market crash in 1929 wiped out the latter. Shortly thereafter the business was abandoned and the petition filed. The debts

were \$7,800 and the assets \$700. All but about \$2,500 was owed the generous relative.

No. 0895 was the case of a corporation engaged in manufacturing, all of the stock being owned by two men in equal amounts. One of these had failed a few years previously in a similar line of business. Practically all of the capital (\$14,000) was furnished by the two organizers without borrowing. The business was not unsuccessful but after a year and a half the two stockholders quarreled over management policies. One brought an action in equity against the other to restrain him from certain acts. The other filed a cross bill. While this action was pending creditors became uneasy and to protect their interests petitioned the corporation into bankruptcy. Its debts were \$4,400. Its assets were sold at auction to a corporation organized by one of the stockholders (the one who had failed previously) for \$4,000, the funds being furnished by friends. At the time of the investigation that corporation was being operated successfully.

Case No. 0896 was a jobber, 42 years old, who had been in the same line of business for twenty years. Up to 1919 he operated as an individual proprietor. In that year he failed settling with his creditors for 45%. Then he formed a corporation owning all the stock except for qualifying shares. That corporation went into bankruptcy in 1923. Another corporation was formed in 1923, this likewise being a "one man" corporation. This went into bankruptcy in 1926. Thereupon another such corporation was formed lasting until 1928, when it was reorganized and still another corporation was formed, this jobber again having all the stock except qualifying shares. This corporation was organized with capital of \$3,000 all furnished by friends and relatives. After two years it came into bankruptcy. The jobber himself likewise filed a petition. His personal obligations were \$5,600 and his assets \$100. The corporation had only nominal assets with liabilities of \$9,700. About half of the personal liabilities arose out of endorsements of notes for the accommodation of the corporation. It appeared that since the earlier failures the jobber never had a bank credit. All of his credit business was done on drafts attached to bills of lading. The practice of the jobber was to discount these drafts with private individuals at rates of 2% or more a month. No element of fraud appeared. The insufficiency of capital and limited credit facilities gave him such a handicap that the small margin of profit and keen competition forced the business into insolvency almost at the start.

Wholesaler No. 0614 failed in a different wholesale business in 1911 and received his discharge. He had been in the present business three years. All of his capital, \$15,000, was obtained on loans from banks. Due to defective machinery the plant had to close down for a short period resulting in cancellation of \$8,000 of orders. Suit against the vendor of the machinery was dismissed. For three years the debtor struggled along. Additional loans of \$10,500 had to be secured from other sources. \$12,600 remained on the original indebtedness to

the bank. Further credit was refused. The cost of doing business on borrowed capital was so great and the pressure of these creditors so severe that a voluntary petition was filed. There was no opportunity to build up a reserve and when prices dropped and the depression increased all margin of profit disappeared. Aside from the bank loans there was \$31,000 owing manufacturers. The assets were \$2,650. A ten per cent settlement was offered a month before bankruptcy and was accepted by all but one creditor whose claim was for \$2,800.

On the basis of the above data is there justification for treating all cases of prior discharge alike? The only discrimination shown in § 14 is between six year old discharges and all discharges granted earlier. But the fact remains that within the six year deadline are found cases of all sorts and varieties. Though all of the examples given are not of cases within the six year group they are truly representative of such cases. Should the administrative procedure under the Bankruptcy Act be so rigid as to be forced to disregard basic differences in types of such cases? Should the cases of misfortune be treated the same as cases of speculation, gambling or gross extravagance? Should the case of the moron be treated the same as the case of the retailer who found his receivables uncollectible due to a textile strike? The problem is not peculiar to cases of "repeaters." It is made perhaps only somewhat more acute in such cases. *Prima facie* it would seem that discharges should be dispensed in light of, not in disregard of, basic differences in types of failure. The administrative procedure should be designed to permit an adjustment to the requirements of individual cases. An attack along that line would result at least in a discrimination between types of cases falling within the six year dead line and would vest in the administrator discretion to deny, grant conditionally or unconditionally, or to suspend the discharge in all such cases.

Further, it might well result in eliminating the six year period. It will be noted that the English Act eliminates entirely the time element and makes it possible to deny, suspend or grant, conditionally or unconditionally, the discharge if at any previous time the applicant has been adjudged a bankrupt. That discards the arbitrary feature of our six year period and by the same token permits greater individualized treatment.

In addition, what justification is there for differentiating between the case where a discharge previously has been given in bankruptcy and where the debtor has been released by his creditors voluntarily without the intervention of the state? It will be noted that the English Act specifies not only a prior adjudication but also a prior composition or arrangement. There are many devices for liquidating estates. Bankruptcy is only one of them. Are not the phenomena for social control recurring failures rather than a recurring type of liquidation or adjustment of failures? It will be seen from Tables II-V inclusive, *supra*, that of the 118 cases of previous failure there were 32 cases of prior assignments, or excluding "one

man" corporations, 28. In most of these the debtor was previously released. As those cases realistically were failures the reason why they should be treated differently under the discharge section is not at all obvious. It might be argued that for the state to give special dispensation in the form of a discharge is one thing; for creditors to release voluntarily is another. On the other hand, if the government desires, through bankruptcy, to effect control over, and provide deterrents to, recurring failures, it might well be argued that the discharge section should be revised, or at least re-examined, with that end in view. The result well might be a revision along the lines of the English Act.

Data on the English cases of previous failure are of interest at this point. [FN 29] Of the 5,685 applications for discharges dealt with during the years 1924-1929 inclusive, in 480 cases (8.4%) it was reported and not disproved that the bankrupt had previously been adjudged a bankrupt or made a composition or arrangement with his creditors. In what portion of the 8.4% of English cases the discharge was granted, conditionally or unconditionally, denied, or suspended does not appear. But in view of the small percentage of all of those cases in which the discharge was denied or granted unconditionally, it seems reasonable to infer that the conditional grant or suspension was used in some of these cases as in cases of other types. The percentage of previous failures among the 1,500 New Jersey and Boston cases—the only data available for this country—was substantially the same as in the English cases—10.8% for Boston; 3.7% for New Jersey; and 7.8% for the combined groups.

In considering the problem of social control through bankruptcy of recurring failures certain other aspects have some direct bearing. First is a comparison of the business or occupation in which these bankrupts were engaged at the time of their present and previous failure. In the case of the business group about 66% of the bankrupts (63 out of 96 for both Boston and New Jersey, including the "one man" corporation) had failed previously while engaged as entrepreneurs in the same line of business. Further, in 29% of these cases (28 out of 96) they had failed previously while engaged as proprietors or owners in a different line of business. In only about 5% of the cases (5 out of 96) had they been laborers, clerks, salesmen, etc., at the time of their first failure. The cases of the 22 laborers, clerks, salesmen, etc., are interesting as they show a decided trend away from entrepreneurial activity after the first failure. Fourteen of the 22 had previously failed as proprietors of the same kind of business in which they were employed at the time of this bankruptcy. The balance had failed previously as employees. The problem of the "repeater" then pertains for the most part to cases where the second failure results from the same activity as the first.

In the second place, it is observed that these repeaters (not including professional men, laborers, clerks, salesmen, etc.) had no greater mortality as respects the length of time in the business which failed than the entire group of

bankrupts studied. The mean for these cases was somewhat less than the mean for all the bankrupts—5.9 for the 66 Boston cases as contrasted to 7.2 for all Boston cases; and 6.1 for the nineteen New Jersey cases as contrasted to 8.1 for all New Jersey cases. But the difference vanishes on comparison of medians. Here it is about 4.5 for all of the cases. In other words, the bankrupt who has failed before struggles along and stays out of bankruptcy about as long as his brethren who have not failed previously.

Relevant to the problem of more effective control over "repeaters" is the question of who financed them in this last enterprise. The following data was obtained for the business cases in the group of 118 previous failures:

[Table deleted]

The difference between the New Jersey and Boston cases is striking. Whereas in Boston the owner and his friends and relatives furnished over 80% of the capital, in New Jersey they furnished less than 40%. The average capital of the Boston cases was \$4,215, the average for New Jersey \$9,030. That may mean that the New Jersey cases were larger and more extensive enterprises. On the other hand, it may reflect in part an ease in getting credit in New Jersey. The analysis of that and allied questions will be postponed for later articles. The point of the data here is merely to suggest their relevancy to the broad problem of social control over recurring failures. Here again, as in the cases discussed above relative to the financing of business by creditors, if the situation generally is similar to that in the New Jersey cases, the part which bankruptcy administration is playing or can play in controlling such phenomena may be small. If credit agencies are making it easy for "repeaters" to try again, perhaps bankruptcy should not tighten up for the benefit of those who are in a position to control the situation more effectively. Obviously these data cannot furnish the basis for an answer. All they can do is to suggest a method of attack and supply leads for further inquiry.

What has been said concerning previous failures and the part bankruptcy can or should play in respect to them is not peculiar to that type of case. It applies as well to all cases of failure. What the function of bankruptcy is, or can or should be, is answerable only after careful examination and analysis of the total situation against which and in relation to which it operates. As stated in the beginning of this essay such examination would be as extensive and intensive as the life which bankruptcy touches and affects. Further exploration of the data will be made in subsequent articles. It will suffice if as a result of that exploration other functional aspects of bankruptcy can be made more articulate.

Conclusions

In summary are the following specific suggestions for consideration in revising § 14 of the Bankruptcy Act:

(1) Granting to the court or other official who dispenses discharges discretion to deny, grant (conditionally or unconditionally) or suspend them so as to avoid the rigidity of the present limited alternatives and to effectuate an administrative flexibility susceptible of nicer adjustments to the requirements of individual cases.

(2) Establishing, as additional grounds for administering discharges in that manner, (a) Failure to keep accounting records as are usual and proper in the particular business and as sufficiently disclose the business transactions and financial position;

(b) Speculation or gambling (not incidental to or inherent in the particular business) which directly caused or contributed to the failure;

(c) Contracting debts without having at the time reasonable grounds of expectation of being able to pay them, with the additional proviso that only cases of *prima facie* fraudulent intent and gross and wholly unjustifiable extravagance be included;

(d) Culpable neglect of business;

(e) Previous failure, at whatever time and irrespective of the method of liquidation then employed.

(3) Limiting the operation of the discharge in respect to claims for personal or property damage arising out of automobile accidents.

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The author wishes to express his indebtedness to Dr. Dorothy S. Thomas and Miss Emma Corstvet for many helpful suggestions and criticisms regarding the analysis of cases and presentation of data in this article.

[FN 1] The study in New Jersey, made from November, 1929-June, 1930, covered 597 of the 1275 petitions filed during the fiscal year ended June 30, 1930. The cases studied were taken from all parts of the District of New Jersey—rural as well as urban, small towns as well as larger cities and included approximately two-thirds of all those who filed their petitions during the period of the study. The study in Massachusetts included 910 of the 2900 (unofficial) petitions filed in the entire District of Massachusetts for the fiscal year ended June 30, 1931. No attempt was made to cover the entire state. Only cases arising in the metropolitan area of Boston, *i.e.*, the counties of Suffolk, Norfolk, and Middlesex, were covered. About 70% of all those cases between October, 1930, and June, 1931 were taken.

The study in New Jersey was carried on with the generous supervision and collaboration of Hon. William Clark of the United States District Court for the District of New Jersey. The Boston study was made possible only because of genuine and whole-hearted cooperation on the part of the three distinguished Boston referees—Hon. Arthur Black, Hon. B. Loring Young, and Hon. Charles C. Cabot.

Both the New Jersey and Boston projects were conducted jointly by the Department of Commerce, the Yale Law School, and the Institute of Human Relations of Yale University. Dr. W. C. Plummer of the Wharton School of Commerce represented the Department of Commerce in the New Jersey study; Mr. Victor Sadd in the Boston study. A report on the New Jersey study has been made by Dr. Plummer. See *Causes of Business Failures and Bankruptcies of Individuals in New Jersey in 1929-1930*, DOMESTIC COMMERCE SERIES No. 54, Publication of the Department of Commerce (Gov. Print. Off. 1931). For similar publications by the Department of Commerce see *Credit Extension and Causes of Failure Among Philadelphia Grocers*, TRADE INF. BULL. No. 700 (Gov. Print. Off. 1930); *Credit Extensions and Business Failures*, TRADE INF. BULL. No. 627 (Gov. Print. Off. 1929).

Not all of the cases reported by Dr. Plummer are embraced in this report, and *vice versa*. Due to the presence of two field staffs cases were occasionally covered separately. In addition the report of Dr. Plummer covers 42 cases administered by the Friendly Adjustment Bureau of the North New Jersey Credit Men's Association. For reports on the methods of investigation see Clark, Douglas and Thomas, *The Business Failures Project—I. A Problem in Methodology* (1930) 39 YALE L. J. 1013; Douglas and Thomas, *The Business Failures Project—II. An Analysis of Methods of Investigation* (1931) 40 YALE L. J. 1034.

[FN 2] 30 STAT. 544 (1898), 11 U. S. C. § 1 (1926).

[FN 3] 32 STAT. 797 (1903); 34 STAT. 267 (1906); 36 STAT. 838 (1910); 39 STAT. 999 (1917); 42 STAT. 354 (1922); 44 STAT. 662 (1926).

[FN 4] Noteworthy exceptions are the studies made and presently being made by the Department of Remedial Loans of the Russell Sage Foundation as to the relation between bankruptcy and consumer credit under the able direction of Messrs. Leon Henderson and Rolf Nugent; and a cooperative study of bankruptcy by the University of Chicago and the Department of Commerce along the lines of the New Jersey and Boston studies. The Chicago study is being directed by Professor John H. Cover for the University of Chicago and Mr. Victor Sadd for the Department of Commerce.

[FN 5] All that the annual reports of the attorney-general contain are the following:

- (1) The number of voluntary and involuntary petitions pending, filed and concluded during the fiscal year.
- (2) The nature of the business of the bankrupts. There are six headings—farmers, wage earners, merchants, manufacturers, professional and others. Not only are these vocational groupings too broad and general but further the group of "others" includes on the average about one-sixth of the total. For any sociological or economic purpose these data would be so vague and general as to be of little utility.
- (3) Liabilities, divided into unsecured claims on one hand and prior or secured claims on the other.
- (4) Amounts realized on the assets, with separate designation of the amounts disbursed in conducting the business.
- (5) Net assets distributed (a) as fees and expenses of administration and (b) to creditors.
- (6) An analysis of fees and expenses of administration showing in general to what officers they were paid.
- (7) Appraised value of exemptions and of property securing debts.
- (8) Number of no-asset cases and total fees and expenses of referees in connection therewith.
- (9) Number of cases filed in *forma pauperis*.
- (10) Separately are given number of indictments and convictions for the nation as a whole.

In the study by the Department of Justice now being brought to a close it was found necessary to send to referees throughout the country long and detailed questionnaires in order to obtain adequate and reliable statistical information respecting the administrative features of the bankruptcy system.

[FN 6] Most significant are the Donovan investigation, conducted for the most part in New York from 1929—1930, and the study carried on by the Department of Justice during the last two years under the direction of Hon. Thomas D. Thacher with the assistance of Mr. Lloyd K. Garrison. The Donovan report is to be found in ADMINISTRATION OF BANKRUPT ESTATES—House Committee Print, 71st Congress, 3d Session (Wash. 1931). The final report on the study by the Department of Justice has not yet been made public. See 16 A. B. A. J. 641 (1930).

[FN 7] See for example Nugent, *Consumer Credit and Social Agencies* (1931) 42 U. S. INVESTOR 1890; Douglas and Marshall, *Some Aspects of Bankruptcy Administration* (1932) 32 COL. L. REV. 1.

[FN 8] 4 & 5 GEO. V. c. 59, § 26 (1914) as amended by 16 & 17 GEO. V, c 7, § 1 (1926). For similar provisions see the Canadian Bankruptcy Act, 1 REV. STAT. c. 11, §§ 141-145 (1927).

[FN 9] See Thacher, *Proposed Change in Bankruptcy Act* (1931) 3 N. Y. STATE BAR ASS. BULL. 532, 537.

[FN 10] *Ibid.* For an incisive treatment of the problem, see Radin, *Discharge in Bankruptcy* (1931) 9 N. Y. U. L. REV. 39.

[FN 11] The ultimate aim of an accounting system is well expressed by Scott, in *Unity in Accounting Theory* (June, 1931) ACCOUNTING REVIEW 106, 107: "...it is the fundamental function of accounts and statistics to so analyze and present the facts that the decisions of the management will be automatic." Only the most appropriate of systems will do this.

[FN 14] For cases interpreting this provision see *Nix v. Sternberg*, 38 F. (2d) 611 (C. C. A. 8th, 1930); *In re Neiderheiser*, 45 F. (2d) 489 (C. C. A. 8th, 1930); *In re Weisberger*, 41 F. (2d) 275 (M. D. Pa. 1930); *Southern Rock Island Plow Co. v. Florence*, 29 F. (2d) 39T (C. C. A. 5th, 1928).

[FN 15] These 1004 cases represented all but 37 cases closed during that fiscal year. They were not the same cases as those being described in this article. For analysis of these 1004 cases see Douglas and Marshall, *op cit. supra* note 7.

[FN 16] Section 158 provides:

"(1) Any person who has been adjudged bankrupt or in respect of whose estate receiving order has been made shall be guilty of a misdemeanour, if, having been engaged in any trade or business during any period in the two years immediately preceding the date of the presentation of the bankruptcy petition, he has not kept proper books of account throughout that period and throughout any further period in which he was so engaged between the date of the presentation of the petition and the date of the receiving order, or has not preserved all books of account so kept:

"Provided that a person who has not kept or has not preserved such books of account shall not be convicted of an offence under this section—

"(a) if his unsecured liabilities at the date of the receiving order did not exceed, in the case of a person who has not on any previous occasion been adjudged bankrupt or made a composition or arrangement with his creditors five hundred pounds; or in any other case one hundred pounds; or

"(b) if he proves that in the circumstances in which he traded or carried on business the omission was honest and excusable. * * *

"(3) For the purposes of this section, a person shall be deemed not to have kept proper books of account if he has not kept such books or accounts as are necessary to exhibit or explain his transactions and financial position in his trade or business, including a book or books containing entries from day to day in sufficient detail of all cash received and cash paid, and, where the trade or business has involved dealings in goods, statements of annual stocktakings, and

(except in the case of goods sold by way of retail trade to the actual consumer) accounts of all goods sold and purchased showing the buyers and sellers thereof in sufficient detail to enable the goods and the buyers and sellers thereof to be identified."

This indicates the seriousness with which the problem of the uncontrolled enterprise is considered in England. Such drastic penalty probably goes further than opinion in this country is prepared to go. It provides an interesting contrast between the philosophies in the two countries. The Canadian Act is very similar to the English. See REV. STAT. c. 11, § 193 (1927). For recent summaries of the English, Italian, Belgian, German, Norwegian, Swedish, Danish, Dutch, Mexican, Swiss, Cuban, and Japanese bankruptcy laws, see 5 JOUR. OF NAT. ASS. OF REFEREES IN BANKRUPTCY (1931) 82 *et. seq.*

[FN 17] The data set forth are compiled from the annual reports of the Board of Trade for the years 1924-1929 inc.

[FN 18] MASS. CUM. STAT. c. 90, §§ 34A *et seq.* (1927).

[FN 19] See Douglas, *Vicarious Liability and Administration of Risk* (1929) 38 YALE L. J. 584, 591.

[FN 20] See, for example, Conn. Public Acts 1927, c. 161; 1929, c. 300; BOWERS, COMPULSORY AUTOMOBILE INSURANCE (1929); Marx, *Compulsory Compensation Insurance* (1925) 25 COL. L. REV. 164; Ballantine, *A Study of Compensation for Automobile Accidents*, 16 A. B. A. J. 97 (1930).

[FN 21] § 157.

[FN 22] These data are compiled from the annual reports of the Board of Trade for the years 1924-1929 inc.

[FN 23] *Ibid.*

[FN 24] In this connection certain data concerning 221 Boston bankrupts from the salaried group are of interest. In the year preceding bankruptcy 5% were out of employment completely; 8% worked, but for less than half time; 33% were employed for half the time or more (but less than full time); 54% were employed full time. During that year 5% received no salary; 5% less than \$500; 16% between \$500 and \$999; 23% between \$1000 and \$1,499; 24% between \$1,500 and \$1,999; 19% from \$2,000 to \$2,499; and 8% over \$2,500. The average salary was \$1,526. The average liabilities were \$3,524; the average assets being \$219. In 166 of the 221 cases (75%) there were no assets. In practically every one of the cases the direct cause of filing the petition was supplementary proceedings.

In 82 of the cases (13%) debts were owed loan and finance companies (not including commercial banks). The average loan for these 82 cases was \$626. Also in 82 cases debts averaging \$420 each were owed for goods bought on instalment.

Except for the examples given above, there were practically none bordering on fraud. In not over 7% of the 221 cases could it be said that there was gross and unjustifiable extravagance measured as of the time of the incurrance of the indebtedness. In the balance of the cases a host of complicating factors such as sickness of the bankrupt, medical cost, unemployment, reduced earnings, had intervened, distorting the picture and forcing the debtor to attempt to amortize his indebtedness over a longer period of time. For a more detailed discussion of these 221 cases see Douglas and Marshall, *op. cit. supra* note 7, in which the suggestion is made that the Bankruptcy Act be amended so as to give salaried bankrupts the option to amortize under the protection and supervision of the bankruptcy court all or a part of their indebtedness.

[FN 25] See *Elenkrieg v. Siebrecht*, 238 N. Y. 254, 144 N. E. 519 (1924); *Salomon v. Salomon & Co., Ltd.*, [1897] A. C. 22; *Louisville Banking Co. v. Eisenman*, 94 Ky. 83, 21 S. W. 531 (1893); Douglas and Shanks, *Insulation from Liability Through Subsidiary Corporations* (1929) 39 YALE L. J. 193.

[FN 26] *Cf. Minifie v. Rowley*, 187 Cal. 481, 202 Pac. 673 (1921); *Wenban Estate, Inc. v. Hewlett*, 193 Cal. 675, 227 Pac. 723 (1924); *Erkenbrecher v. Grant*, 187 Cal. 7, 200 Pac. 641 (1921).

No special investigation of these "one man" corporations, however, was made along that line. The continual use of these "one man" corporations by "repeaters" raises problems susceptible perhaps of special treatment. It may be that additional supervision will have to be provided by incorporating states at the organization stage. Certain it is that they raise peculiar problems requiring serious attention in any comprehensive program for more effective social control of "repeaters."

[FN 27] *In re Skinner*, 298 Fed. 606 (Ga. 1924).

[FN 28] *In re Kubin*, 259 Fed. 607 (D. N. J. 1919), decided by the District Court having jurisdiction over the 597 New Jersey cases embraced in this study.

[FN 29] These were compiled from the annual reports of the Board of Trade for the years 1924-29, inc.