RETAINED JURISDICTION IN CHAPTER XI OF THE BANKRUPTCY ACT: WHY NOT?
OR, HOW TO HAVE YOUR CAKE AND EAT IT TOO

The object of a proceeding under Chapter XI of the Bankruptcy Act[1] is the relief and rehabilitation of a debtor financially distressed. First the relief, then the rehabilitation.

Relief becomes available upon the filing of a petition initiating the proceeding in Chapter XI.[2] At this point the debtor assumes most of the privileges and duties of a bankrupt, and his business and affairs are placed in the hands of a fiduciary, who has special powers and prerogatives provided by the Act.[3] A general inventory of the relief available includes the court's exclusive jurisdiction,[4] the power to reject executory contracts,[5] the opportunity to sell or lease property with summary approval,[6] extensive injunctive relief from creditors and others,[7] the opportunity to exercise the avoiding powers of a bankruptcy trustee,[8] and the ability to secure immediate operating funds by issuing certificates of indebtedness, obligations senior to virtually all other obligations then existing or to accrue.[9]

As the case proceeds, these prerogatives may be used to advance the debtor's salvation. The ultimate goal of the proceeding is the negotiation, acceptance and confirmation of a plan of arrangement which "shall include provisions modifying or altering the rights of

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1. 11 U.S.C. §§ 701-799 (1970). "Act" as used hereafter refers to the Bankruptcy Act.
2. A petition may be filed in a straight bankruptcy proceeding already pending, or as an original petition. Bankruptcy Act §§ 321 & 322, 11 U.S.C. §§ 721 & 722 (1970).
3. In general the debtor might best be referred to as "it," appropriate to a partnership or corporation. An individual may just as well be the debtor, as the benefits of the Act are available to "a person who could become a bankrupt under Section 4 of this Act." Bankruptcy Act § 306(3), 11 U.S.C. 706(3) (1970). "He" bespeaks more life and less boredom; debtors are hereafter so personified. The Congress agrees. *See*, Bankruptcy Act § 311, referring to "the debtor and *his* property." 11 U.S.C. § 711 (1970) (emphasis added).
4. Bankruptcy Act § 311, 11 U.S.C. § 711 (1970).
5. *Id.* § 313(1), 11 U.S.C. § 713(1).
6. *Id.* § 313(2), 11 U.S.C. § 713(2).
7. *Id.* § 314, 11 U.S.C. § 714.
8. *Id.* § 342, 11 U.S.C. § 742.
9. *Id.* § 344, 11 U.S.C. § 744.

unsecured creditors generally or of some class of them, upon any terms or for any consideration."[10] Set forth in some detail are other provisions which a plan of arrangement may, but is not required to include.[11]

As a general rule, the order of confirmation is regarded as the culmination of the proceeding. Little attention is paid to what happens thereafter, although the remaining business can be substantial and of the utmost importance to the debtor's ultimate recovery. The inquiry is of those things which occur subsequent to confirmation. A few are mandatory. Some, by the terms of the statute, are clearly permissive. Others are virtually unexplored.

After confirmation of a plan, those things which do occur take place because the court "retains jurisdiction." The phrase appears repeatedly in the Act. It is nowhere defined and only slightly understood. The object is to set sail upon this uncharted sea, and to inquire what promise it may hold for the salvation of the struggling enterprise.

Some verbal landfalls are provided for guidance. They appear at various places in the Act and delineate the natural segments of the debtor's voyage to salvation.[12]

Petition

Whether or not a straight bankruptcy proceeding preceded entry into Chapter XI, the case is begun with the filing of a petition initiating a proceeding under the chapter. As a general proposition, the obligations upon which the plan will operate are those which precede the filing of the petition in Chapter XI; or, if the proceedings began in bankruptcy, those which antedate the original petition under the Bankruptcy Act.[13]

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10. *Id.* § 356, 11 U.S.C. § 756.
11. *Id.* § 357, 11 U.S.C. § 757.
12. For purposes of accessibility, the inquiry is confined to proceedings in Chapter XI. Much of the statute and many of the problems find parallels in Chapters IX, X, XII, XIII and in railroad reorganizations under Section 77 (11 U.S.C. § 205 (1970)).
13. Section 307 (11 U.S.C. § 707 (1970)) of the Act, defining "creditors" and "debts or claims," suggests some distinctions which depend upon whether the plan proposes to provide an extension of time for payment of debts in full or to provide for their satisfaction by reduction, or "composition."

Confirmation

There follows a period of administration, in which the successful debtor will normally promulgate his plan in negotiation with the creditors, and proceed to secure its acceptance and confirmation.[14] The end of this phase of the proceeding is marked by the entry of an order of confirmation. That order is, in effect, the court's blessing upon the debtor, his plan, and his conduct of the proceeding.[15]

Dismissal

One of the least accessible provisions of the Act then presents itself. Section 367 provides that, "Upon confirmation of an arrangement . . . (4) except as otherwise provided in sections 369 and 370 of this Act, the case shall be dismissed."[16] It suffices for the moment to ignore the content of the sections last identified. What is important is to recognize that the dismissal provided in Chapter XI is no kin to "dismissal" as it is understood in normal legal parlance. The judge does not depart for chambers. The players do not leave the field.

Consummation

The plan which has just been confirmed may include - . . .

> (7) provisions for retention of jurisdiction by the court until provisions of the arrangement, after its confirmation, have been performed; and
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> (8) any other appropriate provisions not inconsistent with this Chapter.[17]

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14. This will not be altogether true of the "ideal" proceeding which is contemplated by the Act and which almost never comes to pass. In theory, at least, a well-advised and thoroughly organized debtor can negotiate, draft and secure the acceptance of a plan before first passing through the courthouse door. *See* Bankruptcy Act §§ 336, 361, 11 U.S.C. §§ 736, 761 (1970). As a general proposition, debtors tend to be under-advised and pervasively disorganized.

15. Bankruptcy Act § 366 (11 U.S.C. § 766 (1970)) provides the standards required for the entry of an order of confirmation. They are not of direct concern here, except to the extent that certain opportunities to be explored may raise questions as to whether "the provisions of this chapter have been complied with" (*Id.* § 366(1), 11 U.S.C. § 766(1)), subsuming the question as to whether particular elements of the plan are in fact "any other appropriate provisions not inconsistent with this chapter." *Id.* § 357(8), 11 U.S.C. § 757(8).

16. 11 U.S.C. § 367(4) (1970).

17. Baukruptcy Act §§ 357(7), (8), 11 U.S.C. §§ 757(7) (8) (1970).

In that event:

> SEC. 368. The court shall retain jurisdiction, if so provided in the arrangement.[18]

So far, not much is clear except that something is supposed to happen after the case has been "dismissed."[19] At some point after the confirmation and after the dismissal, the business of the proceeding will be accomplished. All claims will have been filed and adjudicated. All consideration provided for creditors will have been distributed to them. All business undertaken by the plan will have been finally concluded. The arrangement will then be "consummated."

Final Decree

> SEC. 372. Upon the consummation of a proceeding under this chapter after confirmation of an arrangement, the court shall enter a final decree discharging the receiver or trustee, if any; closing the estate; and making such provisions, by way of injunction or otherwise, as may be equitable.[20]

It may be generally concluded that the interval between "consummation" and "closing" will amount to nothing more than the time required for final ascertainment that all business is completed, and for giving notice that the file drawer is to be closed once and for all.[21]

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18. 11 U.S.C. § 368 (1970).

19. The present inquiry concerns cases which are successful, or at least those which start out that way, that is, cases in which a confirmation is initially secured. Cases which for any number of reasons do not proceed to confirmation are also "dismissed." Depending on the manner in which they began their sojourn in Chapter XI, they may respectively return or proceed to bankruptcy.

Their death knell is an order "dismissing the proceeding under this chapter and directing that the bankruptcy be proceeded with . . . ." Bankruptcy Act § 376, 11 U.S.C. § 776 (1970). In the alternative they may be "dismissed" in the sense in which the term is usually understood — the bailiff closes the door, the secretary locks the file, and everybody stops for a drink on the way home. Everyone, perhaps, except the debtor whose problems (in the person of his unrewarded creditors) might catch up with him there.

20. 11 U.S.C. § 772 (1970).

21. Large questions may be asked whether notice of or hearing on the entry of a final decree is required. COLLIER thinks not. 9 COLLIER ON BANKRUPTCY ¶9.34[3] at 416 (14th ed. 1972) [hereinafter cited as COLLIER]. The point is of no importance here.

On the other hand, the time which may elapse between the entry of an order of confirmation, that type of dismissal which it entails (whatever it may be), the consummation, and the final decree is subject to dramatic variation. The simplest example is the case which operates by way of extension for the payment of debts in whole or in part. It is the kind of plan in which the debtor, in effect, pulls himself up by his own bootstraps. If, as the suggestion will be, the long range retirement of debt is managed by preserving access to the good offices of the court to any degree at all, the period of time involved can be considerable. Five years might be commonplace, ten years not unlikely. Even this suggestion is a great oversimplification.

In any event, the temporal continuum through which a case may be pending before the bankruptcy court is marked by the milestones of the Chapter XI petition, the order of confirmation, the dismissal, the consummation, and the final decree.

By force of law, or by virtue of provisions in the plan of arrangement, jurisdiction will be retained after the order of confirmation and until the time for appeal from the entry of a final decree has elapsed. The duration may be measured as well by years as by days.

I. THE HIGH ROAD

RETAINED JURISDICTION AS A MATTER OF LAW

No matter how tidy or small the case and no matter how simple the plan, it is almost inevitable that certain business will remain to be conducted immediately after the entry of an order of confirmation. The statute contemplates specific situations and provides for the retention of jurisdiction as a matter of law.

Claims

The most obvious of these functions is the continued adjudication of claims. Remaining will be those claims which are disputed for any reason or by any party, those which are permitted to be filed after the giving of notice that an order of confirmation has been entered,[22] and

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22. Bankruptcy Act § 355 (11 U.S.C. § 755 (1970), has special rules for two situations:

those which arose or were ascertainable only in consequence of the time and the fact of the confirmation itself.[23]

For the adjudication of such claims retention of jurisdiction is mandatory:

> Sec. 369. The court shall in any event retain jurisdiction until the final allowance or disallowance of all claims affected by the arrangement which have been filed within the limitations as to time and amount prescribed by section 355 but have not been allowed or disallowed prior to confirmation.[24]

Distribution

It is likewise evident that certain other business cannot be completed until the confirmation is an accomplished fact. Thus, Section 370:

> Upon the allowance of any debts specified in paragraphs (1), (2), and (3) of Section 369 of this Act, the consideration, if any, deposited for them shall be distributed and the rights provided by the arrangement shall inure to the creditors to whom such debts are owing.[25]

While Section 370 does not, in terms, refer to the retention of jurisdiction, the fact of retention is self-evident. The consideration is not distributed until the plan is confirmed, and those things cannot happen simultaneously. Thus Section 367 provides:

> Creditors, including the United States, any State, and any subdivision thereof, shall file their proofs of claim before confirmation except as follows:
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> (1) if scheduled by the debtor, a claim may be filed within thirty days after the date of mailing notice of confirmation to creditors but shall not be allowed for an amount in excess of that set forth in the debtor's schedules; and
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> (2) a claim arising from the rejection of an executory contract of the debtor may be filed within such time as the court may direct.

23. This is the situation contemplated by Bankruptcy Act §355(2) (11 U.S.C. § 755(2) (1970)) when, for example, an executory contract is rejected by a provision of the plan itself. The other party cannot file before confirmation because he does not become a creditor until the confirmation is had. *See* Bankruptcy Act § 353, 11 U.S.C. § 753 (1970).

24. 11 U.S.C. § 769 (1970).

25. *Id.* § 770 (1970). The reference to subdivisions of § 369 is an historical accident. A series of amendments eliminated the subdivisions, but § 370 has yet to be amended to conform.

> Upon confirmation of an arrangement
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> . . . .
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> (2) the money deposited for priority debts and for the costs and expenses shall be disbursed to the persons entitled thereto;
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> (3) the consideration deposited, if any, shall be distributed and the rights provided by the arrangement shall inure to the creditors affected by the arrangement, including the United States, any State, and any subdivision thereof, whose claims are filed within the time prescribed by Section 355 of this chapter and are allowed . . . . [26]

Read with Section 337[27] (relating to the "disbursing agent") and with a pinch of common sense, Section 367 and related provisions mandate the retention of jurisdiction until proper disposition has been made of all the consideration.[28]

Closing

Section 372[29] provides for the closing of the case upon its consummation. It, too, necessarily imports a retention of jurisdiction. This will be true even if the plan is of the simplest cash-on-the-barrelhead type in which all claims are adjudicated by the time of confirmation and under which the entire consideration offered is on deposit and distributed immediately. The court will have to satisfy itself that no loose ends remain and enter its order to that effect.

Fraud

Jurisdiction is retained in one additional situation, notwithstanding any provision of the plan of arrangement, or lack thereof. The Congress has recognized that fraud can readily be practiced in securing the creditors' acceptance of the plan or, for that matter, in securing the findings which the law requires the court to

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26. 11 U.S.C. § 767(2), (3) (1970).
27. *Id.* § 737 (1970).
28. *See In re* J.B. Pollak Co., 86 F.2d 99 (2d Cir. 1936), where Judges L. Hand, A. Hand and Swan wrestled the inadequate precursors of the present sections to this rather unremarkable result.
29. *See* text accompanying note 20 *supra*.

make before entering the order of confirmation.[30]

The Act accordingly contains special provisions to thwart such skulduggery. Section 386 provides the necessary police powers, and in the alternative. The court may alter the arrangement to correct the fraud, or it may set aside the arrangement and direct liquidation.[31]

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30. The court shall confirm an arrangement if satisfied that—

(1) the provisions of this chapter have been complied with;

(2) it is for the best interests of the creditors and is feasible;

(3) the debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt; and

(4) the proposal and its acceptance are in good faith and have not been made or procured by any means, promises, or acts forbidden by this Act.

Confirmation of an arrangement shall not be refused solely because the interest of a debtor, or if the debtor is a corporation, the interests of its stockholders or members will be preserved under the arrangement.

Bankruptcy Act § 366, 11 U.S.C. § 766 (1970).

31. If, upon the application of parties in interest filed at any time within six months after an arrangement has been confirmed, it shall be made to appear that fraud was practiced in the procuring of such arrangement and that knowledge of such fraud has come to the petitioners since the confirmation of such arrangement—

(1) if the debtor has been guilty of or has participated in the fraud or has had knowledge thereof before the confirmation and has failed to inform the court of the fraud, the court may set aside the confirmation and thereupon, (a) where the petition was filed under section 321 of this Act, reinstate the pending bankruptcy proceeding, adjudge the debtor a bankrupt, if he had not already been so adjudged, and direct that the bankruptcy proceeding be proceeded with, or (b) where the petition was filed under section 322 of this Act, reinstate the proceeding, adjudge the debtor a bankrupt, and direct that bankruptcy be proceeded with pursuant to the provisions of this Act; or

(2) the court may set aside the confirmation, reinstate the proceeding under the petition filed under this chapter, and hear and determine applications for leave to propose, within such times as the court may fix, alterations or modifications of the arrangement for the purpose of correcting the fraud; or

(3) the court may reinstate the proceeding under the petition filed under this chapter and modify or alter the arrangement for the purpose of correcting the fraud, but may not materially modify or alter the arrangement adversely to the interests of any party who did not participate in the fraud and who does not consent to such modification or alteration, or to the prejudice of any innocent person, who, for value, subsequent to the confirmation, acquired rights in reliance upon it.

Bankruptcy Act § 386, 11 U.S.C. § 786 (1970).

The section does not, and of course need not, specifically refer to a retention of jurisdiction.

One interesting sidelight is that, where the case involves an original voluntary petition under § 322, the court's choice is limited to correcting the arrangement or adjudicating the debtor and proceeding with bankruptcy. That is unlike the circumstance in which the chapter proceedings terminate before a confirmation. In the latter situation the court is permitted to dismiss the entire proceeding and send the debtor back out into the world on his own, if that is in the best interest of creditors. Bankruptcy Act § 376(2), 11 U.S.C. § 776(2) (1970).

Almost everything has some limit, and this section accordingly provides that an application for relief on account of fraud must be filed by a party in interest within six months of confirmation. It demands, moreover, that the fraud alleged was not known to the applicant until after the confirmation. The cases indicate that expiration of the six month period operates as an absolute bar to an application under Section 386.[32] Six months and one day is too long.

Reexamination of Claims

A recurring problem in the administration of bankruptcy proceedings is the sheer number of claims to be dealt with and the relative informality required for a proof of claim, as compared with the requirements of allegation and proof which exist in other types of legal proceedings. The difficulty in Chapter XI is compounded by the fact that the debtor is engaged in a struggle for his life and tends to have neither the time nor the money to deal with all claims as thoroughly as they might deserve. Receivers and trustees are no different. Mistakes will be made.

Chapter XI contains no express provisions for the reexamination of claims. The situation is dealt with in various provisions of the liquidation chapters, applicable to Chapter XI through Section 302, which incorporates the provisions of Chapters I to VII "insofar as they are not inconsistent with or in conflict with" the provisions of Chapter XI.[33]

Section 2 of the Act contains the general jurisdictional grants for bankruptcy matters, and includes the provision that the court has jurisdiction to "allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates."[34]

The question is more thoroughly covered in Sections 57k and 57l, which provide for reconsideration of claims and summary jurisdic-

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The debtor, it seems, is to be punished for his fraud. The statute does not seem to consider that creditors might be better served with a dismissal. The new proposed rules for Chapter XI offer to change this result, by permitting a dismissal under Rule 11-42(b) even if confirmation was revoked on account of the debtor's fraud. Salutory as it may be, the rule may be in jeopardy as a change of substance only purporting to be procedural.

32. Whiteford Plastics Co. v. Chase Nat'l Bank, 179 F.2d 582 (2d Cir. 1949); *In re* Crusader Oil Refining Corp., 47 F. Supp. 873 (D.N.J. 1942).

33. 11 U.S.C. § 702 (1970).

34. Bankruptcy Act § 2a(2), 11 U.S.C. § 11(a)(2) (1970).

tion to recover dividends paid on them.[35] Section 57 k contains the express limitation that the reconsideration may be had "before but not after the estate has been closed." This would seem clearly to relate to the provisions of Section 372, and its reference to closing the estate after "consummation" of the proceeding.

Beyond that point, the Bankruptcy Act further contemplates that it may be necessary to reopen an estate once closed. Section 2 provides quite simply that the court may "reopen estates for cause shown."[36] There is no basis to question the applicability to proceedings in Chapter XI of the provisions for reopening the estate.

The inquiry proceeds to those situations in which jurisdiction may, but need not necessarily be retained.

II. NEW GROUND

The General Retention of Jurisdiction

Section 368 is a masterpiece of simplicity:

> The Court shall retain jurisdiction, if so provided in the arrangement.[37]

It is likewise, by virtue of its simplicity, a quagmire of confusion.

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35. 11 U.S.C. §§ 93(k), (l) (1970).

36. Bankruptcy Act § 2a(8), 11 U.S.C. § 11(a)(80) (1970). A thorough review of the requirements for and consequences of reopening is tendered in 1 COLLIER ¶2.49 - 2.51, at 287-302. American Guar. Corp. v. United States, 401 F.2d 1004 (Ct. Cl. 1968), illustrates the necessities and how not to deal with them. The arrangement was confirmed. An amount in excess of $140,000 was determined as fees to the Referee's Salary and Expense Fund. Payment was made from the debtor's deposit under the usual procedures making the deposit a condition of confirmation. Thereafter the debtor conceived an argument directed at the validity of the scheme under which the fee schedules are determined by the Judicial Conference and sought to recover back the money paid.

The opinion suggests that the debtor's complaints were conceived at about the time the confirmation was entered, and certainly before the proceeding in Chapter XI would have been dismissed, or closed as the case may be. In any event, rather than presenting the question in the bankruptcy proceeding during its pendency, or by way of an application to reopen the proceedings, the debtor brought a plenary action in the district court for a declaratory judgment. The district court dismissed for lack of jurisdiction. The court of appeals affirmed. American Guar. Corp. v. Burton, 380 F.2d 789 (1st Cir. 1967).

The debtor got no decision on the merits until it finally resorted to the Court of Claims, which held not only that the schedule of fees was proper, but that the plaintiff was estopped by its failure to raise the question in the bankruptcy proceeding.

37. 11 U.S.C. § 768 (1970).

Only one thing seems clear: excepting those situations where jurisdiction is retained as a matter of law, no jurisdiction is retained unless the plan of arrangement says so.[38]

Section 357 of the Act is similarly permissive and nonspecific:

> An arrangement made within the meaning of this Chapter may include —
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> . . . .
>
> (7) provisions for retention of jurisdiction by the court until provisions of the arrangement, after its confirmation, have been performed . . . .[39]

The result is a number of cases in which drafters of plans have indulged in the same generalities as the Congress and have provided simply that "the court shall retain jurisdiction," or words of no greater specificity. That leaves begging the question of just exactly what it is for which the court retains jurisdiction and leaves in confusion the application of such a provision to specific situations thereafter arising.

Some of the problems are nevertheless solved by the Act itself. As to certain matters, provisions of Chapter XI make specific reference to the retention of jurisdiction. The most accessible of these are provisions relating to amendments after confirmation and to further proceedings if the arrangement once confirmed is not performed.

In these situations, so long as the plan provides for the retention in general, the Act itself provides the specifics.

Amendments

> SEC. 363. Alterations or modifications of an arrangement may be proposed in writing by a debtor, with leave of court, at any time before the arrangement is confirmed; or where the court has retained jurisdiction pursuant to the provisions of section 368 of this Act, an arrangement providing for an ex-

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38. Borgenicht v. Creditors' Comm., 479 F.2d 150 (2d Cir. 1973). *See* 9 COLLIER ¶9.29, at 368-69 including a discussion of the provisions of former Section 74 of the Act and the legislative history behind the present provisions. After some years of confusion it is also established that the court's order of confirmation can make no valid provision for the retention of jurisdiction beyond that which is set forth in the plan. Texas Consumer Finance Corp. v. First Nat'l City Bank, 365 F. Supp. 427 (S.D.N.Y. 1973). *See In re* Grayson Robinson Stores, Inc., 227 F. Supp. 609, 613-15 (S.D.N.Y. 1964); *In re* Independent Macaroni Co., 46 F. Supp. 813 (S.D.N.Y. 1942).

39. 11 U.S.C. § 757(7) (1970).

> tension of time for the payment of debts in whole or in part may be altered or modified after it has been confirmed to the extent and subject to the limitations set forth in section 387 of this Act.[40]

Section 387 is principally concerned with the procedural steps required to process the proposed amendment. The limitations referred to are that:

(1) the arrangement first confirmed must have provided for an extension of time for payment in whole or in part of the debts affected by the arrangement.

(2) the court retained jurisdiction pursuant to Section 368 (i.e. pursuant to the plan),

(3) the debtor must secure leave of court to file the amendment proposed,

(4) the consideration originally promised has not yet been paid, and

(5) if the deferred consideration was represented by negotiable promissory notes, those notes have not been delivered to creditors.[41]

Except that deferred consideration may not yet have been paid and negotiable promissory notes may not yet have been delivered, the section otherwise proposes no chronological boundaries.

The most likely case in which the availability of amendment will be important is the one in which the debtor's liquidating value well exceeds the assets which he could distribute to creditors and still survive. Assuming that substantial new capital is not readily available, such a debtor will be effectively obliged to promise his creditors a recovery which he is able to pay only over a period of time. His plan, accordingly, will be of the "bootstrap" variety.

40. Bankruptcy Act § 363, 11 U.S.C. § 763 (1970).

41.
> Where an arrangement which has been confirmed provides for an extension of time for payment in whole or in part of the debts affected by the arrangement, and the court has retained jurisdiction pursuant to section 368 of this Act—
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> (1) A proposal to alter or modify the arrangement by changing the time of payment of deferred installments of the consideration, or by reducing the amount of such payments, or to accomplish both of such alterations or modifications, may be filed by the debtor with leave of court after the arrangement has been confirmed, but before the deferred consideration has been fully paid, or if such deferred consideration is represented by negotiable promissory notes, then before such notes have been delivered to the creditors.
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> . . . .

11 U.S.C. § 787 (1970).

The question will be whether to provide that jurisdiction be retained or not so to provide. The latter choice may be tantamount to suicide.

Borgenicht v. Creditors' Committee[42] is an abrupt example. The debtor's plan was confirmed. It did not include a provision for the retention of jurisdiction under Section 368. The plan provided for payment of claims at 100% of face value, without interest. A down payment was made upon confirmation, and the balance of 88% was to be paid over the next four years. The deferred payments were secured to the creditors by a mortgage on the debtor's real estate and a provision that, upon default, the creditors were permitted to realize on the security in such manner as they deemed best.

Borgenicht got behind, but not before he had paid some two-thirds of the sums first promised. He applied for a modification under Section 363, seeking only ninety days of grace on the installment next due. With much sympathetic and reluctant verbiage, the court quite properly concluded that, absent specific provision in the plan, it was without power to assist — unfortunate as that may have been for Borgenicht in particular and the intentions of Congress in general.

Borgenicht's fate is not disclosed. His creditors may have pulled the plug, or extracted a pound of flesh in return for their forbearance. Happily enough, he did not remain entirely helpless. While no further relief in the arrangement proceeding was available, resort to the bankruptcy court would still have been possible in a new proceeding.

Confirmation of an arrangement is the equivalent of a discharge.[43] Section 14c of the Act might, accordingly, be deemed to deny the debtor an opportunity for a second discharge in any proceeding commenced within six years subsequent to confirmation. Section 14c (5), however, provides that the discharge shall be granted unless the court is satisfied that the bankrupt

> in a proceeding under this Act commenced within six years prior to the date of the filing of the petition in bankruptcy had

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42. 479 F.2d 150 (2d Cir. 1973).

43. Bankruptcy Act § 371, 11 U.S.C. § 771 (1970):

> The confirmation of an arrangement shall discharge a debtor from all his unsecured debts and liabilities provided for by the arrangement, except as provided in the arrangement or the order confirming the arrangement, but excluding such debts as, under section 17 of this Act, are not dischargeable.

> been granted a discharge, or had a composition or an arrangement by way of composition or a wage earner's plan by way of composition confirmed under this Act . . . .[44]

The Borgenicht plan was an extension of time for payments in full. It therefore did not constitute a discharge such as to invoke the six-year limitation.[45]

The situation is quite otherwise where the arrangement provides for a composition. A plan calling for payments of 95% over a period of time may well represent much greater value to creditors than a plan providing for payments of debts in full over a longer period of time.[46] Yet, the former would be a composition and would trigger the bar to subsequent discharge contained in Section 14c (5).[47] If there might be any question at all as to whether an arrangement is a composition rather than an extension, there can be very little reason for a debtor to omit provisions for retention of jurisdiction under Section

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44. 11 U.S.C. § 32(c)(5) (1970).

45. *In re* Thompson, 51 F. Supp. 12 (W.D. Va. 1943). The bankrupt has previously obtained confirmation of a wage earner plan providing an extension of time for payment of his debts in full. The cited case was a subsequent and wholly independent straight bankruptcy, wherein the court held that the prior proceeding was an extension, not a composition. It therefore did not bar the subsequent discharge in straight bankruptcy.

It is worthwhile to consider that new debts did Thompson in after he had paid the debts extended by the wage earner plan, and to ask whether the result would have been the same had he not done so. The answer would seem to be "yes": there is no reason to deny a discharge if on the first effort the insolvent obtained only time rather than forgiveness of his debt. *See* 9 COLLIER ¶9.32[15], at 408.14, concurring. By the same token Thompson remained eligible for an arrangement or a second wage earner plan.

There is, of course, a point at which everyone gives up. That is the spirit of one unpersuasive case to the contrary, wherein the court averred, "I do not believe there is any need to create a class of wage earner users, going through life interest free, converting credit risks desirable for one year to extensions of credit over three or four years, with resultant loss." *In re* J. O. Bingham, 190 F. Supp. 219 (D. Kan. 1960).

46. It is curious but healthy that, at least as to unsecured claims, the Bankruptcy Act thoroughly ignores questions of interest factors and present values.

47. *In re* Thompson, 51 F. Supp. 12, 13-14 (W.D. Va. 1943):

> [C]ompositions, both under old Sect. 12 and under the present law, contemplate the release of the debtor from his indebtedness upon payment, through agreement with his creditors, of something less than its full amount.

The case provides a considerable discussion of the distinction between "composition" and "extension."

368.[48]

By the same token, there seems to be no good reason why a debtor should employ as consideration any negotiable promissory note. Even if the plan purports to retain jurisdiction, the debtor will have scuttled his chances for a life-saving amendment if he has delivered those notes to creditors.[49]

Adjudication on Default

Sections 363 and 387 delineate the terms on which a debtor can secure post confirmation relief by retaining jurisdiction in the most general of language. Section 377 provides the corresponding advantage to creditors.[50] If no jurisdiction is retained, and the debtor thereafter defaults, the creditors' options are limited. Their claims will nevertheless be discharged according to the terms of the plan,

48. The question can be very close. Consider, for example, an arrangement which provides that the debts affected shall be paid at 100 per cent of the amount in which they are allowed, that payment shall be made according to some formula based upon the debtor's gross income, net earnings, or the like, but that payments to creditors will in all events cease at the expiration of a fixed period of time — whether or not the formula has by then produced payments of 100 per cent. If difficulties should ensue prior to the expiration of that period, it will be entirely speculative whether the original arrangement should be deemed one by way of extension or of composition. Yet, in the absence of retained jurisdiction, that determination will control the availability of a discharge in a subsequent proceeding.

49. There seems to be no reason for the Act to contain this limitation in its present form. The evident objective is to restrict the debtor from securing confirmation of an amendment which would adversely affect the terms of promissory notes which are then abroad in the world in the hands of unknown holders in due course, to whom notices cannot be given. The rule is arbitrary and not well thought out. Assuming some compelling reason for the use of negotiable notes in the first place, there remain more sensible solutions:

(a) Permit the debtor his amendment if he can secure possession of all such notes, obtain the requisite acceptances for the amendment, and reissue the amended evidences of indebtedness.

(b) Permit the debtor an amendment which will apply only to those notes he can secure, leaving others unaffected. That will in effect subdivide the note holders into two new classes, some with greater rights than others. There seems no harm in it, particularly where the alternative is death and dismemberment.

As the Act now stands, the best solution is to avoid negotiable notes altogether. Make them assignable if necessary, but not negotiable.

50. 11 U.S.C. § 777 (1970). The arrangement proceeding is dismissed. The debtor can be promptly adjudicated unless, in the case of an original petition, the court elects to send him back out into the world.

May an arrangement retain jurisdiction for the purpose of permitting the debtor to propose an amendment under Section 363 but exclude such retention for the purpose of empowering the court to adjudicate a defaulting debtor under Section 377? "Why not?" is the answer proposed.

The opposite has in fact occurred. *In re* Euclid Underwriting Corp., 45 F. Supp. 498 (E.D.N.Y. 1942). The plan retained jurisdiction solely for the purpose of making adjudication under Section 377 available in the case of default. "Solely" meant what it said: the debtor was not permitted a minor and harmless amendment.

and they will be relegated to collect from the debtor only such amounts as the plan, rather than their original obligations, provided them. They will be left to a race of diligence in their individual collection efforts, or to the initiation of a brand new proceeding in bankruptcy. In that event, it is entirely possible that the relief obtained by the debtor in an arrangement by way of composition will have improved his condition sufficiently that the creditors will be unable to secure an involuntary adjudication.[51]

If that were not enough, the potential estate available for creditors may have substantially declined by virtue of the termination of the original arrangement proceeding. The readiest examples are cases in which recoveries from preferences or fraudulent conveyances may have been available but, because of the time and expense, and because of value of the debtor's undertakings in the arrangement, were not pursued. Where jurisdiction is retained and the case proceeds pursuant to Section 377, the filing dates from which the Act measures the avoiding power of the trustee are preserved.[52]

Borrowing

The remaining area in which a retention of jurisdiction in general terms explains itself involves the certificates of indebtedness authorized by Section 344:

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51. Bankruptcy Act § 3, 11 U.S.C. § 21 (1970).

52. Section 378 (11 U.S.C. § 778 (1970)) provides that an original petition under Section 322 is treated as a voluntary petition filed that date, and that the Section 321 case proceeds as though the arrangement petition had not been filed. The effect, of course, is that the date of the original petition in bankruptcy controls the trustee's recoveries.

It is important to remember that preservation of those filing dates may not be enough. Section 391 (11 U.S.C. § 791 (1970)) tolls the running of statutes of limitation while a proceeding in Chapter XI "is pending and until it is finally dismissed." The problem is to understand just what "dismissed" is supposed to mean. Specifically, does it correspond with that point in time at which the arrangement proceedings are ended and the liquidation begins, or may it be a point in time considerably before that? Section 367(4) (11 U.S.C. § 767(4) (1970)) provides that "upon confirmation of an arrangement — . . . (4) except as otherwise provided in sections 369 and 370 of this Act, the case shall be dismissed." The latter sections have only to do with completing the adjudication of claims affected by the arrangement and the distribution of the consideration provided for them. It is then altogether possible that, although such jurisdiction was retained as permitted an adjudication under Section 377, the dismissal contemplated by Section 391 may have taken place years before, with the result that applicable statutes have run against the trustee. It does nothing for one's understanding to observe that Section 391 speaks of "finally dismissed" rather than simply "dismissed." The uncertainty as to the meaning of "dismissal" is one of the most perplexing problems in the whole area. In general, the courts decline to make the trustee suffer for the law's confusion. *See In re* Ira Haupt & Co., 390 F.2d 251 (2d Cir. 1968), *cert denied,* 391 U.S. 916 (1968); Liman v. Bank of Nova Scotia. 337 F.Supp. 62 (S.D.N.Y. 1971).

> During the pendency of a proceeding for an arrangement, or after the confirmation of the arrangement where the court has retained jurisdiction, the court may upon cause shown authorize the receiver or trustee, or the debtor in possession, to issue certificates of indebtedness for cash, property, or other consideration approved by the court, upon such terms and conditions and with such security and priority in payment over existing obligations as in the particular case may be equitable.[53]

The section unquestionably contemplates that certificates of indebtedness may be issued by the receiver or trustee, or the debtor in possession, during the period after commencement of the proceeding and prior to confirmation, and as well during the period after confirmation where jurisdiction has been retained.

The objective is self-evident. Under any circumstances which create a need for proceedings under the Act, the debtor is going to be short of money. Continuation of the business and the debtor's survival for any period of time sufficient to give the rehabilitation a chance may very well depend upon some ready cash. The only basis upon which someone might be expected to become a lender or credit grantor is special assurance that his new obligation is not going to be buried with the old. The availability of priority over other expenses of administration may be critical. All this is relatively obvious and straightforward when it involves financing the period of administration prior to confirmation of the plan.

The use of such certificates after confirmation poses questions more interesting. The usual concept of proceedings for an arrangement is that once the confirmation is secured, the debtor's problems have been solved. The financing required is secured or committed in the process.

Except for tidying up the claims and distributing the consideration the proceeding will be "dismissed" upon confirmation.[54] Title to the debtor's assets will revest in him:

> SEC. 70i. Upon the confirmation of an arrangement or plan, or at such later time as may be provided by the arrange-

53. 11 U.S.C. § 744 (1970).
54. Bankruptcy Act § 367(4), 11 U.S.C. § 767(4) (1970).

> ment or plan, or in the order confirming the arrangement or plan, the title to the property dealt with shall revest in the bankrupt or debtor, or vest in such other person as may be provided by the arrangement or plan or in the order confirming the arrangement or plan.[55]

In that event it seems unlikely there would be a receiver, a trustee, or a debtor in possession to seek authorization from the court for the issuance of certificates. The debtor has made his deal and should be back in business on his own.

The plan may nevertheless defer revesting of title and, in addition, contain provisions extending the life of a receiver:

> Sec. 357. An arrangement made within the meaning of this chapter may include —
>
> . . . .
>
> (5) provisions for continuation of the debtor's business with or without supervision or control by a receiver or by a committee of creditors or otherwise;
>
> . . . .
>
> (8) any other appropriate provisions not inconsistent with this chapter.[56]

"Or otherwise" presumably will include supervision or control by a debtor in possession as well. Prior to confirmation, the result is automatic where a separate fiduciary has not been appointed.[57]

A general retention of jurisdiction, therefore, will not necessarily make post-confirmation certificates of indebtedness available. Some kind of fiduciary will be required, and his existence will not be discernable unless the plan so provides.

There is nothing to indicate that the post-confirmation receiver is the same fellow he used to be, or that he has the same rights and responsibilities as a receiver appointed by the court.

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55. *Id.* § 70i, 11 U.S.C. § (110(i) (1970).

56. *Id.* §§ 357(5), (8), 11 U.S.C. §§ 757 (5), (8) (1970).

57. *Id.* § 342, 11 U.S.C. § 742 (1970). Section 332 (11 U.S.C. § 732 (1970)) provides for the appointment of a receiver "if necessary" or the continuation in possession of a trustee if one has previously been appointed (as may occur when a petition under Section 321 converts a pre-existing bankruptcy to Chapter XI). If there is no receiver or trustee the debtor will remain in possession, but in a fiduciary role distinguishable from that of a receiver only in that no special compensation is provided.

Since Section 357(5) invites the debtor to write his own ticket, a receiver could very well be provided whose job is analogous to any of the types of receivers contemplated in Section 48 of the Act, that is, a receiver acting "as mere custodian," a receiver with full powers, a receiver conducting a business, or, indeed, an ancillary receiver.[58] For that matter, there appears to be no reason why a plan could not provide a receiver quite unlike any receiver acting under the Bankruptcy Act, and who has no responsibility at all to the bankruptcy court. The permissive provisions of Section 357(5) are independent of the permissive provisions of Section 357(7),[59] permitting the retention of jurisdiction. Who, then, is it that may issue certificates of indebtedness?

The central message is presented: when it comes to periods of retained jurisdiction subsequent to confirmation, the Act does not say just what that is, or who under those conditions may do what to whom.

THESIS

Thus the thesis: within certain broad limits, the debtor is free to invent his own world and in negotiation with his creditors to determine outside the courtroom what duties will remain for the court once the confirmation is had. The prime corollary of the thesis is that the plan need be drafted with great particularity. It needs to state exactly what it is that the court will have a voice in, exactly what benefits will survive the confirmation and what burdens will expire with it, or vice versa. As all good lawyers know, the name of the game is to take every legitimate advantage of the rules; to seek, as the advantage may appear, the best of the world within and without the courtroom.

Violation of the corollary will prejudice the thesis. Apart from cases where the debtor neglects to retain any jurisdiction and later rues his thoughtlessness,[60] he may "retain jurisdiction" and fail to say what he means by that. The court will be left to muddle through to answers the debtor should have provided in advance. He may not like the ones he gets.

In re Ohio Builders & Milling, Inc.[61] saw the debtor secure the

58. *Id.* § 48, 11 U.S.C. §§ 76(a) (1)-(4) (1970).
59. 11 U.S.C. § 757 (1970).
60. *See, e.g.*, Borgenicht v. Creditors' Comm., 479 F.2d 150 (2d Cir. 1973), discussed at note 38 *supra*.
61. 128 F.2d 165 (6th Cir. 1942).

confirmation of its plan. The plan provided:

> Subject to its approval the Court shall retain jurisdiction over the assets herein dealt with and over any and all persons, firms or corporations to whom said assets may be transferred, and over all parties appearing herein for the purpose of carrying out and giving effect to any and all provisions of the Plan and the decree confirming the same.[62]

It does not appear that direct reference was made to the question of when and in what manner the revesting of title contemplated by Section 70i might occur. It may, after all, be one thing for the court to retain jurisdiction over the debtor's assets and another for title to those assets, as distinguished from jurisdiction over them, to change hands.

Subsequent to confirmation the debtor executed a mortgage upon its real and personal property and expended the proceeds in the normal course of business. The debtor did not seek the court's approval of the transaction. Thereafter the arrangement aborted and the trustee of the ensuing bankruptcy sought to invalidate the mortgage lien. Judge Swinford summarily concluded: "Certainly no encumbrance could be put upon the assets of the debtor without the court's approval" and declared the mortgage worthless.[63]

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62. *Id.*

63. *Id.* at 166. The court also announced the irrelevant, unsupported and entirely questionable conclusion that Sections 357(7) and 368 "make it clear that the statute contemplates that retention of jurisdiction, whether general or limited may be stated either in the plan or in the order confirming the plan." *Id.*

Long thereafter, a different panel of the same court (evidently not very comfortable with *Ohio Builders)* vindicated itself and the doctrine of *stare decisis* simultaneously. *In re* Patton Mfg. Co., 413 F.2d 1258 (6th Cir. 1969), *cert. denied,* 396 U.S. 1004 (1970), produced a plan, an amendment to the plan, and a modification to the amendment. At each juncture, the plan did not provide for retention, but the confirming order did. Default occurred and liquidation ensued (presumably under Section 377, although it is not so stated). A secured creditor objected to a stay obtained by the trustee in the superseding bankruptcy on the basis that no jurisdiction was retained and the debtor could not, accordingly, be liquidated in the continuing proceeding. The court insisted it must follow *Ohio Builders,* expressed concern for the district judges and referees who might all this time have thought *Ohio Builders* was good law, apologized to COLLIER, waved off some pertinent legislative history, and finally conceived this rationale: Before confirming the plan, the referee was required to make the findings under Section 366 (the court persisted in mis-citing it as 11 U.S.C. § 621, which is Section 221 from Chapter X and dramatically different), *inter alia,* that the plan was for the best interests of creditors and was feasible. If he did not so find, he could not confirm. Since he insisted on inserting a retention of jurisdiction in his order of confirmation, he must have found that the statutory requirements would not be met without the retention. That left he parties to take a confirmation with retained jurisdiction or have no confirmation. The parties did not object, the case proceeded, and they accordingly backed themselves into an "implicit agreement to include such a provision . . . as a part of the arrangement." 412 F.2d at 1263. Zounds!

Having entertained no distinction between title and jurisdiction, the court then set forth Section 344 verbatim, as though to suggest that a certificate of indebtedness was the only means by which the post confirmation debtor could have borrowed money. By this time, while the moribund debtor may have been remorseful, the good faith mortgage lender must have been enraged. Both, it may be supposed, fired their lawyers; but, having cast their pearls before Swinford, they could do nothing but groan — and that only discreetly.

The judge in *Seedman v. Friedman*[64] would have been more popular, as is usual when justice is done. In that case the court was likewise left to wrestle with the manner in which a retention of jurisdiction expressed in the most general terms should apply to a specific problem arising subsequent to confirmation.

An arrangement was confirmed which was already in default. Even as the order was entered there existed an undisclosed delinquency in the payment of obligations which the plan required to have been kept current. The plan provided that the court should "retain jurisdiction over the debtor and its property"[65] until certain identified payments were made. Very shortly after confirmation, one Seedman contracted for a bulk sale of the debtor's merchandise and fixtures pursuant to express provisions contained in the plan. Thereafter, a creditor moved to set the plan aside, obtained such an order, and further obtained an order restraining the sale to Seedman. Seedman did not appeal from the restraining order.

Thereafter, Friedman, the trustee, effected a sale of the same assets to a third party (who, if it matters, then resold to the very same Seedman and at a profit). Seedman filed a "priority claim"[66] to recover his damages for the breach of his original contract.

The trustee loosed a barrage of ingenious defenses upon Seedman, of which only one is of interest here. That defense, in short, was that since the plan provided for the court to retain jurisdiction over the debtor and its property, the contract under which Seedman claimed could not be valid unless it had been approved by the court. There being no such approval, there was no contract. There being no contract, there was no damage. There being no damage, there was no

64. 132 F.2d 290 (2d Cir. 1942). Seedman was a creditor. Friedman was trustee in an ensuing liquidation. In view of the law which has developed since and in reliance on the case, it seems appropriate that the debtor was Humpty Dumpty Auto Stores, Inc.

65. *Id.* at 292.

66. *Id.* at 293.

claim. Seedman had been had.[67]

At this point the court was required to decide whether the frustrated Seedman would have a chance to prove the damages he clearly had sustained and to hope for some dividend thereon, or whether he was to be thwarted by a monstrous technicality.

The court did justice to Seedman. It is not so clear that the court did justice to Chapter XI of the Bankruptcy Act. While it rescued Seedman from the blunt instruments of generality, it did so with the following language:

> Even assuming § 369(3) to be applicable, the court properly retained jurisdiction under it only in so far as necessary to carry out its provisions and the terms of the arrangement . . . . The court, however, was without authority to exercise a continuous and active control over the conduct of the debtor's business . . . . Unless required, therefore, by the terms of the arrangement or the court's order, it seems clear that the court's stamp of approval was not essential to the validity of the sale of the debtor's assets.[68]
>
> . . . .
>
> But even if this interpretation is incorrect, retention of jurisdiction, at least under the circumstances of this case, should still be operative only to insure compliance with the terms of the arrangement and the statutory provisions, not to pass on all details of the debtor's business. 8 Collier on Bankruptcy, 14th Ed. 1941, 1246. When the court here retained jurisdiction, § 377 authorized it to intervene upon any default in the terms of the arrangement and either to dismiss the proceedings or to adjudicate the debtor a bankrupt, 8 Collier on Bankruptcy, 1246, 1247; but until that time its function is essentially one of, at most, watchful waiting. See In re Hession, 7 Cir., 97 F.2d 902, 904. Its consent, therefore, was not a prerequisite to the validity of the contract entered into pursuant to the express terms of the arrangement.[69]

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67. A curious sidelight is that it was neither Friedman nor the referee who molded this argument. It was invented by the district judge as the case passed him on its way up. *Id.*
68. *Id.* at 294.
69. *Id.* at 295.

The court had been confronted with a fairly novel question. With nothing much to go on, it was required to articulate a response to the district judge's theory and to rationalize its decision to protect the hapless Seedman. It had no authority on which to rely except the conclusions of *Collier on Bankruptcy*, which itself had no authority but the veneration customarily accorded it.

The result was undoubtedly correct—and fair, to boot. Since then, however, Judge Clark's words and the authority of *Collier* and *Seedman* have spawned a theory which has come to be widely recited and little questioned. Some expansive thoughts uttered to abstract Mr. Seedman from a technical vise have without fault of their own been dressed as general principles. An epistle masquerades as gospel, and few stop to recall the facts of the case or to remember that the conclusions applied "at least under the circumstances of this case."[70]

The biggest villains are lack of foresight by the parties and the resulting lack of drafting. The court in *Ohio Builders*[71] had only the most general words to work from. Its progeny, *In re Patton Manufacturing Co.*,[72] was no better. *Seedman* was some improvement, for the contract of sale was made with an eye to specific provisions for it in the plan. The words fell short, however, of specifying whether the post-confirmation debtor (or as was the fact there, a post-confirmation creditors' committee) did or did not require the court's permission to contract with Seedman. The problem: little foresight and less drafting. The answer: the parties, not the court, should wrestle the ambiguities and define the court's role in the post-confirmation period.

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70. *Id.* For example:

> Once the order of confirmation has been entered, the debtor-in-possession ceases to exist as such and the property and business revert to the debtor. The court may no longer exercise jurisdiction over the operation of the business. Although the debtor's plan may include a provision for reservation of jurisdiction, such jurisdiction is only for the purpose of carrying out the terms of the arrangement, *Seedman v. Friedman*, 132 F. (2d) 290 (2d Cir. 1942).

A. HERZOG, S. LOWE & J. ZEIBEL, ARRANGEMENTS UNDER CHAPTER XI THE BANKRUPTCY ACT 25 (1968).

It is just not so. *See, e.g., In re* Gelardin, Inc., 41 F.Supp. 17 (E.D.N.Y. 1941), which clearly identifies the problem. If the language of retention is general, the *Seedman* result will obtain. If the plan specifically provides that operation of the business will be subject to the court's control, such provisions are valid and will be respected.

71. *See* text at notes 61-63 *supra*.

72. *See* note 63 *supra*.

In general, however, parties negotiating the terms of a plan seem to fall short of realizing upon the opportunities presented them. Also in general, the courts which are left to supply answers to questions which the parties did not think about will struggle to conclusions both unpredictable and on occasion satisfactory to no one.

In re California Eastern Airways, Inc.,[73] was a case which produced a problem in spite of what appears to have been some rather thorough thinking. At the outset of the proceedings, the debtor secured the normal orders granting injunctive relief, continuing the debtor in possession, and authorizing it to operate the business.

The plan and the order by which it was confirmed, while not altogether consistent with each other, provided between them that the court would "retain jurisdiction over the Debtor and all its properties until all provisions of the Modified Plan were performed."[74] In addition some provisions of the original protective orders were to be continued in force, including particularly those providing injunctive relief. Some two and one-half years later the plan had been consummated, and a final decree was entered. During that time the debtor had routinely sought permission of the court "when it sought to transact any corporate business of major importance or to dispose of corporate property . . . ."[75] There was one exception, and that was the adoption by the debtor of an incentive profit sharing plan for the benefit of its executives. Authorizing resolutions were adopted before consummation by the debtor of all its undertakings under the plan of arrangement. Payments, however, were made only after consummation although before the estate was closed.[76] Disgruntled shareholders sought to hold the debtor in contempt of court for violating the terms of the order entered at the outset of the proceedings by which the debtor was continued in possession, authorized to operate the business, and made in all respects subject to the control of the court.[77]

73. 97 F.Supp. 847 (D. Del. 1951).
74. *Id.* at 848.
75. *Id.*
76. This demonstrates the temporal sequence of "consummation" and "final decree."
77. They clearly felt that executives were feathering their own nests with dollars which might have become dividends. Derivative litigation was already pending in the state courts. There is no indication that the debtor raised the possibly determinative question as to whether shareholders of a corporate debtor in Chapter XI have, as such, standing independently to intervene, much less to move for a contempt citation after all the creditors have been paid off pursuant to the plan.

Sorting out the provisions of the plan of arrangement and the provisions of the original protective orders incorporated in it, the court concluded that the inclusive provisions for court supervision to which the debtor was subject between its original petition and the confirmation were not, in fact, carried over into the post confirmation period.

At that point the case was effectively decided:

(1) Neither the plan, the order confirming it, nor both of them taken together could be construed to have placed the debtor under the same degree of supervision to which it was subject prior to confirmation.

(2) The actions for which the debtor was sought to be held in contempt were not in fact taken until after consummation of the plan, notwithstanding that its directors had adopted authorizing resolutions prior to such consummation.

In short, the case was decided without further exploration of the degree of retained jurisdiction which might or could have been applicable.

The court nevertheless proceeded to soliloquize for publication. Although it had not been necessary, the debtor had still bothered the court for approval of innumerable transactions occurring between confirmation and consummation.[78] The whole experience became a retrospective annoyance. Furthermore, the only thing of import which the debtor did not present to the court for approval was the controversial profit sharing plan. That seemed downright sneaky.[79] As in *Seedman*, the general pronouncements for which the case is cited have little to do with the facts or with the specific basis for the decision.

78. 97 F. Supp. at 850:

> It is true as petitioners argue that on numerous occasions when Debtor sought approval for some of its actions from this court, Debtor recited in its petitions that its action was taken "subject to the approval of this court." On this basis the petitioners assert that Debtor should not be allowed, now, to repudiate its former position that at all times its activities were subject to the control of the court. Even though Debtor may have thought this court had jurisdiction, if in fact this court did not have jurisdiction over all the acts of the Debtor but only jurisdiction as limited by its policy of "watchful waiting", the mere belief of Debtor and its acts in reliance on that belief would not be sufficient to confer jurisdiction on this court where otherwise it would not have jurisdiction.

79. The court expends three columns of Federal Second chastising debtor and counsel for being less than exhaustive in disclosing corporate action which the court has just decided was none of its business in the first place. *Id.* at 851-52.

The line of cases under *Seedman* includes *North American Car Corp. v. Peerless Weighing & Vending Machine Corp.*[80] This case is likewise popular for certain broad language:

> We have had occasion before to deplore the tendency of District Courts to keep reorganized concerns in tutelage indefinitely by orders purporting to retain jurisdiction for a variety of purposes, extending from complete supervision of the new business to modifications of detail in the reorganization. See Clinton Trust Co. v. John H. Elliott Leather Co., 2 Cir., 132 F.2d 299; In re Flatbush Ave.-Nevins St. Corp., 2 Cir., 133 F.2d 760; Seedman v. Friedman, 2 Cir., 132 F.2d 290. Since the purpose of reorganization clearly is to rehabilitate the business and start it off on a new and to-be-hoped-for more successful career, it should be the objective of courts to cast off as quickly as possible all leading strings which may limit and hamper its activities and throw doubt upon its responsibility. It is not consonant with the purposes of the Act, or feasible as a judicial function, for the courts to assume to supervise a business somewhat indefinitely.[81]

Such language by a court of appeals is enough to chill the spine of any subordinate judicial officer. Again, the facts indicate that the evil responded to was judicial megalomania rather than overreaching by the drafters of the plan. The provisions for retention of jurisdiction were extremely general, extremely broad, and not part of the plan. The district judge invented them all by himself.[82] As if that weren't

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80. 143 F.2d 938 (2d Cir. 1944). The proceeding was under Act of June 7, 1934, ch. 424, § 1, 48 Stat. 912, precursor of Chapter X.

81. 143 F.2d at 940.

82. *Id.* at 939:

> *This order* stated that the court "expressly retained" jurisdiction over the debtor companies "for all purposes" until the final determination of the court as to all claims against the debtors and the payment of such as were allowed, and until Peerless should have reported consummation of the plan and "have secured the final decree or order of this Court concluding these proceedings and closing the case." It further reserved "full right and jurisdiction to make from time to time such orders amplifying, extending, confirming or otherwise modifying this order and all other orders hereinbefore entered herein as to this Court may at any time seem proper." Accordingly, by order of December 31, 1937, the time for exchange of bonds for stock in Peerless was extended until July 1, 1938. (emphasis added)

enough, the relief to which such retention was essential was extreme.[83]

Somewhere, sometime, everything must end; *North American* does not in fact deny effect to specific provisions for the retention of jurisdiction provided in the plan. It does upbraid the charity of a district judge whose indulgence of a tardy creditor prejudiced the rights of parties who had in the meantime changed position in reliance on the notion that a confirmed plan of arrangment meant what it said.

The courts are in business to do justice. Given a chance, they will most often muddle through to a fair result. While the point is that proper lawyering should obviate uncertainties about the court's post-confirmation role, it remains true that not everything can be foreseen.

Such might be said of the problem presented by *In re Pathe News, Inc.*[84] A plan was confirmed which provided retained jurisdiction in general terms: "the court shall retain jurisdiction pursuant to section 357(7) and 368 of the [Bankruptcy] Act."[85] The plan provided for the debtor to make monthly payments after confirmation to a creditor's designee for distribution on claims. The claims of three creditors were subordinated and were to receive no payment until all others had received the amounts provided under the arrangement. Just after confirmation, attorneys for the subordinated creditors applied to the court for enforcement of a statutory attorneys' lien against the allowed claims of their clients and such payments as might become available on them. The legal services were rendered in the arrangement proceedings.[86]

The referee's theory was that there was no jurisdiction, specifically because "there is no fund or res in the possession of the bankruptcy court or subject to its control to which the lien asserted by petitioners could attach."[87] The district judge reversed on the theory that the liens had attached prior to confirmation by operation of the New York attorney's lien statute, and that all the petitioners sought was the enforcement of those liens. The court did not take the

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83. *Id.* at 940: "We thus have before us the question whether a plan of reorganization shall be modified eight years after its confirmation to make provision for a claim which has been barred for over five years."

84. 276 F. Supp. 670 (S.D.N.Y. 1967).

85. *Id.* at 671.

86. Among respondents resisting the application were other attorneys seeking their own lien against the same claims, but for services which had no relation to the arrangement proceeding. They received short shrift. *Id.* at 674 n.3.

87. 276 F. Supp. at 671.

trouble to reconcile its conclusion to the referee's theory, as by suggesting that since the liens attached prior to confirmation, they therefore attached at a time when the debtor's property was thoroughly subject to the jurisdiction of the court.[88]

The court was quite practical and straightforward. The opinion recites that a court retains "a measure of jurisdiction"[89] after confirmation and before final decree, although that jurisdiction is limited. Completing this unfinished business could do no harm:

> No case has been called to my attention which holds that such a logical and sensible exercise of jurisdiction post-confirmation and pre-consummation is not authorized by the statute and I have found none.[90]

The result was simply that which was practical and fair. The court was forthright in saying so.

The *Collier* treatise proposes to be more theoretical, if not altogether oracular and definitive. There is, of course, no question about those situations in which the court retains jurisdiction as a matter of law, notwithstanding any provisions contained in a plan of arrangement, an order of confirmation, or the lack of such provisions. Beyond that, however, the treatise concludes:

> As a result of § 367(4), moreover, *it is clear* that even where retention of jurisdiction is provided for in the arrangement, the court does not continue to have all the jurisdiction it theretofore possessed, but that some of that jurisdiction is lost. It has the jurisdiction, already indicated, which it would have even if retention of jurisdiction were not provided for, and in addition it has only the jurisdiction specifically conferred by §§ 344 and 377. (emphasis added)[91]

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88. That approach would not hold much water either, since the liens were not sought against the debtor's property but, in effect, against money it had yet to earn. No consideration was given to the revesting provisions of Section 70i.

89. 276 F. Supp. at 672.

90. *Id.* at 673. The "Why not?" approach at work.

91. 9 COLLIER ¶9.29[2], at 369. The REMINGTON treatise, incidentally, is in perfect accord. It gets its ideas from Seedman v. Friedman, 132 F.2d 290 (2d Cir. 1942), which got its ideas from COLLIER. *See* 9 H. REMINGTON, BANKRUPTCY LAW §§ 3652 *et seq.* (6th ed. 1955). Skulking in each other's shadows, COLLIER and *Seedman* have hoodwinked lots of people who should know better.

The clarity consists of *Collier's* conclusion, not of any authority therefor. Section 367 (4), the touchstone proposed, reads:

> Upon confirmation of an arrangement —
>
> . . . .
>
> (4) Except as otherwise provided in Sections 369 and 370 of this Act, the case shall be dismissed.[92]

Far from being "clear," that provision appears to be the least understood and least understandable of any of the statutory provisions bearing upon the retention of jurisdiction.[93]

The *Collier* analysis operates on the maxim of *expressio unius est exclusio alterius.* The argument is that since Sections 344 (certificates on indebtedness) and 377 (continued proceedings for liquidation on default) are by their terms made applicable to cases in which jurisdiction has been retained, it must be that jurisdiction is not retained as to matters contemplated in other sections of the Act that do not contain such a reference.

The *Collier* argument proceeds:

> Even apart from § 367(4), *it does not seem that it was intended* that where jurisdiction is retained the court should continue to have all the jurisdiction which it possessed before confirmation. That result would mean, even if title to the assets had revested in the debtor, that the operation of the business would still be subject to the control of the court, that the debtor would require authority of the court to lease or sell his property, that new creditors could petition the court to direct the debtor to pay their claims, and that in general the debtor's estate would be administered the same as it is prior to confirmation. *It is not likely that such a result could have been intended after confirmation.* (emphasis added)[94]

To which the answer is, "why not?" No proscription of the statute or legislative history suggests that jurisdiction may not be retained for whatever purpose may be useful to the ends of the rehabilitation.

92. 11 U.S.C. § 767(4) (1970).
93. *See* discussion at notes 19 & 52 *supra.*
94. 9 COLLIER ¶9.29[2], at 371.

If the patient survives the operation it may be ill-advised if not irresponsible to deny him such post-operative and convalescent care as will contribute to his ultimate recovery. Indeed, the breadth and permissiveness of Section 357 seem to argue in favor of such liberality:

> SEC. 357. An arrangement made within the meaning of this chapter may include —
>
> (1) provisions for treatment of unsecured debts on a parity one with the other, or for the division of such debts into classes and the treatment thereof in different ways or upon different terms;
>
> (2) provisions for the rejection of any executory contract;
>
> (3) provisions for specific undertakings of the debtor during any period of extension provided for by the arrangement, including provisions for payments on account;
>
> (4) provisions for the termination, under specified conditions, of any period of extension provided by the arrangement;
>
> (5) provisions for continuation of the debtor's business with or without supervision or control by a receiver or by a committee of creditors or otherwise;
>
> (6) provisions for payment of debts incurred after the filing of the petition and during the pendency of the arrangement, in priority over the debts affected by such arrangement;
>
> (7) provisions for retention of jurisdiction by the court until provisions of the arrangement, after its confirmation, have been performed; and
>
> (8) any other appropriate provisions not inconsistent with this chapter.[95]

The key must be that all such things are provisions which the arrangement *may* include. The simple conclusion is that he who wants them had better include them — specifically and in detail.

The thesis re-enters: the *Collier* analysis and the difficulties encountered in the cases result not from the mandates or limitations of the statute or from such logic as may be inherent in the Chapter. They

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95. 11 U.S.C. § 757 (1970).

result from situations in which specific problems arise subsequent to confirmation which the courts must solve with no more guidance than a permissive statute and a few general words contained in the plan of arrangement.

Apropos Collier's position that express references to the retention of jurisdiction for some purposes (as in the case of certificates of indebtedness under Section 344) should be interpreted to mean that jurisdiction cannot be retained for other purposes, the conclusion might just as well be the contrary: the express references are by way of inclusion, rather than by way of limitation.

Thus, Section 363 pertaining to amendments after confirmation necessarily makes reference to a retention of jurisdiction. If it did not, there would be no way to distinguish between arrangements which, when once confirmed, are not intended to be susceptible of change and, on the other hand, those as to which the parties desire to preserve such flexibility. The special provisions of Section 387 are likewise necessary to deal with problems which are peculiar to amendments. The clearest illustration is the limitation on amendments where negotiable promissory notes have been delivered to creditors. The amendment will propose to alter rights fixed at the confirmation, and some provision is necessary to protect parties whose rights have accrued and to whom the debtor may be unable to give notice.

Similar considerations pertain in the matter of certificates of indebtedness. Section 344 has specific language stating that such certificates may issue after as well as before the confirmation. Absent that reassurance, it might well be doubted whether the courts would be willing to permit subordination of the interests of post-confirmation creditors (and, for that matter, the interests of pre-petition creditors) to further claims they had not bargained for.[96] Indeed, by expressly requiring court authority before new priorities may be created, the Act operates to provide the court's protection for then-existing claimants. Without the special wording of Section 344, it

96. This is to be distinguished from the problem now solved by Section 381, which permits the plan to decide the priority between pre- and post-confirmation debts in the event of subsequent liquidation. A provision in the plan gives warning before the storm. A certificate of indebtedness authorized after confirmation does not.

might be doubted whether the court could in fairness, or perhaps even with due process, further tamper with rights and priorities already once adjusted by a confirmation.

The ensuing section considers particular benefits and burdens which the parties to an arrangement might contract for themselves in the context of retained jurisdiction. The most significant of these will be the delineation of the role which the court thereafter is to play. The ideas advanced are intended as an exploration of the opportunities in general. The specifics necessarily depend on the needs of the case and the bargain which the parties reach. The premise is that there exists no reason why such things may not be done so long as they are agreed upon in the plan, beneficial to the rehabilitation, and not otherwise illegal, immoral, or excessively fattening.

III. THE WILDERNESS

Retention of Jurisdiction Where Specifically Contracted

A. The Power of Stay

> SEC. 314. The court may, in addition to the relief provided by section 11 of this Act and elsewhere under this chapter, enjoin or stay until final decree the commencement or continuation of suits other than suits to enforce liens upon the property of a debtor, and may, upon notice and for cause shown, enjoin or stay until final decree any act or the commencement or continuation of any proceeding to enforce any lien upon the property of a debtor.[97]

The temporal limit of the stays so authorized is the final decree. It is not the confirmation, the dismissal, or the consummation to which the duration of stays is limited. In the case of a "bootstrap" plan, wherein the debtor proposes to pay his debts out of the proceeds of future operations, a considerable period of time may elapse before a final decree becomes appropriate. There is no reason at all why the full injunctive powers of the court cannot be engaged to protect the objective until it is attained.[98] As is the practice in the period

97. 11 U.S.C. § 714 (1970).

98. For an inquiry into just how far these powers have gone, *see* Festersen, *Equitable Powers in Bankruptcy Rehabilitation: Protection of the Debtor and the Doomsday Principle,* 5 CREIGHTON L. REV. 221 (1971), 46 AM. BANKR. L.J. 311 (1972).

between the petition and the confirmation, there is likewise no reason that the court may not from time to time reconsider and modify its injunctive orders.

In re California Eastern Airways, Inc.[99] did just that. The basic issue was the extent to which the debtor's operation of its business between confirmation and consummation was or could be subject to the complete control of the court. Not directly questioned was a provision of the plan of arrangement that a general stay previously issued would, after confirmation, remain in full force and effect until the court might otherwise order. Indeed, its validity was assumed. The exact language of the order is set forth in the report.[100] It is all-inclusive.

A fair question is whether the continuation of such an order is effective to protect the debtor from every kind of suit, proceeding, and adverse activity existing or threatened from the time of the original petition through the entry of the final decree many years later, or whether the stay may operate only as to the activity of adverse parties arising out of claims or obligations which existed prior to the confirmation. That is, will the stay operate as to

(1) activity connected with claims arising prior to the petition and affected by the arrangement;

(2) activity connected with claims arising during the period of administration between the filing of the petition and the confirmation;

(3) activity connected with claims arising prior to confirmation which are not affected by the arrangement, such as claims of secured parties or claims which are not dischargeable;

(4) activity connected with claims arising subsequent to confirmation, or

(5) as to all or only some of the above?

Neither logic nor the Act suggests that there need be any limit. The possibility is raised that his own plan might provide a debtor an impenetrable cocoon of judicial power. If he will but use enough of the right words he becomes untouchable except by advance permission of the court.[101] The idea is not really so shocking when one considers that a debtor enjoys exactly that status during the period of administration prior to confirmation, which may extend for years.

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99. 97 F. Supp. 847 (D. Del.1951).

100. *Id.* at 848 n.2.

101. Persuading the creditors to accept such provisions is the easy part: anything that helps the debtor consummate his plan helps the creditors.

Why, then, may the plan not continue the protection? Apart from those provisions which Section 357[102] expressly enumerates as permissible, the outer limit of what a plan may contain is "any other appropriate provisions not inconsistent with this chapter."[103] Accordingly, the Ultimate Stay must find its parameters within the statute. In the case of Section 314, the key is discretion. The court "may," not "shall" issue the stays. It would seem, then, that while the debtor by his plan may authorize the court's continued resort to the stay powers, he may not require the court's discretion to be exercised in his favor.[104] In sum, all that is accomplished is to leave the courtroom door ajar. Depending on the judge, there is nothing very threatening about that.

The idea finds further support in the proposed new Chapter XI rules. Apart from making automatic those stays theretofore requiring paper and ink, Rule 11-44 expressly provides in subsection (b) that, except as otherwise "terminated, annulled, modified, or conditioned . . . the stay shall continue until the case is closed, dismissed, or converted to bankruptcy or the property subject to the lien is, with the approval of the court, abandoned or transferred."[105]

The proposition that full stay powers survive confirmation is buttressed by reference to Sections 14, 17, and 372.[106] Sections 14 and 17 contain the provisions for injunctive relief consequent upon a discharge, including particularly the mandatory injunctive relief added to Section 17 by 1970 amendments. Section 372 completes the picture with its provision for "a final decree . . . making such provisions, by way of injunction or otherwise, as may be equitable."[107] Since confirmation is equivalent to discharge,[108] Sections 14 and 17 in general operate with respect to pre-petition debts or those otherwise affected by the arrangement. Section 372 provides for the exercise of injunctive powers at the very last stage of the proceeding. That leaves Section 314 to assure the availability of injunctive relief not only up to

102. Bankruptcy Act § 357, 11 U.S.C. § 757 (1970).
103. *Id.* § 357(8), 11 U.S.C. § 757(8) (1970).
104. The same should apply to the general equity powers provided in Bankruptcy Act § 2a(15) (11 U.S.C. § 11(a) (15), 1970)) and the even more general powers contemplated by 28 U.S.C. § 1651 (1970).
105. "Dismissed" still plagues the analysis. Apart from that lingering reservation, the new rule reinforces the conclusion that the power of stay is not enervated by confirmation, although one could puzzle over the disjunctive "or" linking "closed," "dismissed," etc. Whichever comes first, or whichever comes last?
106. 11 U.S.C. §§ 32, 35, 772 (1970).
107. 11 U.S.C. § 772 (1970).
108. 11 U.S.C. § 771 (1970).

the time of confirmation, but in additon during the period between confirmation and the final decree.

It should also be observed that Section 311, which provides the court "exclusive jurisdiction of the debtor and his property, wherever located" likewise suggests no temporal limitation.[109]

B. Receivers, Trustees and Debtors in Possession; Avoiding Powers

The trustee, receiver, or debtor in possession is commonly regarded as the Bankruptcy Act fiduciary whose functions in a Chapter XI proceeding will commence at or about the time the initiating petition is filed and determine upon the confirmation, or as soon thereafter as he secures approval of his stewardship and accounts.

Nevertheless, the Act expressly contemplates utilization of such fiduciaries beyond confirmation. Section 357 (5) permits an arrangement to include "provisions for continuation of the debtor's business with or without supervision or control by a receiver or by a committee of creditors or otherwise . . . ."[110]

Section 372[111] contemplates that the final decree will close the estate and that it may at the same time be the occasion for discharge of the receiver or trustee. Section 344, referring to retained jurisdiction, provides for the court to authorize "the receiver or trustee, or the debtor in possession, to issue certificates of indebtedness . . . ."[112] Other provisions of the Chapter pertaining to the fiduciary likewise contain no indication of a limit on his useful life.[113]

It is the fiduciary to whom management of the business is entrusted during the period of administration, and it is he who must be authorized to operate the business, to seek rejection of executory contracts, to sell or lease property, etc.[114] It is he who is required to file reports with the court and to be directly responsible to it.[115] Since the fiduciary function may continue into a period of retained jurisdiction,[116] how can it be, as *Collier* maintains, that the court's

109. 11 U.S.C. § 711 (1970).
110. 11 U.S.C. § 757(5) (1970). *See* text accompanying note 58 *supra.*
111. 11 U.S.C. § 772 (1970).
112. 11 U.S.C. § 744 (1970).
113. Bankruptcy Act §§ 313, 332, 333, 337, 341-344, 11 U.S.C. §§ 713, 732, 733, 737, 741-744 (1970).
114. Bankruptcy Act § 313, 11 U.S.C. § 713 (1970).
115. Bankruptcy Act §§ 342 & 343, 11 U.S.C. §§ 742 & 743 (1970).
116. For additional reassurance, if any be needed, *see* United States v. Sampsell, 193 F.2d 154 (9th Cir. 1951).

jurisdiction over those functions must cease at confirmation?[117]

Again, it is one thing to suggest a limit on the court's jurisdiction where the plan provides nothing more than the general phrase that "jurisdiction shall be retained." It is quite another to imply that a plan may not by specific provision preserve the fiduciary's role. If it does, there is no reason the receiver, trustee, or debtor in possession may not retain all the special powers of the bankruptcy trustee.

In the case of a debtor in possession, the Act expressly provides that he shall have "all the title and exercise all the powers of a trustee appointed under this Act . . ."[118] It is on that basis, of course, that a debtor in possession pursues voidable preferences and fraudulent conveyances, and upon that basis that he may defeat for the benefit of the estate liens to which his property would otherwise be subject, had he not donned the mantle of the bankruptcy trustee.

The estate, through whichever officer it acts, may therefore seek recoveries for the benefit of creditors during the period of its administration prior to confirmation. This tends not to be done in practice, particularly where the debtor remains in possession.[119]

The debtor in possession is really the same fellow as the debtor, but with a different hat on. He will be motivated more to nurse his business and to work on his plan of arrangement than to exercise his newly granted powers to bring back into the estate assets or property with which he parted only very recently and at least somewhat voluntarily.

There are other factors. Recovery of a large preference may produce an irate transferee who becomes such a substantial creditor that he threatens to disrupt a successful vote on acceptance of the

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117. *See In re* Irving Elec. Supply Co., 41 F. Supp. 16 (S.D.N.Y. 1941), holding that a retention of jurisdiction of the debtor's assets meant that post-confirmation operations were those of the debtor in possession, who remained subject to the control of the court.

In another case the plan had a provision by which the "debtor specifically 'consents to the retention of the jurisdiction of the court, until the provisions of this arrangement, after its confirmation, have been fully performed.'" *In re* Kepp Elec. & Mfg. Co., 98 F. Supp. 51, 67 (D. Minn. 1951). The court concluded with no hesitation: "Thus, debtor remains subject to the jurisdiction of the bankruptcy court, to the same extent as was the case at the inception of his arrangement proceeding." *Id.*

118. Bankruptcy Act § 342, 11 U.S.C. § 742 (1970).

119. Under Section 342 the debtor will stay in possession unless someone takes affirmative steps to secure a receiver. Local practices seem to vary, with some courts being routinely partial to the appointment of receivers. The theory is that they will be more aggressive in investigating past management and seeking out recoveries. The practice is often that they are pals of the judge and cost more than they are worth. The debtor in possession, after all, works for free.

plan. Again, the transferee may be someone with whom the debtor desperately needs to do business in the future if his hopes of rehabilitation are to be rewarded. The same applies to a secured creditor who might be vulnerable to the exercise of trustee powers. Such is the case of the debtor's favorite banker, whose limited capacity for mercy should not be strained.

Creditors may feel that the efforts of all concerned, and the expenses which vary directly with those efforts, are best devoted to the debtor's rehabilitation. The basic bargaining dynamic is that the plan provide recoveries for creditors greater than or substantially equal to their prospects in liquidation.[120] If the plan is adequate, the creditors are motivated to let the debtor worry about recovering assets. So long as Section 391 suspends the running of statutes of limitation applicable to seeking recovery of pre-petition transfers, the creditors may bide their time and give the arrangement a chance.[121]

Depending upon the situation, of course, both the debtor and his creditors may elect to pursue selected recoveries, especially if there seem to be some easy pickings. That will be particularly true in the case of transfers without adequate consideration, as opposed to recoveries of preferential payments made on account of antecedent debts. In the former instance the estate can hope to bring in value which exceeds the cost of obtaining it. In the latter, the benefit is a function of the percentage to be paid on the claim created by the recovery. The higher the percentage, the lower the benefit.

Great opportunities for the plan of arrangement are thereby created. First, the creditors may bargain for a provision giving a receiver special authority to seek recovery on specific claims or to seek avoidance of specific liens or transfers, or to do such things in general, leaving the debtor free to operate his business. It may be provided that expenses of the battle be charged against sums otherwise promised to creditors, or that recoveries be pursued only if contingent fee arrangements with attorneys can be secured. The net proceeds of such efforts can operate to increase the creditors' recovery over that which they have otherwise agreed to accept, or to

120. That is the effective definition of "best interests of creditors" as it applies to the standards for confirmation. Bankruptcy Act § 366(2), 11 U.S.C. § 766(2) (1970). *See* Technical Color & Chem. Works, Inc. v. Two Guys From Massapequa, Inc., 327 F.2d 737 (2d Cir. 1964). *Cf.* United Properties, Inc. v. Emporium Dep't Stores, Inc., 379 F.2d 55 (8th Cir. 1967).

121. Bankruptcy Act § 391, 11 U.S.C. § 791 (1970). *See* Liman v. Bank of Nova Scotia, 337 F.Supp. 62 (S.D.N.Y. 1971), discussing this familiar phenomenon.

accelerate payment on long term commitments which the debtor will otherwise have to meet from future operations. On the other hand the debtor, particularly one who is a good negotiator, may sell a plan which fixes an upper limit on what creditors may recover and a generous period within which he is required to provide it. If he then retains sufficient jurisdiction to pursue the recoveries on his own, he might be rehabilitated in a hurry.

The retention of sufficient jurisdiction is essential to these ends. However the negotiations work out, it is also of utmost importance to creditors who accept a bootstrap plan that they preserve for the potential trustee in a superseding bankruptcy the opportunity to pursue recoveries on which they have temporarily waived action. If the jurisdiction is not retained, the opportunity is lost. Where jurisdiction is retained, however, the post confirmation fiduciary may proceed to his recovery.[122]

In re Kessler[123] involved the rather classic situation of a bank which took a chattel mortgage from a distressed debtor and was careless in perfecting it. The bank loan did not solve Kessler's problems, and within two months an involuntary proceeding was filed against him. Thereafter he converted the proceedings to Chapter XI and secured confirmation of a plan of arrangement. The plan contemplated that proceeds of the mortgaged chattels would be distributed to creditors if the bank's lien were invalidated.

Jurisdiction was retained "until all of the terms and conditions of said arrangement have been completed" and "for the purpose of hearing and determining such objections as may be filed to the claims of creditors herein."[124] The court proceeded to find a rather technical defect in the mortgage and concluded that jurisdiction was no problem:

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122. *See* Section 357 (11 U.S.C. § 757 (1970)) in general and subsection (8) in particular. The plan may include "any other appropriate provisions not inconsistent with this chapter." For some reason, however, the practical expedient of designating a special person to exercise the fiduciary powers of avoidance and recovery seems to be unavailable. *In re* Texas Consumer Finance Corp. v. First Nat'l City Bank, 365 F. Supp. 427 (S.D.N.Y. 1973) held invalid a provision of a plan which purported to assign a cause of action for a preference to the disbursing agent, as a designee of the creditors' committee.

The plan retained jurisdiction. It stated expressly that the debtor would be continued in possession, and it directly referred to the court's power to determine controversies between the estate and other parties: "After the confirmation of the plan we, therefore, have a debtor in possession, with the powers of a trustee to avoid preferences, and a specific retention of jurisdiction to prosecute actions for the recovery of preferences." *Id.* at 431. COLLIER was expressly discussed and rejected. *Q.E.D.*

123. 90 F. Supp. 1012 (S.D. Cal. 1950).

124. *Id.* at 1014.

> It is my opinion . . . that the bankruptcy court now has jurisdiction after confirmation of an arrangement under the present statute to hear and determine known claims to property remaining in its possession, regardless of whether the confirmed arrangement includes express provision for retention of such jurisdiction pursuant to §§ 368.[125]

Reliance on such overconfident judging is not recommended. One does best to be specific about just how much jurisdiction is and is not to be retained. At the very least, it may save the price of a lawsuit.

There are no lack of pitfalls. *In re Miske*[126] was a monument to bad drafting. An arrangement was confirmed, and jurisdiction was retained in the following language:

> 1. Petitioner to remain in possession and control of business, and is to be allowed limited credit in time and amount by creditors subject to periodic audit and approval of the Court.
>
> 4. Federal Court to retain jurisdiction until plan is fully executed or for such reasonable time as is necessary for the petitioner to demonstrate that the plan will be successfully executed.[127]

The debtor made his first payment under the arrangement and then defaulted, but not before he acquired for resale in his business two refrigerators and one washer

> on a "memo basis" upon the express understanding, entered into in good faith and openly, that title to such merchandise was to remain in the petitioner, Roth, and that in the event any of such merchandise was sold, the proceeds of such sale would belong to Roth.[128]

125. *Id.* at 1015.
126. 159 F. Supp. 677 (E.D. Wisc. 1958).
127. *Id.* at 678.
128. *Id.* at 679. The apparent size of the case may have had something to do with the quality of the drafting.

Liquidation ensued. The referee felt that the retention of jurisdiction was sufficient to continue Miske as a debtor in possession and officer of the court. Evidently impressed with the good faith of consignor Roth, the referee ordered reclamation.

The district judge, for his part, concluded that the language by which jurisdiction was retained was insufficient to preserve Miske's status as a debtor in possession. He further cited Section 70i[129] which, absent sufficient language in the plan to the contrary, revested title to the debtor's goods in the debtor, as distinguished from the debtor in possession. Since the debtor neither saw nor heard of the goods until after confirmation, it is not at all clear what Section 70i had to do with the goods in question. In any event, Miske was not an officer of the court and had none of the peculiar attributes of one.

The conclusion was truly remarkable. Since Miske was not an officer of the court, the property was not in *custodia legis*. In that event, the Wisconsin statute on consignments applied. The statute provided that title to consigned goods was deemed to be "in the consignee as to purchasers thereof and creditors of such consignee,"[130] unless the consignment was in writing and filed of record. Therefore, as to creditors of Miske, Miske was deemed to have title rather than consignor Roth. Roth was denied his reclamation, and the trustee wound up with three appliances the value of which most certainly was dissipated in the course of two appearances in contested proceedings.

The case is like a boomerang. If the plan had meant to continue Miske in the role of a debtor in possession, it seems the appliances would have been in *custodia legis*, and title to them protected in favor of Roth as against the trustees. Since title was in Miske in *propria persona* instead of Miske as officer of the court, state law gave the nod to the trustee.

If it was Miske's desire to protect post-confirmation credit grantors, he should have (1) explicitly provided that he was to continue as a debtor in possession, that is, a bankruptcy fiduciary, not just a debtor who happens to have regained possession of his assets, and (2) expressly deferred revesting of title as permitted by Section 70i.

Short of protecting Roth's title to the goods, Miske might also have provided post-confirmation creditors the complete priority which is permitted under Section 381.[131] Assuming sufficient assets remained

129. 11 U.S.C. § 110(i) (1970).
130. Wisc. Stat. Ann. § 241.26(2) (1957).
131. 11 U.S.C. § 681 (1970).

to cover administrative expenses of the ensuing liquidation and all the new, post-confirmation debt, Roth would have been made whole in that manner.

Roth, of course, had no one but himself to blame.

C. Executory Contracts

Somewhat more daring and less secure are suggestions that a plan might provide retained jurisdiction for the purpose of rejecting executory contracts.

It is elementary that executory contracts may be rejected with the court's approval as soon as the petition is filed.[132] It is also generally accepted that, as distinguished from proceedings in bankruptcy, the pendency of proceedings in Chapter XI has no necessary effect upon the status of executory contracts. They are not automatically rejected, nor does continuing performance automatically affirm them.[133]

The proposition that the plan of arrangement itself may provide for the rejection of contracts is likewise undoubted.[134] In that situation the rejection is a term of the plan. It does not occur and is not effective except upon confirmation of the plan.[135] Although there were in the past some deficiencies in the statute respecting the manner in which the non-debtor party to the executory contract might secure his remedy for the breach, there now exist few problems in that regard. The present Section 369 provides mandatory retention of jurisdiction until all claims filed in compliance with Section 355 have been disposed of.[136] Section 355 expressly excepts claims arising from the rejection of executory contracts from the requirement that all claims be filed before confirmation: "a claim arising from the rejection of an executory contract of the debtor may be filed within such time as the court may direct."[137]

132. Bankruptcy Act § 313(1) 11, U.S.C. § 713(1) (1970).

133. *See In re* American Anthracite & Bituminous Coal Corp., 171 F. Supp. 377 (S.D.N.Y. 1959); 8 COLLIER ¶3.15[6], at 227.

134. Bankruptcy Act § 357(2), 11 U.S.C. § 757(2) (1970).

135. *In re* Alfar Dairy, Inc., 458 F.2d 1258 (5th Cir. 1972), *cert. denied*, 409 U.S. 1048 (1973).

136. Bankruptcy Act § 369, 11 U.S.C. § 769 (1970).

137. Bankruptcy Act § 355(2), 11 U.S.C. § 755(2) (1970). *See also* Bankruptcy Act § 353, 11 U.S.C. § 753 (1970). Since the third party does not become a creditor until the rejection occurs, a series of problems arise as to his inability to participate in the negotiation of the plan which is to affect him and control the extent of his recovery. The case law tends to confusion, although much of it is obsolete since the enactment of present Section 355. Such nagging questions as persist are largely beyond the present scope of inquiry.

The challenge presented is to inquire whether and by what means a debtor may hedge his bets and reserve the right to reject executory contracts after the plan is confirmed. The plan would neither affirm nor reject particular contracts. It would simply retain jurisdiction allowing the debtor to make his decision at a later time. The advantages are self-evident.

The problems are readily identified by reference to *In re Grayson-Robinson Stores, Inc.*[138] The debtor was a party to a contract entered into before the proceeding commenced. One week before the debtor's arrangement was confirmed, it obtained an order to show cause why the executory contract should not be rejected. The return of the order to show cause, the hearing on it, the referee's decision, and his entry of an order permitting rejection extended over a period of nearly four months after the plan was confirmed. The district judge held that the referee had no jurisdiction to authorize rejection of the contract.[139]

Among the grounds was the proposition that, although the referee's order of confirmation purported to retain jurisdiction, the plan had no such provision and the referee could not on his own initiative cause sufficient jurisdiction to be retained.[140] The real problem, and the essence of the holding, amounted to a question of fairness. The debtor had not included the contract in question in its statement of executory contracts. So far as the report discloses, the other parties had no notice that the arrangement might affect them, and they had no opportunity to participate in its negotiation.[141] By the

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138. 227 F. Supp. 609 (S.D.N.Y. 1964).

139. *Id.* at 614-15.

140. *Id.* at 613-14.

141. The court dwelled on the insecurity by which the non-debtor party to an executory contract is threatened. Since the contract is subject to rejection he is a potentional creditor who, upon its rejection, will be affected by the plan (assuming that the plan says what happens to him if the contract is in fact rejected). On the other hand, prior to rejection, and prior to the proof and allowance of the resulting claim, he is not a creditor who is permitted to vote on the acceptance of the plan, or to be counted in the numbers from which the voting majorities are determined. *Id.* at 614. *See* Bankruptcy Act § 362(1), 11 U.S.C. § 762(1) (1970).

This should pose no particiular problem. Assuming the third party has adequate notice (which was not the case in *Grayson-Robinson*) he will have sufficient opportunity to participate in the formulation of the plan and the consideration of its confirmation. He is included at least in the category of "parties in interest," to whom notice must be given under Section 365 (11 U.S.C. § 765 (1970)). At the hearing on confirmation, if not before, he may present any valid objection, including particularly whether the manner of his treatment and its potential effect on other creditors may conflict with the requirement that the plan "is for the best interests of the creditors and is feasible." Bankruptcy Act § 366(2), 11 U.S.C. § 766(2) (1970).

A special situation exists with the arrangement under Section 361 (11 U.S.C. § 761 (1970)) which, because it "has been accepted in writing by all creditors affected thereby, whether or not their claims have been proved" **requires no voting**

same token, other creditors affected by the arrangement had no warning that they would have to share with new creditors created by the rejection.[142] Finally, the words used to define classes of creditors did not readily apply to creditors whose claims arose from contracts not yet rejected at confirmation.[143]

If the objective is to get the greatest benefit from the opportunity to retain jurisdiction, *Grayson-Robinson* stands as an excellent lesson in how not to go about it. Every problem existing there and every reason impelling the court's decision is susceptible of ready solution.

First, if the debtor is supposed to file a statement of his executory contracts,[144] he ought to do just that. He should take particular care to see that the parties to those contracts are on the mailing lists for all notices in the case.

His plan should state that jurisdiction will be retained for the express purpose, among others, of obtaining an order of rejection after confirmation.

The arrangement should also specifically provide for those who become creditors only in consequence of a rejection not finally decreed until after confirmation is secured. In this fashion the party to the executory contract and the other creditors whose ranks he may thereafter join will all be aware of that possibility and its consequences. Simple notice of this contingency should suffice. It creates no more uncertainty for creditors in general than is routinely created by disputed claims which, although filed before confirmation, may

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and no determination that the plan is for the best interests of the creditors and is feasible. If the plan contains a provision under which the non-debtor party may find his contract rejected, he ought readily to be deemed a "creditor affected thereby" under Section 361, since the plan proposes in effect to create an option for the debtor to put him in that category.

142. In such situations the existing creditors have to move over in the boat. This obviously happens when the consideration for a class of claimants is one lump sum which they distribute pro rata according to the amounts in which their claims are finally allowed. It likewise occurs in the case where the consideration for creditors is a fixed percentage recovery for each claim, and not all the consideration is to be provided in the deposit. In the first situation the other, pre-existing creditors get less, and there are difficult mechnical problems of delaying distribution, holding back part of the consideration, or making a distribution subject to recall. In the latter situation all creditors are promised the same amount, and there is no impediment to making distributions to creditors with allowed claims as soon as the payments are called for. The debtor, however, will increase his total burden when damages from the delayed rejection are allowed. Depending upon the economics of the particular case, that may or may not have a substantial effect on the fairness of the initial bargain and on the debtor's chances of being able to perform it.

143. Implicit but not discussed in the opinion was the conclusion that the commencement of proceedings looking toward rejection was not tantamount to rejection itself.

144. Bankruptcy Act § 324(1), 11 U.S.C. § 724(1) (1970).

be finally allowed only after litigation extending years beyond the confirmation.

The same considerations will apply where a debtor proposes to bide his time before deciding whether to seek rejection of a contract. That is, he has not rejected or begun proceedings for that purpose prior to confirmation. He further abstains from making rejection of a specific contract an express term of his plan. What he does may be either or both of the following:

(1) Specifically identify in his plan executory contracts then existing and not theretofore rejected, and provide that the court shall retain jurisdiction to consider such applications to reject as he may subsequently choose to present. Depending upon what is necessary or appropriate, the plan might describe what contingent future events will provide grounds for the rejection, a limit of time after confirmation within which any application must be filed, and other details. He should further state just what consideration will be forthcoming for the party who becomes a creditor in consequence of the deferred rejection.[145]

(2) Provide in similar detail that, between confirmation of the plan and the entry of the final decree, the debtor will have the prerogative of rejecting any contract to which he is a party whether it was entered into before the petition, after the petition and before the confirmation, or even after the confirmation and before the final decree.

The last suggestion seems almost outrageous. Commerce becomes one way, and the debtor becomes a most favored citizen whose friendly bankruptcy court will give him every unfair advantage he asks for.

The first thing to remember is that a debtor in a rehabilitation proceeding has many of those characteristics to begin with. Utilities may not shut him off for nonpayment of old bills (as they do everyone else),[146] banks find themselves with their sacred rights of setoff

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145. As to the new creditor's equality with creditors existing at the time of confirmation, such a plan might simply provide that the price of a deferred rejection is new money. The debtor must provide enough new consideration to make the new creditor equal to existing creditors of the same class. If that is to be the case, one might argue, there is no need for such complication: the debtor is going to have to buy off the other party and does not need the mechanics of the Act for that purpose. Quite the contrary, it may be extremely important for the debtor to restrict this new creditor to the same low percentage recovery he has provided others, and to secure the ceiling which the Act provides on the allowable claims of landlords. Bankruptcy Act § 353, 11 U.S.C. § 753 (1970).

146. *In re* Arel, Inc., No. 63B 666 (E.D.N.Y. 1963), *reported in* 38 REF. J. 27 (1964), freezing the telephone man at the shutoff switch.

shattered and discarded,[147] secured creditors receive no payments and repossess no collateral,[148] and it may be somewhere between a long time and forever before unsecured creditors see a nickel.

Accordingly, to the extent that such extreme coddling is necessary to secure the rehabilitative objectives of the Act, there seems to be no reason why it cannot be provided after, as well as before, the confirmation.

Additional support for the belief that the rejection of executory contracts can be carried out subsequent to confirmation lies in the express statutory provisions for the amendment of a plan of arrangement.[149] Nothing prohibits the plan as amended from containing a provision for rejection which the original plan did not. Assuming that the amended plan satisfies the requirements for confirmation, the job could be accomplished in that way.[150] There is also authority that a debtor who has once been denied rejection of a contract may still be able to secure that relief on a second try.[151]

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147. *In re* Penn Cent. Transp. Co., 453 F.2d 520 (3d Cir. 1972), *cert. denied* 408 U.S. 923 (1972), enjoining 142 banks from millions of dollars of set-offs.

148. *In re* Yale Express Sys. Inc., 250 F. Supp. 249 (S.D.N.Y. 1966), *rev'd and remanded*, 370 F.2d 433 (2d Cir. 1966), *aff'd*, 384 F.2d 990 (2d Cir. 1967). The opinions operated to deprive a thoroughly innocent secured party, successively, of payments on its debt, of reclamation of its collateral, of payments as for rent, and of faith in the Constitution. In the meantime, the debtor was driving the encumbered trucks into junk. The *Yale Express* cases were in Chapter X. Since the victims now under consideration are creditors with claims arising from rejected contracts, and their claims are unlikely to be secured, the extent to which Chapter XI limits the punishment of secured creditors is not a material inquiry.

149. Bankruptcy Act § 363, 11 U.S.C. § 763 (1970).

150. There may be room to argue that this procedure is not in fact available. Section 363 provides that a confirmed arrangement may be altered or modified "to the extent and subject to the limitations set forth in Section 387 of this Act." Section 387 provides that post-confirmation amendments may alter or modify the arrangement by changing the time of payment of deferred installments of the consideration, or by reducing the amount of such payments, or both. The language could be construed as authorizing no other type of amendment—*expressio unius* again.

Prior to 1958 the statute contained no authority for any amendment of confirmed arrangements (except in the case of fraud). Considering that the purpose of the 1958 amendment was to rescue rather than ruin a confirmed arrangement, this argument hardly seems in the spirit of the thing. COLLIER agrees. 9 COLLIER ¶9.10.

151. *See* 8 COLLIER ¶3.15[11], at 231. *Cf. In re* Roger Williams Bldg. Corp., 99 F.2d 212 (7th Cir. 1938). That may not be the case where a bankruptcy officer has previously taken affirmative action to adopt the contract. *In re* Wil-Low Cafeterias, Inc., 111 F.2d 83 (2d Cir. 1940). (Both cases were decided under Act of June 7, 1934, ch. 424, § 1, 48 Stat. 912, precursor of Chapter X).

The lesson here, of course, is that the potential creditor should insist on affirmative adoption at the time the rejection is first considered, or himself initiate proceedings for that purpose. *See In re* Greenpoint Metallic Bed Co., 113 F.2d 881 (2d Cir. 1940) and Mohonk Realty Corp. v. Wise Shoe Stores, Inc., 111 F.2d 287 (2d Cir. 1940) both holding that the non-debtor party may demand the debtor fish or cut bait.

A post-confirmation rejection presents some mechanical questions, such as how to separate the creditor's damage claim from obligations which may have accrued to him during the period of administration prior to confirmation and between the time of confirmation and the subsequent rejection. Similarly, if damages are determined over the remaining life of a long term contract now rejected, the debtor will have to be credited with his performance up to the time of the rejection, even though the rejection is considered a breach of the contract as of the date of the petition first initiating a proceeding under the Bankruptcy Act.[152] In any event, there seems no reason why those problems cannot be surmounted by adequate foresight and drafting and by the flexible remedies which a court of equity may fashion.

D. Self-Executing Limits; Priorities

In all these explorations three points must be kept in mind:

(1) The debtor has to sell his advanced ideas of post-confirmation powers to his creditors, or at least to the requisite majorities of them. They are generally able to look out for themselves, particularly since the advent of present Section 339 and the influential role it provides for committees of creditors.[153] Then, too, nothing sells like simplicity. These complications are hardly as marketable as the fifty cents, cash-on-the-line composition.

(2) Virtually all the extended prerogatives under consideration are subject to the discretion of the court which, by declining to exercise its powers, can put an abrupt end to situations which have become unfair or ridiculous. The court is not required to authorize certificates of indebtedness; it is not required to issue or continue stays; it is not required to permit the rejection of executory contracts at the debtor's whim.

(3) The debtor may find the Super Powers he proposes for himself suicidal. For example, the creditors may well refuse to accept a plan under which they risk issuance of post-confirmation certificates of

152. Bankruptcy Act § 63c, 11 U.S.C. § 103(c) (1970).

153. 11 U.S.C. § 739 (1970). The role of the creditors committee seems about to be enlarged. New Rule 11-29(c) will effectively amend Section 339(2) (11 U.S.C. § 739(2) (1970)) by permitting for the first time allowance of the committee's expense for agents, attorneys, and accountants whether or not an arrangement is confirmed. The creditors' lawyers no longer have to choose between selling out or starving.

indebtedness. If losses should occur, the creditors may have become so far subordinated that they will have no reasonable expectations of being paid the consideration promised in the plan or of receiving anything in a subsequent liquidation. The court can deny confirmation by finding the debtor's ambitious proposals to be not in the best interests of creditors, even though the plan promises to provide them recoveries much greater than their prospects in an immediate liquidation.

On the other hand, creditors might be enthusiastic about some of the debtor's ideas. Stays to protect him after confirmation are attractive. It is comforting to know he may escape bad deals by rejecting contracts. Still, the counterpoise is effective: so far as possible, the business community likes to believe that all pigs are equal, and that all parties have comparable legal rights and remedies. If the debtor is going to be a pig more equal than others, he may have great difficulty persuading anyone to deal with him. The seller of goods on credit may decline to do so if he knows that the buyer has available extraordinary means to escape collection efforts or to resist repossession. A third party may decline to contract with the debtor if he knows the debtor can avoid the contract with relative ease and impunity.

In short, the dynamics of business will regulate the abuse of post-confirmation powers. If the debtor overreaches, or if the court overindulges him, he may become that very lonely debtor who proceeds to a prompt and friendless liquidation.

In one significant area the Act expressly invites this kind of self-regulating phenomenon. Section 381[154] governs the conduct of a liquidation which may ensue where a plan has been confirmed and set aside, and the court orders that bankruptcy be proceeded with. Subsection 2 provides:

> [T]he unsecured debts incurred by the debtor after the confirmation of the arrangement and before the date of the entry of the final order directing that bankruptcy be proceeded with shall, unless and except as otherwise provided in the arrangement or in the order confirming the arrangement, share on a parity with the prior unsecured debts of the same classes, provable in the ensuing bankruptcy proceeding, and for such purpose the prior unsecured debts shall be deemed

154. 11 U.S.C. § 781 (1970).

> to be reduced to the amounts respectively provided for them in the arrangement or in the order confirming the arrangement, less any payment made thereunder . . . .

Accordingly, at the time the arrangement is originally negotiated, the debtor and his creditors will consider just how they want their world to look in the event the debtor's future comes to an untimely expiration. If the arrangement makes no express provision to upset the parities and priorities set forth in that section, a middle ground will have been taken between the interests of the creditors of the past and the creditors of the future. On the other hand, provision could be made that debts incurred after confirmation will have an absolute priority and will be paid (so far as the assets last) in full before the debts affected by the arrangement see a penny. The debtor who wants to maximize his creditworthiness is likely to prefer that approach.[155]

At the other extreme, the creditors may drive a hard bargain and insist not only that post-confirmation debts are subordinated to the debts affected by the plan of arrangement, but that no composition of their debts shall remain effective if the arrangement is set aside. In other words, the old debts are to be paid in full before the post-confirmation creditors receive a penny.[156] In that case, even though

155. As will the prodigal who wants to start spending big again.

156. There are notice questions. How can the new creditors be subordinated to old unsecured debts they are unaware of? It isn't fair. This is not, after all, the same situation as that in which a trade creditor loses out to a secured party whose interest was of record with the county clerk — even if the creditor neglected to check on it.

The answer is to make such a filing. Designate a nominee to act as "secured party" for the creditors affected by the plan, execute in his favor a security agreement covering everything, and file a financing statement. In the alternative, or at the same time, put appropriate cautionary language in the order of confirmation. Register the order in other federal courts as contemplated by Bankruptcy Act § 14g (11 U.S.C. § 32(g) (1970)) and proposed Rule 11-43(b).

The filings might just as well contain references to the continued availability of stay powers and rights to reject contracts. All this will minimize the chance that a court will later upset the apple cart in sympathy for an ingenuous post-confirmation creditor.

Note that Bankruptcy Act § 64a(1) (11 U.S.C. § 104a(1) (1970)) provides as a matter of law for certain priorities where a chapter proceeding aborts and bankruptcy is proceeded with. It is a pecking order of inverse chronological order, and applies only to costs and expenses of administration. That raises the question whether Section 381 "unsecured debts incurred by the debtor" after confirmation and before the order for liquidation are really the same thing as Section 64a(1) "costs and expenses of administration . . . incurred in the superseded proceeding . . . ."

the debtor may technically survive the operating table, he will be hit by a truck as soon as he leaves the hospital grounds.[157]

Section 381 says "why not?". Why not give the parties, who are presumably better businessmen than the judges, the framework within which to work out these questions in such fashion as they feel shall maximize the debtor's recovery of his health and the creditors' recovery of their money. The court in all events will remain available to take action as necessary.

E. Discharges

The nature of the plan of arrangement will control the question of the debtor's discharge. If the arrangement is by way of composition, in which the creditors are promised something less than the full amount of their claims, Section 14 c (5) will operate to bar another discharge in any proceeding commenced within the next following six years.[158] If, however, the arrangement operates only by way of an extension of time for the debtor's payment of his creditors in full, his confirmation will not exhaust his allotment of discharges.[159]

If, therefore, the debtor's plan offers something less than full payment, he will most certainly want to retain jurisdiction. The benefits are twofold. Assuming that he promises to pay more than he can deposit at confirmation, and further assuming that his good intentions exceed his performance, a retention of jurisdiction will make available to him the benefits of an amendment under Section 363[160] by which he can further reduce his obligations, get more time, or both. If nothing works out, the retention will likewise permit liquidation to proceed by virtue of Section 377.[161] Discharge will remain available.

One sensible answer is that Section 64a(1) will apply only where liquidation ensued before a confirmation was had; that Section 381 will apply, as it specifically contemplates, only where a confirmation did take place; and that the result is required by Section 302 because in this application Section 64 is "inconsistent with or in conflict with" the provisions of Chapter XI.

By this time it is probable that no one cares. The proceeding has been such a disaster that there is no money left for anyone, including the lawyers and the judges ("Referee's Salary and Expense Fund," as the Act will continue to denominate it). That brings things to a halt in a hurry.

157. With this prospect, the doctor may not release the patient: the judge will determine in advance that the plan simply is not feasible and will deny it confirmation.

158. 11 U.S.C. § 32(c)(5) (1970).

159. *In re* Thompson, 51 F. Supp. 12 (W.D. Va. 1943); 9 COLLIER ¶9.32[151], at 408.13.

160. 11 U.S.C. § 763 (1970).

161. *Id.* § 777.

As a practical matter, the availability of a discharge is not likely to concern a corporation. If the end comes within six years of a confirmation by way of composition, the remaining assets will still be liquidated for the benefit of creditors, and the undischarged corporation will consist of papers that no one looks at anymore. Absent some peculiar assets such as good will inhering in a name or tax loss carryforward which might be used to advantage, the principals of the undischarged bankrupt corporation can just as well go back in business with a shiny new corporation. Even then, permission for a name might be purchased from the trustee for a nominal sum or used without objection. The trustee has no use for it, and in the eyes of the corporate authorities, the original owner will shortly be deceased.[162]

Accordingly, a crafty corporate debtor might retain jurisdiction for the sole purpose of insuring that Section 363 amendments remain available to deal with future hard times. The retention will specifically exclude the possibility that default could result in proceedings for liquidation under Section 377. If a plan so drafted could be successfully bargained for, and if the selective effect of the retention survived later attack, the debtor would have the best of both worlds. Relief would be available if he needed it, but the creditors would be unable to secure a prompt liquidation on default. They would be required to begin a brand new involuntary proceeding and to bear the burden of securing an adjudication.[163] The debtor's leverage would be considerable. No authority has been discovered to indicate that such selective retention would be improper or ineffective.[164]

F. Certificates of Indebtedness, Securities, and Exemptions From Registration

One of the signal and increasingly attractive features of an arrangement is the opportunity for the debtor to effect the widespread distribution of his securities without the trouble, expense, or responsibility he would otherwise incur under the labyrinth of law and regulations administered by the Securities and Exchange Commission.

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162. Sooner or later the corporation will be executed by state authorities for its neglect of franchise tax payments, annual reports, or the like.

163. Bankruptcy Act § 3, 11 U.S.C. § 21 (1970). The possibilities are equally intriguing in the case of a wage earner or farmer who cannot be adjudged an involuntary bankrupt. *See* Bankruptcy Act § 4, 11 U.S.C. § 22 (1970).

164. *See* note 50 *supra*.

Most simply stated, the Act contemplates that the estate may keep itself alive by issuing certificates of indebtedness under the authority of Section 344[165] both before and after confirmation, and in addition that the debtor may contract to solve his problems by converting the unsecured indebtedness by which he is pressed into some form of long term interest which will provide him a more stable capital structure.

Thus in defining the "consideration" which the debtor will provide his creditors, the Act provides:

> "[C]onsideration" shall include evidences of indebtedness, either secured or unsecured, stock and certificates of beneficial interest therein, and certificates of beneficial interest in property . . . .[166]

Harmoniously, Section 356 provides:

> An arrangement within the meaning of this chapter shall include provisions modifying or altering the rights of unsecured creditors generally or of some class of them, upon any terms or for any consideration.[167]

The resulting opportunity is that by which the debtor may transmute an invoice into an investment.

To facilitate this end, the Act contains Section 393:

> SEC. 393. a. The provisions of section 5 of the Securities Act of 1933 shall not apply to—
>
> (1) any security issued by a receiver, trustee, or debtor in possession pursuant to section 344 of this Act; or
>
> (2) any transaction in any security issued pursuant to an arrangement in exchange for claims against the debtor or partly in exchange and party [sic] for cash and/or property, or issued upon exercise of any right to subscribe or conversion privilege so issued, except (A) transactions by an issuer or an underwriter in connection with a distribution otherwise than pursuant to the arrangement, and (B) transactions by a dealer

165. 11 U.S.C. § 744 (1970).
166. Bankruptcy Act § 306(2), 11 U.S.C. § 706 (1970).
167. 11 U.S.C. § 756 (1970).

as to securities constituting the whole or a part of an unsold allotment to or subscription by the dealer as a participant in a distribution of such securities by the issuer or by or through an underwriter otherwise than pursuant to the arrangement.

b. As used in this section, the terms "security", "issuer", "underwriter", and "dealer" shall have the meanings provided in section 2 of the Securities Act of 1933, and the term "Securities Act of 1933" shall be deemed to refer to such Act as heretofore or hereafter amended.[168]

In addition, Section 3(a)(10) of the Securities Act of 1933, exempts:

> Any security which is issued in exchange for one or more bona fide outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where the terms and conditions of such issuance and exchange are approved, after a hearing upon the fairness of such terms and conditions at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear, by any court, or by any official or agency of the United States, or by any State or Territorial banking or insurance commission or other governmental authority expressly authorized by law to grant such approval . . . .[169]

Just how far these provisions will stretch has to be the most fascinating question offered by the entire chapter. The inquiry outstrips present ambitions to explore the use and abuse of retained jurisdiction. It suffices to observe that proper use of retained jurisdiction will vastly increase the advantages offered by these ex-

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168. *Id.* § 793. Section 5 of the 1933 Act prohibits the use of instrumentalities of interstate commerce in connection with unregistered securities. 15 U.S.C. § 77e (1970).

169. 15 U.S.C. § 77c(10) (1970). Exemption at the state level will follow from exemption at the federal level, or will be provided by comparable provisions of state securities enactments. *See, e.g.*, NEB. REV. STAT. § 8-1111 (Reissue 1970) exempting:

> (6) Any transaction by an executor, administrator, sheriff, marshal, receiver, trustee in bankruptcy, guardian, or conservator;
>
> . . . .
>
> (14) Any transaction incident to a right of conversion or a statutory or judicially approved reclassification, recapitalization, reorganization, quasi reorganization, stock split, reverse stock split, merger, consolidation or sale of assets.

Interestingly enough, the Nebraska scheme does not have a provision exempting the security in these situations — only transactions.

emptions. Certificates of indebtedness may finance the debtor during the administration of the proceeding prior to confirmation. The plan may convert current trade debt into common stock or other securities. Thereafter, similar opportunities will remain in the debtor's grasp if he retains jurisdiction in such a manner as to preserve them without losing the applicability of the special provisions of the Act.

The readiest example is the instant availability of long term borrowings invited by the express applicability of Section 344[170] to certificates of indebtedness issued by a fiduciary subsequent to confirmation. That section, it should be noted, applies only to obligations of the receiver, the trustee, or the debtor in possession, and only upon advance permission of the court. It is therefore necessary that the existence of such a fiduciary be specifically assured by the terms of the plan of arrangement.

The exemption proceeds from Section 393 a(1) and applies to "any security" issued under Section 344. While "security" is one of the broadest terms encountered in the law,[171] "certificate of indebtedness" is among the most vague. Nowhere is it defined. The best guess must be that "security" will include "certificate of indebtedness," but that "certificate of indebtedness" must be a limited and specialized type of "security." The fundamental and antithetical notions of "debt" and "equity" may be expected to assert themselves.

However that may be, even a conservative view leaves one contemplating the wonders which can be accomplished by the availability of registration-free obligations with such pervasive priority. There seems no indication, for example, that a certificate of indebtedness may not be used effectively to create a class of long term debentures the maturities of which might extend well beyond the satisfaction of the debtor's obligations to his creditors and the date upon which he obtains his final decree. The debentures would have to be issued by the fiduciary with the court's authorization, but that is not to say they could not thereafter remain outstanding as obligations of the debtor.

Section 393 of the Bankruptcy Act says that the Section 344 security is exempt from the prohibitions of Section 5 of the Securities Act of 1933. Whether the evident statutory contemplation of exempting the security itself as opposed to an initial transaction in the same can be expected to survive the increasing sophistication of the law of

170. 11 U.S.C. § 744 (1970).
171. *See* Section 2 of the Securities Act of 1933, 15 U.S.C. § 77b(1) (1970).

securities regulation is a question simply asked but not answered. For present purposes the point is that a sufficiently specific retention of jurisdiction leaves open broad and long range opportunities.

Section 344 is limited to obligations of the fiduciary. Certificates thereunder will be issued for new consideration, that is, in respect of obligations arising subsequent to the commencement of the proceeding. The normal, simple case is that in which the estate borrows cash for current operating needs. By the same token it might issue certificates to pay for administrative expenses already incurred — the effect is essentially the same.

Consideration offered by the debtor to adjust his preexisting obligations is a different situation. Where that consideration is some form of security, it is Section 393 a (2) which applies. The exemption is made applicable to transactions rather than to securities.

At its simplest level the operation seems fairly routine. A debtor may bargain to exchange stock for claims and be reassured that his activity is protected from the penalties for engaging in an unregistered public offering of securities.[172] It is worth remarking that "claims" is a term of great breadth, and one wanting of definition. A "debt" *includes* a "claim" provable in bankruptcy.[173] "Debt" does not necessarily *exclude* any other sort of claim which may be one not provable in bankruptcy.[174] Moreover, in the case of arrangements providing for extensions rather than compositions,

> "debts" or "claims" shall include all unsecured debts, demands, or claims of whatever character against the debtor, whether or not provable as debts under § 63 of this Act and whether liquidated or unliquidated, fixed or contingent.[175]

Thus it would appear that securities exempt from registration may be issued in consideration not only of the provable debts subject to

172. Whether and to what extent the claimants who receive securities instead of dollars may be free to negotiate them remains a puzzle. *See* Salter, *Exemption of Securities From Registration Issued Under Chapters X and XI*, 76 COM. L.J. 6 (1971). The author finds no cases resolving the question, and suggests that the general rehabilitative purposes of the Act, together with the absence of any statutory prohibition, mandate exemption of the transaction between the original creditor and his transferees, presumably including successive transferees. *Id.* at 8.

The position appears perfectly sound, but it is open to speculation whether the SEC would share the orientation of insolvent people.

173. Bankruptcy Act § 1(14), 11 U.S.C. § 1(14) (1970).

174. *See* Bankruptcy Act § 63, 11 U.S.C. § 103 (1970).

175. Bankruptcy Act § 307(2), 11 U.S.C. § 707(2) (1970).

composition by an arrangement but, as well, to (a) such claims as may be other than provable debts under any circumstances and (b) obligations not provable but which are nevertheless to be extended under the terms of an arrangement providing for payment in full. That, for example, could very well involve expenses of administration for which a debtor would otherwise be required to deposit cash prior to confirmation.[176]

This inquiry does not aspire to exhaust the possibilities by which arrangements may exploit the exemptions from securities registration.[177] It does suggest the advantage to the debtor of maximizing the exemption by retaining jurisdiction so that securities may be offered at a time when his health is so far restored that a conventional offering by registration might look attractive. An example is the debtor who makes large but long term promises to his creditors and who is able to engineer his recovery ahead of schedule. With retained jurisdiction he might then offer to amend his plan by issuing securities in lieu of the remaining debt. Assuming his good health, he might achieve a classic objective of a public offering of securities: convert a debt relatively large into equity relatively small when expressed as a percentage of the pre-existing holdings which survive.[178]

One concedes, as in all things, that it is possible to go too far. Just where that first occurs is the quandary. Here is a suggestion.

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176. The process would be voluntary, just as the creditors' acceptance of an arrangement is voluntary, although subject to the tyranny of the majority under Bankruptcy Act § 362, 11 U.S.C. § 762 (1970).

As to obligations for which the deposit must provide, the Act already contemplates waivers by the persons entitled to payment. Bankruptcy Act § 337(2), 11 U.S.C. § 737(2) (1970). Someday the lawyers may own the debtor—literally.

177. A lesson in what cannot be done under these exemptions was taught in SEC v. Granco Prods., Inc., 236 F. Supp. 968 (S.D.N.Y. 1964). The essence of the arrangement was that principals of the debtor and others would sell stock to the public, using the proceeds to pay administrative claims and promissory notes issued to unsecured creditors. A preliminary injunction issued to restrain the goings-on because the securities transaction did not represent exchanges with existing creditors or security holders and the offerees were not parties who did or would have been permitted to participate in the arrangement proceeding. In a second cause of action the SEC made out a prima facie case of fraudulent representations in connection with the offering. Exemptions from registration do not extend to fraud under Section 17a of the Securities Act of 1933 (15 U.S.C. § 77q (1970)).

178. A potential stumbling block exists in the wording of Bankruptcy Act § 387, 11 U.S.C. § 787 (1970). Is the proferred amendment one which will "alter or modify the arrangement by changing the time of payment of deferred installments of the consideration, or by reducing the amount of such payments, or . . . both"? The amendment being considered might be argued to be one changing the character of the deferred consideration rather than its time of payment or amount and to be thus improper under Section 387. *See* note 150 *supra*.

A corporate debtor obtains confirmation of a plan of arrangement. The plan provides immediate payments to unsecured creditors from the debtor's deposit, and additional payments at fixed intervals over ensuing years. Apart from that business for which retention of jurisdiction is mandatory, jurisdiction is retained for limited purposes expressly delineated, such as granting relief in the event of default, supervising deposit and payment of the deferred consideration, enforcing release of liens by which the debtor offers security for the deferred installments, and entering a final decree.

Thereafter, an opportunity is presented for majority shareholders of the debtor to sell their common stock. The buyer insists on a tender offer designed to secure a minimum percentage of ownership and to make possible equal treatment of all shareholders who may elect to sell. The consideration proposed includes long term notes or other obligations classifiable as securities, the offering of which without registration or exemption would involve violations of the securities laws.

All principal interests like the deal. An approach is suggested whereby the buyer, the debtor, and its creditors' committee seek court approval of the stock transaction for the purpose of securing the exemption provided in Section 3 (a) (10) of the Securities Act of 1933.[179] There seems no question but that the section operates to exempt securities used in exchange transactions which are court approved. The problem:

(1) If the plan of arrangement has not retained sufficient and specific jurisdiction to entertain such an application, whether or not it is construed as an amendment to the plan,[180] the court which is asked to give the blessing contemplated by Section 3 (a) (10) simply will not have jurisdiction to do it.

(2) Section 393 of the Bankruptcy Act will not apply unless the plan preserves the existence of a fiduciary who might issue certificates of indebtedness, or unless the securities proposed to be ex-

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179. 15 U.S.C. § 77c(10) (1970).

180. The stock purchase agreement may involve using or restricting use of the debtor's assets to secure the purchasing shareholders' obligations to the selling shareholders. If that might conflict with limitations the plan imposes on the debtor's use of its assets until payments to creditors have been completed, the stock purchase agreement may have some characteristics of an amendment.

empted are issued in exchange for claims against the debtor.[181]

Even in this rather extreme example, however, there is room to argue that the court would have jurisdiction and that the exemption would therefore apply if only the plan had made a sufficient and specific retention. If the stock sale proposed to affect assets of the debtor, and if those same assets were subject to restrictions in favor of the creditors affected by the plan, it might be maintained that jurisdiction existed to the extent of permitting the court to ascertain whether the stock sale involved elements which might be urged as defaults in the performance of the arrangement. Even so, the question would remain whether the court's jurisdiction to entertain that limited inquiry would be sufficient jurisdiction to establish the exemption of Section 3 (a) (10). The best answer is in the negative: whether the selling shareholders' claims on corporate assets are antithetical to the claims of unpaid creditors has little if anything to do with an investigation of the security which the purchasing shareholders are offering to the minority selling shareholders. The protective spirit of the exemption is not honored. The pesky widows and orphans are in line for their usual comeuppance.

The situation just considered is not unlikely. Incompetence or fractiousness among dominant owners of the debtor may have contributed heavily to the failures which first brought it to the bankruptcy court. Spent in pocket and in spirit, the owners may be among the world's most avid sellers. At the same time, a successful arrangement may attract some of the world's most avid buyers. They are likely to want stock, since apart from the unitary value of a business presumably still viable, the debtor corporation can be expected to offer dramatic tax losses and considerable leverage in its debt to equity ratio.

A much safer approach, but one which may lack some advantages the buyers seek, is for them to buy assets, rather than stock. The deb-

181. There is little doubt on that score. A 1962 amendment to Section 393 expressly removed the italicized words from its language: "any transaction in any security issued pursuant to an arrangement in exchange for *securities of or* claims against the debtor . . . ." Pub. L. No. 87-681, § 16, 76 Stat. 570 (1962). *See* 9 COLLIER ¶12.03, at 656-59 describing as background that since an arrangement is to affect only unsecured creditors, the SEC proposed to eliminate any reference to exchanging securities, lest the suggestion remain that the arrangement and the exemption applicable to it could be used to modify the rights of security holders, rather than those of unsecured creditors only. *Cf.* SEC v. Bloomberg, 299 F.2d 315 (1st Cir. 1962), where a Chapter XI debtor transfered its case to Chapter X for the very reason that Chapter XI did not permit a registration-free exchange of securities with existing shareholders.

tor's assets could be paid for with the buyers' stock or other securities, which could then be held by the debtor or distributed by it in satisfaction of the creditors' claim. This result will obtain because the exemption of Section 393 applies to "any security issued pursuant to an arrangement in exchange for claims" and is not thereby limited to securities of which the debtor is the issuer.

The possibilities are endless. The requirements for their exploitation are creativity, temerity, and the proper use of retained jurisdiction.[182]

G. *Etc.*

Once the debtor decides to retain jurisdiction and to venture into a brave new world of his own drafting, there are a host of problems and opportunities to be considered.

To them apply the same general rules and dynamics as apply to the matters already considered. A partial inventory is suggested.

During the debtor's post confirmation convalescence it may be appropriate to provide not only for his continued protection by the powers of stay, but for any one or more of the sorts of limitations which a well-drawn loan agreement will contain. These will include restrictions on how the debtor may deal with his assets, limitations upon the amount of new indebtedness he may incur, a ceiling on the compensation of his officers and directors, requirements for working capital ratios, and the like.

To the extent that jurisdiction is retained at all, it should certainly be retained for the purpose of securing rulings on any disputes about the construction of the terms of the plan itself. This will apply not just to construing the existence or absence of a default which could trigger adjudication, but as well to securing a determination of other matters pending between the debtor and any third parties.

If jurisdiction is retained, it is likely that creditors will wish to maintain the existence of their committee. Effective functioning of the committee entails the assistance of attorneys, accountants and

182. To which might be added "discretion," or some assurance that the SEC is not watching. *See* Corotto, *Debtor Relief Proceedings Under the Bankruptcy Act and the Securities Act of 1933: The Registration Requirement and Its Implications*, 47 AM. BANKR. L.J. 183 (1973). The author, an SEC attorney, explores the same questions posed here and finds few firm answers, except the possibly overconfident conclusion that the bankruptcy exemptions are strictly transactional, notwithstanding some apparent clear language in the Act to the contrary.

other agents, just as in the period culminating with acceptance and confirmation. If the creditors insist the debtor pay for the professionals' compensation, the debtor will want that compensation to be payable only upon application to and allowance by the court. At the very least, if the debtor is foolish enough to finance the enemy's troops, he will want recourse to the court if he has cause to complain of the expenses. The creditors for their part may want similar provisions by which to govern the debtor's past confirmation generosity with his professionals.[183]

The plan might well contain provisions for the re-examination of claims which have been allowed. It may often happen that in the press of other problems a debtor or fiduciary will allow claims by mistake, or claims to which it is subsequently discovered a defense exists.[184] A retention of jurisdiction should make possible the court's continuing exercise of its summary powers to re-examine the claims[185] and, having done so, to order the return of consideration which may have been erroneously paid.

To the extent that jurisdiction is retained with express provisions for the continuation of the bankruptcy fiduciary, there is no reason why the business may not be operated subject in all respects to the control of the court, just as it was operated prior to the confirmation. It is Section 343 which provides authority for the operation of the business during the proceeding, and it contains no time limits upon the useful life of the fiduciary:

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183. A related problem is evidenced by *In re* A. Roth Co., 128 F.2d 428 (7th Cir. 1942). Insufficient jurisdiction was retained to permit adjudication upon default pursuant to Section 377. The debtor was adjudicated in a new proceeding. The court had jurisdiction to allow fees to the debtor's attorney for pre-confirmation services in the "superseded" arrangement proceeding, but not to allow any priority to the claim for services in the period between confirmation and the filing of the petition in the subsequent bankruptcy. *In re* G & G Appliance Co., 197 F. Supp. 844 (D. Conn. 1961) memorializes another mistake. The debtor's attorney did everything he could to advance his client's interest. He even waived his right to be paid from the deposit and agreed to take $25 a week instead. As luck would have it, the deposit produced a surplus. Honorable counsel applied to be paid from that surplus and found himself a party adverse to his own (and one presumes former) client. The jurisdiction retained did not suffice. The lawyer was not paid. Said Judge Blumenfeld of such attorneys, "the bed they made for themselves they should lie in." *Id.* at 847, *quoting In re* Frischknecht, 223 F. 417, 420 (2d Cir. 1915). Caveat counsel.

184. *See In re* WNCN, Inc., 246 F. Supp. 30 (S.D.N.Y. 1965). The post-confirmation debtor was confronted with a government claim for penalties upon a tax which had been proved, allowed and paid under the plan. In addition to holding that the penalty, as part of the tax, was non-dischargeable (although not provable) the court held that the absence of sufficient provision for retention of jurisdiction left it unable to entertain the debtor's application.

185. *See* Bankruptcy Act § 2a(2), 11 U.S.C. § 11(a)(2) (1970).

> Sec. 343. The receiver or trustee, or the debtor in possession, shall have the power, upon authorization by and subject to the control of the court, to operate the business and manage the property of the debtor during such period, limited or indefinite, as the court may from time to time fix, and during such operation or management shall file reports thereof with the court at such intervals as the court may designate.[186]

The creditors are likely to prefer a receiver who gives some accountings over the debtor who got them there in the first place.

Other opportunities are implicit in areas already discussed, such as the continued use of stay powers to protect a business swimming upstream toward sanity.[187]

IV. THE NETHER REGIONS

Caveat

Whatever situations may arise, and whatever advantage is proposed to be taken of retained jurisdiction, the thesis remains in all events that discretion lies with the court to prevent abuses and absurdities. Virtually all the statutory bases upon which a court may act

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186. 11 U.S.C. § 743 (1970). The proposition is reinforced by other sections expressly recognizing the existence of a post-confirmation fiduciary, *e.g.*, Section 344 (11 U.S.C. § 744 (1970)), pertaining to certificates of indebtedness. *Cf.* Texas Consumer Finance Corp. v. First Nat'l City Bank, 365 F. Supp. 427 (S.D.N.Y. 1973).

187. It is difficult to conceive worthy opportunities for employing a plan of arrangement, with or without retained jurisdiction, to manipulate tax consequences. Sections 395 and 396, (11 U.S.C. §§ 795 & 796 (1970)), protect the debtor from income tax disasters consequent upon having to pay tax on the income realized by the reduction of indebtedness effected in a plan which operates by way of composition. To prevent the debtor from obtaining a double tax benefit in the situation where his property sells after confirmation for less than its basis but more than its value determined at the time of confirmation, Section 396 provides that the post-confirmation basis of a debtor's property is equal to the greater of (1) its market value at confirmation or (2) its basis in the debtor's hands reduced by the amount by which the debtor's obligations have been reduced or cancelled in consequence of the plan. This effectively prevents a debtor from tacking a capital loss to a tax-free forgiveness of indebtedness.

Fertile minds may construct a plethora of schemes by which these provisions could be manipulated to produce some startling tax benefits, such as by discharging debt with securities representing equity interests and providing artificial values for the equity securities. No matter how indulgent the bankruptcy court and all others might be of such inspired self help, the Secretary of the Treasury has the ultimate weapon: "*Provided, however,* That if it shall be made to appear that the arrangement had for one of its principal purposes the evasion of any income tax, the exemption provided by this section shall be disallowed." 11 U.S.C. § 795 (1970). One can debate "evasion" and "avoidance"; but sooner or later, the jig may be expected to be up. Still, proponents of the "Why not?" school may think some discreet manipulation worth a try. It might succeed; at worst, it will be a draw.

where jurisdiction is retained are couched in permissive language. While the debtor may include any number of provisions for retained jurisdiction in his plan, exercise of the powers thereby preserved to the court remain discretionary with it. The court may or may not elect to exercise those powers. It may determine that its jurisdiction is lacking or, more frankly, admit that it voluntarily abstains.[188]

Thus, *In re Mountjoy*[189] found pre-petition creditors litigating the bankrupt's fraud in the state courts. Their grounds made dischargeability a matter of the exclusive jurisdiction of the bankruptcy court.[190] The court declined to grant the bankrupt's application for protection, and permitted the state court actions to proceed. Referring to exclusive jurisdiction under the 1970 amendments, the court held:

> However, this legislation did not divest the bankruptcy courts of the discretion, absent special and unusual circumstances, to refrain from ruling on the dischargeability of a specific claim then in issue in a state court proceeding.[191]

The courts, quixotically enough, may decide that they have jurisdiction just sufficient to excuse themselves from the battlefield.[192]

Goggin v. Bank of America National Trust & Savings Association[193] effectively establishes the point:

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188. Local Loan Co. v. Hunt, 292 U.S. 234 (1934), holding that the bankruptcy court had "ancillary" jurisdiction to protect a discharged bankrupt from collection efforts by a creditor holding a wage assignment still valid by state law. The court, however, continued:

> It does not follow, however, that the court was bound to exercise its authority. And it probably would not and should not have done so except under unusual circumstances such as here exist.

Id. at 241.

189. 368 F. Supp. 1087 (W.D. Mo. 1973).

190. Bankruptcy Act §§ 17a(2), (4) & (8), 11 U.S.C. §§ 35(a)(2), (4) & (8) (1970).

191. 368 F. Supp. at 1096. The statute in terms provides for exclusive jurisdiction. How much easier is it, then, to decline action when the parties' plan, rather than the Congress, has made the rules.

192. *See In re* Scranton Corp., 235 F. Supp. 770 (M.D. Pa. 1964) where a Chapter X court determined it had jurisdiction to enjoin Tax Court proceedings against two non-debtor subsidiaries. The subsidiaries' profits could be offset by the debtor's losses through the use of consolidated returns. That made the losses "property of the debtor" over which the court had exclusive jurisdiction. The court then declined to exercise that jurisdiction, and let the Tax Court do the work, because its resolution of the issues would be convenient, expeditious, and not disruptive of the parent's reorganization.

193. 186 F.2d 158 (9th Cir. 1951).

> The amended plan purported to reserve to the bankruptcy court the general jurisdiction which it would have had if the debtor had been adjudicated a bankrupt. Similarly, the plan purported to reserve to the receiver all the rights he would have had in the event he had been appointed trustee in bankruptcy.[194]

The issue was whether jurisdiction had been retained by which the court might subordinate a claim allowed prior to confirmation. Reading Section 368 and the plan together, the court concluded that it did in fact have that jurisdiction. It then declined to use it by searching out another ground on which to deny the relief requested. The courts themselves will prevent abuses of their jurisdiction. A reluctant dragon thwarts the most ambitious knights.

> There are more things in heaven and earth, Horatio,
> Than are dreamt of in your philosophy.[195]

194. *Id.* at 159.
195. Shakespeare, *Hamlet,* I, v, 166.