WHERE DID CHAPTER 13 COME FROM AND WHERE SHOULD IT GO?*

TIMOTHY W. DIXON** AND DAVID G. EPSTEIN***

"Birmingham, Alabama." That is our short answer to the question "where did Chapter 13 come from?"[1]

The bulk of this paper is a more detailed answer to that question.[2] And (to state

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* Our choice of title was inspired by either (1) the title of Bruce Markell's program for the Association of American Law Schools Debtor Creditor Committee (Symposium 100 Years of Bankruptcy: Looking Forward by Looking Back. 15 Bankruptcy Developments Journal 2543 (1999)) or (2) more likely, the words of "Cotton Eyed Joe," *available at* http://www.whitegum.com/introjs.htm?/songfile/COTTONEY. HTM.

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*** Charles. E. Tweedy. Jr. Chair in Law, University of Alabama Law School. Generally, I prefer to work with people whose last names begin with a letter that comes after "E" in the alphabet so that my name will appear first in the article or on the book. Even if Professor Dixon's last name was "Zelmo Zzzzzip" which is the last name in the 2002 Manhattan Verizon Super Pages, it should come first in this article. Tim did most of the work; Tim did the best of the work.

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The authors would like to note they completed their work on this paper on October 1, 2002. And up until October 1, 2002, every attempt was made to locate the Congressional papers of Congressman Walter Chandler. They are not located in any known collection. Chandler's son, Wyeth Chandler, contacted in the Spring of 2000, believed the papers were left in Washington, D.C. when Chandler left office in 1940 to become Mayor of Memphis, Tennessee. They could not be located in any national collection. Chandler's mayoral papers are preserved in the Memphis Shelby County Public Library. The person responsible for those papers, Wayne Dowdy, also contacted in Spring, 2000, believes that Chandler's Congressional papers have been lost. The Tennessee Department of Archives and History acknowledged at that same time that they had been unable to locate Chandler's Congressional records.

Similarly, a search for the judicial records and personal papers of Special Referee Valentine J. Nesbit has been unavailing.

Records of the wage-earner proceedings conducted from 1933 to 1938 in the Birmingham Debtor's Court have not been entirely preserved. In the late 1970s a sample of all cases was selected for preservation, approximately one out of every seven files. The cases are located in Record Group 21 at the National Archives and Records Administration-Southeast Region, East Point, Georgia. They are filed as "Debtor Bankruptcy Cases (chapter XIII), Northern District of Alabama, Southern Division [Birmingham], Record Group 21 [U.S. District Courts]." The author would like to thank Mary Ann Hawkins of the National Archives for her assistance in obtaining wage earner case files. A representative case file is on file with the authors.

[1] *See* JOHN HANNA & JAMES ANGELL MCLAUGHLIN, CASES AND MATERIALS ON CREDITORS RIGHTS 870 (3d ed. 1939) ("It [chapter XIII] is based on procedures worked out in the United States District Court of Birmingham, Alabama . . . ."); R. Preston Shealey, *The Wage-Earner Amortization Amendment to the National Bankruptcy Act,* XXVI THE CREDIT WORLD 30 (Sept. 1938) ("Chapter 13 represents, in general, procedure which has been in operation through a liberal interpretation of former section 74 at Birmingham.").

[2] And, in all immodesty, our answer to the question of where chapter 13 came from is more detailed than any of the other recent bankruptcy histories. Professor David Skeel's *Debt's Dominion: A History of*

the obvious) we believe that the question of where chapter 13 comes from is important to try to answer as Congress re-considers the question of where to go with chapter 13.[3]

I. CONSUMER BANKRUPTCY BEFORE VALENTINE NESBIT

Charles Warren, Charles Tabb and other scholars not named "Charles" have explored the early history of bankruptcy law.[4] For our purposes, it is sufficient to note simply that Congressional concern about bankruptcy abuse by individuals is not new. In their excellent history of consumer use and abuse of the bankruptcy laws,[5] David A. Moss and Gibbs A. Johnson discuss efforts in 1910 to repeal the Bankruptcy Act of 1898 because

> some dishonest people make it a practice to go into debt to these merchants for the necessaries of life and then seek the bankruptcy court to get relief from the payment of such debts . . . . We ought to go back to the old-fashioned primitive doctrine that requires the payment of honest debts.[6]

Bankruptcy Law in America, (2001), devotes one paragraph on page 99 and another paragraph on page 133 to the origins of chapter XIII. Professor Charles Jordan Tabb's article *The History of the Bankruptcy Laws of the United States*, 3 AM. BANKR. INST. L. REV. 5 (1995), uses the words "[c]hapter XIII" on page 30. There is more on the origins of chapter XIII in Harry H. Haden, *Chapter XIII Wage Earner Plans – Forgotten Man Bankruptcy*, 55 KY. L.J. 564, 681–84 (1967). That is understandable – Professor Haden taught at the University of Alabama Law School. The most complete discussion of the origins of chapter XIII is in *In re Perry*, 272 F. Supp. 73, 76–90 (D. Me. 1967). The *Perry* case was decided by Judge Gignoux. Readers familiar with Judge Gignoux might ask why would a busy federal district judge, touted as a possible Supreme Court nominee, *Obituary: Edward T. Gignoux*, S.F. CHRON., Nov. 7, 1988, at B6, assigned to the second trial of the Chicago Seven, Pnina Lahav, *The Chicago Conspiracy Trial: Character and Judicial Discretion* 71 U. COLO. L. REV. 1327, 1336 (2000), asked to succeed Elliott Richardson as Watergate Special Prosecutor, KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION 234 (1997), and named to the first Advisory Committee on Bankruptcy Rules, Lawrence P. King, *The History and Development of the Bankruptcy Rules*, 70 AM. BANKR. L.J. 217, 218–19 (1996), spend so much of his time (and so much of the money of the lawyers who buy Federal Supplement) to write a history of chapter XIII, when the *Perry* case involved a clear application of a clear statutory provision. Readers unfamiliar with Judge Gignoux might ask how to pronounce "Gignoux." Readers who are familiar with the *Perry* decision will instead ask how to pronounce "Poulos" and why Judge (then Referee) Richard Poulos would write such a complete history of chapter XIII. Judge Poulos died in 2002. His daughter described him "[as] a fighter for social justice. . . and he never lost sight of the original reason he went to law school, and that was he wanted to help people . . . it was as simple as that." Joshua L. Weinstein, *Richard E. Poulos, Former Judge, Teacher, Lawyer*, PORTLAND PRESS HERALD, July 17, 2000, at 5B.

[3] *See* Bankruptcy Reform Act of 2001, S. 420, 107th Cong. (2001) (discussing changes to chapter 13); Bankruptcy Abuse Prevention and Consumer Protection Act of 2001, H.R. 333, 107th Cong. (2001) (containing sections explaining alterations made to chapter 13).

[4] *See generally* Charles J. Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5 (1995) (representing one of many publications written by Charles Tabb and citing CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 1 (1935)).

[5] *See* David A. Moss & Gibbs A. Johnson, *The Rise of Consumer Bankruptcy: Evolution, Revolution or Both?*, 73 AM. BANKR. L.J. 311 (1999) (providing comprehensive history of American bankruptcy laws).

[6] *Id*. at 314 –15 (quoting Representative Clayton of Alabama). Congressman Clayton is better known as the "author" of the Clayton Antitrust Act of 1914. He was a United States district judge from 1914 until his

Moss and Johnson report that the increase in the use of consumer credit for appliances and automobiles in the 1920's led to an increase in consumer bankruptcies and to an increase in support for change in the bankruptcy laws.[7] Moss and Johnson quote from a 1933 Department of Commerce report:

> [A] large number of consumers appearing in the bankruptcy courts . . . consider the receipt of a legal discharge of their debts as a creditable achievement. Freedom from debt without being held accountable for his past actions encourages the unconcerned debtor to resume his wasteful and extravagant habits . . . . No doubt the ease with which debts can be discharged through bankruptcy has had an influence on the increase in number of consumer bankruptcies.[8]

A. Donovan and Thacher

Two general investigations of bankruptcy conditions generated interest in amortization of the debts of wage-earners as an alternative to consumer bankruptcy. First, the Donovan investigation of bankruptcies in New York City in 1929,[9] and second, the Thacher investigation of nationwide bankruptcy conditions in 1930 and 1931.[10]

As a result of a series of indictments for bankruptcy fraud in the Southern District of New York in 1929,[11] an inquiry was conducted into the administration of bankrupt estates. Directed by William J. Donovan, counsel for a joint committee of the bar association, under the guidance of United States District Judge Thomas D.

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death in 1929. *See generally* TONY FREYER & TIMOTHY DIXON, DEMOCRACY AND JUDICIAL INDEPENDENCE: A HISTORY OF THE FEDERAL COURTS OF ALABAMA 1820-1994, 82 (1995) (providing background information regarding Congressman Clayton).

[7] *Id.* at 315 (noting extending credit to consumers allowed them to purchase expensive items such as cars and appliances which led to increases in bankruptcy).

[8] *Id.* at 317 (quoting VICTOR SADD & ROBERT T. WILLIAMS, U.S. DEPARTMENT OF COMMERCE, CAUSES OF BANKRUPTCIES AMONG CONSUMERS 5, 8 (1933)).

[9] *See In re* Perry, 272 F. Supp. 73, 77–78 (D. Me. 1967) (explaining background of Donovan investigation); Prudence Beatty Abram, *The More Things Change*, 1994 AM. BANKR. INST. J., May 1994, at 1 (describing bankruptcy conditions discussed in Donovan report).

[10] Background material on these events is derived from *In re Perry*, 272 F. Supp. 73, 79 (S.D. Me. 1967) (stating Lloyd K. Garrison, original staff member of Donovan inquiry, collected most available data pertaining to Thacher investigation); Mitchell S. Dvoret, *Federal Legislation: Bankruptcy Under the Chandler Act: Background*, 27 GEO. L.J. 194, 199 (1938) (explaining report submitted to President Hoover in 1931 outlined nationwide scope of Thacher investigation, prevalent defects in law and its administration, and proposed bill containing amendments necessary to cure defects); H.R. REP. NO. 75-1409 Vol. 3 (1937).

[11] *See In re Perry*, 272 F. Supp. at 77–78 (stating Donovan inquiry started after three New York bar associations were invited to participate in investigation ordered by local federal district court, following disclosures of serious abuses and malpractice in bankruptcy proceedings administration in Southern District of New York).

Thacher, the New York investigation revealed abuses of the bankruptcy system by corrupt debtors and malpractice in the administration of bankruptcy proceedings.[12]

The 1930 Donovan Report recommended further investigations of bankruptcy administration and a study of the provisions of the Bankruptcy Act of 1898.[13] More specifically, the Donovan Report determined that the procedures were too slow, and reliance on creditors to control and manage the proceedings was misplaced.[14] The Report recommended simplification of the bankruptcy procedures, limiting creditor control of bankrupt estates, and strict enforcement of criminal fraud penalties.[15]

Judge Thacher, who played an active role in the Donovan investigation, wanted to completely overhaul the bankruptcy laws and their administration. He was influenced by his observation of the English bankruptcy system. At one phase of the Donovan investigation, Thacher traveled to England and studied the operation of the English bankruptcy system for two months in 1929. Thacher was impressed by the English system's emphasis on rehabilitation rather than liquidation and its use of compositions and extensions for debtors under the supervision of the court.

After the Donovan Report's release, Judge Thacher resigned from the bench to become Solicitor General of the United States, in June 1930. As Solicitor General, Thacher convinced President Hoover of the need for a nationwide study of bankruptcy proceedings with an eye to statutory revisions. This study began in July, 1930. The work was done under Thacher's direction. Lloyd K. Garrison, who later served as dean of the University of Wisconsin Law School,[16] served as Thacher's special assistant on the study.[17]

The Thacher study found that the bankruptcy laws failed in the mission of distributing assets to creditors. Between 1921 and 1931 the average amount paid to

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[12] *See id.*

[13] *See id.* at 78.

[14] *See In re* Jeppson, 66 B.R. 269, 276 (Bankr. Utah 1986) (discussing determinations of Donovan Report).

[15] *See id.* Specifically, the Donovan report recommended:

> (1) more prompt administration of the law; (2) more simplified procedure and administration; (3) relieving the courts of administrative responsibilities and centralization of such responsibilities in the executive branch of the federal government; (4) limitation of creditor control through committee action to cases where the committees were genuinely interested; (5) the thorough examination of all bankrupts in all cases, permitting trustees to object to discharges; and (6) the strict enforcement of the criminal and discharge provisions of the act.

Id.

[16] Garrison a grandson of William Lloyd Garrison, served as the first Chairman of the National Labor Relations Board while dean of the University of Wisconsin Law School. Later in life, he became a "name partner" in the law firm of Paul, Weiss, Rifkind, Wharton & Garrison and represented Arthur Miller and J. Robert Oppenheimer during the age of McCarthyism. *See* Jennifer Reikerd, *About the Lloyd K. Garrison Lecture*, Pace Law School (2002) *available at* http://www.pace.edu/LawSchool/News/about_garrison02.html.

[17] *See In re Perry*, 272 F. Supp. at 79 ("Once the investigation was commenced, much of the actual labor of gathering all available data relating to the operation of the law and the administration of estates thereunder was performed by Mr. Lloyd K. Garrison.").

general creditors from bankrupt estates ranged only from five to seven percent. One reason for this was that over one-half of the bankruptcies were filed by wage-earners who possessed few assets above exemptions. The Thacher study concluded that most of them were anxious to pay their debts but were forced to file for bankruptcy in order to protect their sole source of support, wages, from garnishment. Many were so eager to avoid the stigma of bankruptcy that they borrowed heavily from small loan companies in order to pay off their debts, but were required to pay exceedingly high interest rates, thus compounding their debt problems. The Thacher Report proposed numerous legislative changes.

B. Hastings-Michener

In response to this report and the growing number of bankruptcy filings,[18] President Hoover, in early 1932, called for new bankruptcy legislation to amend the 1898 Act. The Hastings-Michener Bill was introduced in Congress to remedy the defects in the system of bankruptcy administration.

Solicitor General Thomas Thacher drafted the Hastings-Michener bill.[19] The bill "was designed in a sincere effort to save business concerns without forcing them into liquidation,"[20] and provided a simple method of corporate reorganization.[21] More relevant to our purposes, Hastings-Michener also offered relief to wage earners.[22] A new section 75 was to be added to the Bankruptcy Act under which wage earners could pay their debts from future earnings over a two-year period and during that period these "debtors" would be protected from wage garnishments.[23] The bill drafted by Thacher was not enacted in 1932.[24]

C. 1933 Legislation

In early 1933 economic conditions in the nation brought renewed pressure for emergency measures to provide relief from growing debt burdens. In response to the deepening Depression, part of what had been the Hastings-Michener Bill was enacted by Congress.

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[18] A 1931 Department of Commerce report revealed employee bankruptcies increased over four hundred percent between 1920 and 1930. *See* Walter Chandler, *The Revised Bankruptcy Act of 1938*, 24 A.B.A. J. 880, 884 (1938) [hereinafter *Chandler-Revised*].

[19] *See* Lloyd K. Garrison, *The New Bankruptcy Amendments: Some Problems of Construction*, 8 WISC. L. REV. 291, 290 (1933). The law review identifies Dean Garrison not only as the dean of the Wisconsin Law School but also as a "collaborator with" Thacher on the Thacher Report. *See In re Perry*, 272 F. Supp. at 79. Later, Dean Garrison became Chairman of the National Labor Relations Board and a "name partner" in the law firm of Paul, Weiss, Rifkind, Wharton & Garrison.

[20] Dvoret, *supra* note 10, at 200.

[21] *See id.*

[22] *See id.*

[23] *See id.* at 200, 204.

[24] *See id.* at 201.

The legislation enacted in 1933 had "many changes, additions, and omissions" from Thacher's recommendations. Most important for our purposes, section 75, as enacted, dealt only with compositions and extensions by farmers. The recommended wage earner provisions were omitted. After the enactment of the 1933 legislation, a wage earner who wanted to use bankruptcy to pay his debts out of future earnings had to work with the new section 74.

D. Section 74

Section 74 was long and complicated –16 sections, more than 1800 words.[25] Section 74's only reference to "wage earners" is at the very end: "involuntary proceedings under this section shall not be taken against a wage earner."[26] In his brief history of chapter XIII, Clive Bare, a Tennessee bankruptcy referee, provides this brief overview of section 74: "The statute did not meet with general success, due primarily to its failure to give the court jurisdiction over the debtor's wages and to provide for the debtor's discharge . . . . That section was used however quite extensively in the Northern District of Alabama for the relief of wage earners."[27]

II. VALENTINE NESBIT

In Alabama, W.I. Grubb, United States District Judge for the Northern District of Alabama was increasingly concerned with the volume of bankruptcies and their effect on the economy of the Birmingham area. Judge Grubb met with businessmen, lawyers and representatives of large employers in the area.[28] Judge Grubb concluded that wage earners (who in 1931 represented 82% of bankruptcy filers in Alabama)[29] would pay their debts if given the chance. To provide them that opportunity he appointed Valentine J. Nesbit as Special Referee in Bankruptcy.[30] Nesbit was appointed to the position in April, 1933, one month after the signing of the emergency bankruptcy legislation, which included section 74.

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[25] *See* COLLIER ON BANKRUPTCY ¶ 1321 *et seq*. (4th ed. 1937) (providing a subsection by subsection explanation of section 74); *see also* Garrison, *supra* note 19, at 292 (providing a more accessible discussion of section 74).

[26] COLLIER ON BANKRUPTCY ¶ 1338 (4th ed. 1937). And this reference seems superfluous: "All petitions for composition or extension under section 74 must be filed by the debtor." *Id*. at 1326; *see also* ARTHUR MARCH BROWN, GUIDE TO FEDERAL AND BANKRUPTCY PRACTICE 329 (1933).

[27] Clive W. Bare, CHAPTER XII , FIRST SEMINAR FOR REFEREES IN BANKRUPTCY 355 (1964).

[28] *See* Harry H. Haden, *Chapter XIII Wage Earner Plans – Forgotten Man Bankruptcy*, 55 KY. L.J. 564, 581–82 (1967). Information is contained in a letter to Professor Haden from the late Clarence W. Allgood, former bankruptcy referee and Judge of the Federal District Court for the Northern District of Alabama.

[29] *See* Wesley A. Sturges & Don E. Cooper, *Credit Administration and Wage Earner Bankruptcies*, XLII YALE L.J. 487, 498 (1933).

[30] *See* Haden, *supra* note 28, at 581–82.

A. Nesbit – The Man

Valentine Jordan Nesbit was born in South Carolina in 1883. He received his A.B. degree from the University of the South at Sewanee, Tennessee, an A.M. degree from Princeton University, and his law degree at the University of Pittsburgh in 1908. He then entered practice in Birmingham, Alabama.

During World War I, Nesbit was an associate state director of the Four Minute Organization of Alabama. As a "Four Minute Man" (so called for their delivery of brief addresses) he gave numerous speeches in support of the war effort, on behalf of war relief efforts, and in support of the sale of Liberty Bonds. He was the Chairman of the Red Cross speakers of Alabama, organizing thousands of speakers in relief drives. After the war he was appointed Belgian consul in Birmingham. For his services in raising funds on behalf of destitute Belgians after the war the King of Belgium gave him the title of Chevalier of the Order of the Crown of King Leopold III.[31]

In the early 1920s he entered into partnership with William H. Sadler, to form the firm of Nesbit & Sadler. By 1933 the firm had become Nesbit, Sadler & Dunn. The firm represented numerous local and regional businesses. It was Division counsel for Central of Georgia Railroad Co., and counsel for an iron company, two coal companies, at least four insurance companies, a bank, a savings and loan, a mortgage company, a construction company, a securities corporation, and other local manufacturing concerns.[32] In 1934 Nesbit opened his own office. He continued as the attorney for most of the clients the partnership had previously represented.[33] He was also vice-president and director of the Montevallo Coal Mining Co., the Straven Coal Mining Co., and a director of the Continental Securities Co.[34]

Nesbit came from a wealthy and socially prominent family in South Carolina.[35] And, he was wealthy and socially prominent in Birmingham.[36] Looking only at

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[31] *See generally* THE HISTORY OF THE FOUR MINUTE MEN OF ALABAMA 56–57 (G.M. Cruikshank, ed., The Alabama Historical Publishing Company (1921) (providing background information on preceding discussion); *Memorials, Valentine J. Nesbit*, 12 J. OF THE NAT'L ASS'N OF REFEREES IN BANKR. at 152 (July 1938) [hereinafter *Memorials, Nesbit*]; *Obituary*, *Valentine J. Nesbit*, BIRMINGHAM POST, February 8, 1938, at 6.

[32] *See* THE MARTINDALE-HUBBELL LAW DIRECTORY 50 (Martindale-Hubbell Law Directory, Inc. Volume I, January, 1933).

[33] *See* THE MARTINDALE-HUBBELL LAW DIRECTORY 8 (Martindale-Hubbell Law Directory, Inc. Volume I, January, 1934); *see also* THE MARTINDALE-HUBBELL LAW DIRECTORY 7 (Martindale-Hubbell Law Directory, Inc. Volume I, January, 1935).

[34] *See* WHO WAS WHO IN AMERICA (Marquis—Who's Who, Inc. 1968).

[35] *See Obituary*, *Valentine J. Nesbit*, BIRMINGHAM POST, February 8, 1938, at 6. Nesbit's obituary described him as "a member of a pioneer South Carolina family" who was "raised on his family's estate on Pantley's Island." *Id.*

[36] *See id*. The obituary also mentions his presidency of the Birmingham Country Club and the Rotary Club. *See id.*

Nesbit's background, it would be easy to question his interest and motives. Too easy. Particularly, after looking at Nesbit's words and work.

Asked how he had become interested in consumer bankruptcy, Nesbit responded: "At first it was rather a sociological proposition . . . . I was interested to see if I could aid in rehabilitating men involved in financial difficulties."[37] His position was later framed in terms of his protecting the wage earner from the big corporations' predations.[38] He testified before the Senate that the debtors had shown him that they would lose their jobs as creditors harassed corporate employers with attachments and garnishments.[39] When one Representative remarked that the court was a collection agency, Nesbit replied: "But that is for the benefit of the debtor."[40] Nesbit explained that in his scheme the debtor was entitled to a living for himself and his family, and "if there is anything left" it would be divided among the creditors, who would not be permitted to take a man's living.[41] Creditors were not entitled to more consideration than debtors.[42] Nesbit's overriding concern appeared to be for the family: "I am not trying so much to protect the debtor, but his family . . . That debtor owes a social obligation to society to provide for his family."[43] Referee Nesbit's desire to assist the wage earner in fulfilling his societal duties led Representative Earl C. Michener to describe him as a "philanthropist."[44]

B. Nesbit – The Special Referee

Referee Nesbit's appointment was specifically to handle cases that arose under section 74.[45] His first case was the application of a merchant who paid a reduced amount on his debts in a composition and then went into business again.[46] This use of section 74 proceedings by small businessmen was exactly what Congress had envisioned when the section was enacted. As Congressman Walter Chandler later observed: "Section 74 was designed primarily to rehabilitate the small business man

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[37] *Revision of the National Bankruptcy Act: Hearings on H.R. 8046 Before a Subcomm. of the Senate Comm. on the Judiciary*, 75th Cong. 71 (1937-38) [hereinafter *Hearings on H.R. 8046*] (testimony of Valentine Nesbit).

[38] *See id*. at 68 (remark by Sen. Joseph O'Mahoney).

[39] *See id.*

[40] *An Act to Establish a Uniform System of Bankruptcy Throughout the United States: Hearings on H.R. 1981 Before the Subcomm. on Bankruptcy and Reorganization of the House Comm. on the Judiciary,* 75th Cong. 33 (1937) (unpublished) [hereinafter *Hearings on H.R. 1981*] (testimony of Valentine Nesbit).

[41] *Id*.

[42] *Id*. at 27.

[43] *Id*. at 29.

[44] *Hearings on H.R. 8046*, *supra* note 37, at 260. Nothing contained in any testimony by Nesbit or others regarding the Birmingham Debtor's Court revealed any motive on Nesbit's part other than to assist wage-earners in trouble who asked for help.

[45] *See id.* at 71 (statement of Valentine Nesbit).

[46] *See Hearings on H.R. 1981*, *supra* note 40, at 9.

. . . ."[47] When the next five section 74 cases to cross his desk were filed by individual employees of the local telephone company, Nesbit "became really interested in seeing what could be done for the individual debtor in the amortization of his debts."[48] Nesbit had a large task before him; eighty-two percent of the bankruptcies filed in Alabama in 1931, for example, were wage earner bankruptcies.[49] More wage earner bankruptcies were filed in Alabama that year than were filed in New York, which had five times the population of Alabama.[50]

Nesbit believed that both the debtor and the creditor were responsible for the debtor's plight.[51] The debtor for purchasing beyond his means, and the creditor for selling to someone who is known to be overextended, then gambling that payments would be made.[52] He made his position clear when considering proposals for payment by debtors, confronting the creditors with their own improvident extension of credit to the debtor.[53]

Referee Nesbit also believed that the ordinary wage earning debtor wanted to pay his debts in full, but often needed some 'breathing room' in order to do so.[54] He discovered that the men seeking bankruptcy often did so to avoid garnishment or attachment of their wages, a procedure that often led the employer to terminate the employee who had created an additional burden for the company.[55] He believed that the wage earners who appeared before him shared with most other working men the desire to avoid the stigma attached to bankruptcy, which they saw as a disgrace.[56] They wanted to honor their debts but needed more time to pay.

Section 74 did not seem to give the bankruptcy referee the power to deal with the requests of wage earners to grant them additional time to pay. The section was designed to aid the business of a small merchant, particularly concerned with the

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[47] *See* Walter Chandler, *Wage Earners' Plans*, 40 CREDIT AND FIN. MGMT. NO. 12, 10 (1938) [hereinafter *Chandler-Earners*]. The language of section 74 reflects this intent. In subsection (h) it speaks of "control over the debtor's *business*" (emphasis added). Moreover, the bankruptcy court is not given control of future wages by the section. *See also* GILBERT'S COLLIER ON BANKRUPTCY ¶ 1323 (James WM. Moore & Edward H. Levi eds. 4th ed. 1937).

[48] *See Hearings on H.R. 1981*, *supra* note 40, at 9 (statement of Valentine J. Nesbit). The preservation of only a sampling of files prevented the authors from locating and obtaining files specifically identified by Mr. Nesbit in his testimony. *See supra* note ***.

[49] *See* Sturges & Cooper, *supra* note 29, at 498–99 (finding 3447 of 4196 bankruptcies filed in Alabama during 1931 were by wage earners).

[50] *See id*.

[51] *See Hearings on H.R. 1981, supra* note 40, at 18–19.

[52] *See id*.

[53] *See id*.

[54] *See An Act to Establish a Uniform System of Bankruptcy Throughout the United States: Hearings on H.R. 11219 before the House Comm. on the Judiciary*, 74th Cong. (1936) (unpublished) [hereinafter *Hearings on H.R. 11219*] (testimony of Valentine Nesbit).

[55] *Hearings on H.R. 8046, supra* note 37, at 262 (testimony of Valentine Nesbit).

[56] *See* Clarence W. Allgood, *Operation of the Wage Earner's Plan in the Northern District of Alabama*, 14 RUTGERS L. REV. 578, 585 (1960) [hereinafter *Allgood-Operation*] (asserting debtors think bankruptcy is disgraceful and reflects dishonesty).

secured debts of the business.[57] Section 74 was based on the court's jurisdiction over and control of the 'property' of the debtor, and Referee Nesbit acknowledged that the wage earner debtors in his court had only their wages and a few personal effects. He admitted that only by inference could he apply section 74 to these cases and grant relief.[58]

With a "very liberal interpretation of the law," described by some as 'stretching' or 'straining' the law, Valentine Nesbit applied section 74 to wage earners, developing extensions of time to pay and retaining jurisdiction over their wages to make payments.[59] In doing so, Nesbit sought to imitate Canadian and English laws that allowed "for the liquidation of the indebtedness of individuals . . . on a partial-payment plan, thereby enabling a debtor who had become financially involved to pay off his obligations over a period of months . . . ."[60]

C. Nesbit's Procedures

Having committed to offering relief to wage earners, Nesbit devised procedures to carry out this commitment. When a petition for relief was filed under section 74, the court referred it to Special Referee Nesbit.[61] A notice setting the time and date for a hearing was mailed to each creditor and to the debtor ten days in advance of the scheduled hearing. At the hearing the debtor was sworn and examined as to his earnings, expenses, debts, and family situation to determine what amount he and his family needed to live on each month and what amount might be paid against his indebtedness.

The examination was not simply an exercise in arithmetic. Nesbit took into account the debtor's social station in determining need, so the debtor could maintain appearances.[62] The debtor would make a proposal for payment of both secured and unsecured creditors.[63] The proposal would be calendared for a confirmation

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[57] *See Hearings on H.R. 11219, supra* note 54, at 38 (testimony of Professor Charles T. Clayton); R. Preston Shealey, *Salvaging Consumer Debt*, XXIII THE CREDIT WORLD 8, May 1935; Haden, *supra* note 28, at 583.

[58] *See Hearings on H.R. 11219, supra* note 54, at 9.

[59] *See* PAT BOYD RUMORE, LAWYERS IN A NEW SOUTH CITY, 87 (Ass'n Pub. Co. 2000); Morgan, *Ten Years of Legislative Work— With Suggestions for the Future*, XXVII THE CREDIT WORLD (Oct. 1938). Section 74, in fact, did not give the court jurisdiction over the future wages of the debtor; Shealey, *supra* note 64.

[60] *See Hearings on H.R. 8046, supra* note 37, at 247, 258–59; *supra* Part IA (concerning Judge Thacher's observations).

[61] Nesbit's very position at the Court is interesting. He was not a "regularly appointed referee in bankruptcy," but only handled section 74 cases. He performed none of the other functions assigned to the regularly appointed referee. In the course of research for this article, Nesbit's name was not found on lists of bankruptcy referees encountered by the authors. *See Hearings on H.R. 11219, supra* note 54, at 3 (testimony of Valentine Nesbit).

[62] *See Hearings on H.R. 8046, supra* note 37, at 259.

[63] *See* Symposium, *Revision of the Bankruptcy Act: Wage Earner Plans*, 12 J. OF THE NAT'L ASSOC. OF REFEREES IN BANKR. 18, 19 (Oct. 1937) [hereinafter *Revision of the Bankruptcy Act*].

hearing.[64] If the proposal was approved by a majority in amount and number of the creditors whose claims were filed and approved, the proposal would be confirmed and bind both the debtor and creditors.[65] Nesbit estimated the length of time the court was involved in the matter to be four to seven minutes.[66]

Occasionally there would be disagreements over the proposals. In those cases, Nesbit would dispense justice and equity "as he saw fit," confirming proposals that he considered fair for all concerned.[67] He resorted to "strong arm" tactics from time to time, particularly in reducing the claims of 'loan sharks,' short-term moneylenders. He would tell an objecting creditor to appeal the issue to Judge Grubb who would then support Nesbit's position in the matter.[68]

At first, Nesbit's procedures called for the debtors to remit payments directly to the creditors. This did not work well. Young lawyers were then appointed to supervise debtors and creditors. And, this did not work well because the lawyers lacked skills in keeping accounts, and the amount paid to the lawyer was so small that "he soon lost interest."[69]

Nesbit created the position of "supervisor." A supervisor was appointed to collect and disburse all payments in accordance with the approved proposals. This supervisor was placed under bond for the performance of his duties, which were to collect all payments from the debtor and remit all payments to the creditors whose claims had been allowed, in accordance with the terms of the extension.[70] The supervisor established an office several blocks from the Federal Courthouse and separate from the Special Referee's offices. This had "the advantage of letting debtors see Supervisor [sic] and his employees without molesting the busy referee, to whom only very important features of carrying out the debtor's proposal are submitted."[71]

Bookkeepers were hired to keep formal records and to manage collection and disbursement of the debtor's payments. By 1938, there were three bookkeepers working on these section 74 cases, and occasionally additional help had to be brought in.[72] Creditors and debtors alike could obtain current statements of account. Two methods of payment to the supervisor were used. In the first, the debtor paid the agreed amount to the supervisor. In the second, the debtor's employer deducted the agreed amount from his pay and remitted it to the supervisor's office.[73] If a debtor failed to make payments as provided in his proposal, Nesbit would issue an

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[64] *See id.*
[65] *See id*. at 18.
[66] *See Hearings on H.R. 1981, supra* note 40, at 32; *Revision of the Bankruptcy Act*, *supra* note 63, at 20.
[67] *See Hearings on H.R. 11219, supra* note 54, at 23; *Revision of the Bankruptcy Act*, *supra* note 63, at 19.
[68] *See Hearings on H.R. 11219, supra* note 54, at 3.
[69] *Hearings on H.R. 8046, supra* note 37, at 67 (testimony of Valentine Nesbit).
[70] *See id*.
[71] MALCOLM SMITH CARMICHAEL & WALTER JAMES KNABE, THE NEW BANKRUPTCY HANDBOOK 84 (Kreider–Thompson & Co., 1935).
[72] *See Hearings on H.R. 8046, supra* note 37, at 67 (testimony of Valentine Nesbit).
[73] *See Hearings on H.R. 1981, supra* note 40, at 30.

order on the debtor's wages that required the employer either to make monthly deductions from the debtor's pay, or remit the debtor's entire earnings to the Debtor's Court for division by the court.[74] These procedures were used for all of Nesbit's cases.[75]

After Nesbit approved the debtor's proposal, Nesbit's role practically ended as the collections and disbursements were handled by the supervisor and his staff.[76] After the debtor had paid in full the debts approved in the proposal, Nesbit closed the case by recommending to the Federal District Court judge that an order be entered dismissing the case.[77] The order would state that the debts had been paid in full, and be a matter of record.[78]

In sum, Nesbit's role in the section 74 proceedings, once he established the procedures outlined above, was limited to setting up and mediating at the meeting of the debtor and creditors, confirming a proposal for extension when it was presented, submitting the proposal to the Court for confirmation and then passing it on to the supervisor and his staff.[79] When advised by the supervisor that the debtor had completed payments, Nesbit performed a final act of requesting dismissal of the case to the Court.[80]

III. NESBIT'S RESULTS

The supervisor's office was a busy one. From the time of the organization of the "Debtor's Court"[81] in April, 1933, up to the time of the new chapter XIII wage earner statutes, 3,421 cases were filed in Birmingham under section 74.[82]

In testimony in January, 1938, Valentine Nesbit gave a breakdown of the occupations of the debtors and the businesses of the creditors who had appeared before him to that date.[83] Employees of the local industries (principally coal and steel), railroad and public utility employees made up the bulk of the 2,300 debtors,

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[74] *See* Haden, *supra* note 28, at 582 (detailing procedure if debtor failed to pay).

[75] *See id*. at 582; s*ee also* CARMICHAEL ET AL., *supra* note 71, at 81(describing Birmingham procedures).

[76] *See Hearings on H.R. 8046, supra* note 37, at 67 (prepared statement of Joe Lee, Bankr. J.).

[77] *See id*.

[78] *See id*. at 249. Section 74 did *not* provide for a discharge at the completion of an extension agreement. *See* RUMORE, *supra* note 59, at 87.

[79] *See Hearings on H.R. 8046*, *supra* note 37, at 249.

[80] *Revision of the Bankruptcy Act*, *supra* note 63, at 19.

[81] This is the term employed by Referee Nesbit to describe his court. *See Hearings on H.R. 8046, supra* note 37, at 249. Congressman Chandler also used this description. *See Chandler-Earners*, *supra* note 47; *see also* Judge Seybourne H. Lynne, *Address Before the 26th Conference of the National Association of Referees in Bankruptcy* (Oct. 14, 1952), 27 J. OF THE NAT'L ASS'N OF REFS. IN BANKR., 10–11 (Jan. 1953).

[82] *See* Clarence W. Allgood, *Chapter XIII Proceedings–Suggestions as to Use*, 14 J. OF THE NAT'L ASS'N OF REFS IN BANKR. 3, 86 (1940) [hereinafter *Allgood-Proceedings*] (stating from 1933 to 1938, 3421 cases were filed in Northern District of Alabama).

[83] *See Revision of the Bankruptcy Act*, *supra* note 63, at 18–19 (stating in total there were 2300 debtors and 814 different creditors).

with city, county, state and federal employees also appearing on the list.[84] Nesbit estimated that about one-half of the debtors were African-Americans.[85] The list of 814 creditors included grocers, dairies, doctors, furniture and department stores, and loan companies.[86]

Both debtors and creditors fared well in the Debtor's Court. Nesbit estimated that over 90% of the total of creditor claims on this list were paid in full by the debtors.[87] This success rate may explain the remarks of Alabama Congressman Sam Hobbs, who stated that the creditors in Birmingham were "loud in their praise" of the Debtor's Court program.[88]

Nesbit asserted that the creditors liked the program because it made collecting their money easier and more certain.[89] It was estimated in 1939 that 85% of the wage earner petition filers would have qualified for regular bankruptcy and that the relief available through the Debtor's Court may have, each month, kept 50 wage earner debtors with no assets from filing for regular bankruptcy.[90] One law professor estimated that if the Birmingham program were employed in urban areas nationwide, $20 to $25 million dollars each year would be "salvaged" from being dissipated in bankruptcies.[91]

One measure of the attitude of debtors is the "thank-you" letters received by Nesbit from people who had been in the Debtor's Court. James Clements, a Birmingham machinist wrote to "express my appreciation of your kindness to me, and strange as it was even my creditors seemed satisfied." Mary Abbott, a power company employee thanked Mr. Nesbit for sparing her embarrassment due to her financial difficulties brought on by illness in her family. C.F. Smith was thankful that the Debtor's Court allowed him to avoid bankruptcy and satisfy his creditors. He added: "You have done a very splendid work in helping hundreds of working people of this district to retain their self respect."[92]

With this success in Birmingham, why wasn't the section 74 procedure used elsewhere? Valentine Nesbit asserted that he believed that no judges and referees knew about it and so could not employ it.[93] Professor Clayton claimed that the keys

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[84] *See Revision of the Bankruptcy Act*, *supra* note 63, at 18 (stating industry, railroad and utility employees totaled 1905 out of 2300 debtors, 1029 of 2300 debtors were industrial employees, 659 railroad employees and 217 public utility employees. While city employees totaled 98, county employees totaled 34 and state employees totaled 2).

[85] *See Revision of the Bankruptcy Act*, *supra* note 63, at 21.

[86] *See Hearings on H.R. 8046, supra* note 37, at 66.

[87] *See id*. at 72.

[88] *See Hearings on H.R. 11219, supra* note 54, at 50.

[89] *See Hearings on H.R. 8046, supra* note 37, at 259.

[90] *See* Woodbridge, *Wage Earners' Receiverships*, 23 J. AM. JUDICATURE SOC'Y NO. 6, 242, 277–78 (1940).

[91] *See Hearings on H.R. 11219, supra* note 54, at 39 (testimony of Charles T. Clayton).

[92] *See Hearings on H.R. 1981, supra* note 40, at 36a (Letters introduced as exhibits to accompany Valentine Nesbit's testimony).

[93] *See id*. at 29-30. In Birmingham, the Birmingham Post carried a front-page article informing the public about the enactment the month before of section 74 legislation and outlining its uses and benefits to the

to the successful use of section 74 for wage earners in Alabama were (1) Valentine Nesbit's willingness to strain the intent of the statute, and (2) Nesbit's personal qualities, including a "kind heart," that made the 'strong arm' tactics acceptable.[94]

Nesbit probably strained more than the "intent" of the statute. Reported decision limited the referee's ability to control future earnings, undermining section 74 cases.[95] Another legal barrier to the widespread use of section 74 was that it "required that the debtor deposit in cash the cost of the proceedings, which now included the commissions to the referee and the trustee upon the full amount of the debts extended, and the cash for all priorities."[96] For a strapped wage earner this was usually impossible; in cases of moderate indebtedness, the costs simply were not worth the effort.[97]

In Birmingham the costs at filing were modest (and a pauper's oath was available to delay payment of filing costs), and all administrative costs were deducted as a percentage from each of the debtor's payments to the court, not paid all at once upon approval of the debtor's plan.[98] [Nesbit actually wanted to find a way to make the creditors pay the costs of the proceedings.] [99] In the Debtor's Court the filing cost was twenty-eight dollars, and the supervisor was allowed to deduct eight percent from the amounts paid by the debtor to pay salaries for himself and his staff.[100] Referee Nesbit received one-half of one percent of the amount paid by the debtor.[101]

Alternatives to Nesbit's programs were available for debtors in other parts of the country. Voluntary associations of lawyers, retail credit associations, loan companies and other creditors tried pooling arrangements to gather creditor claims and allow debtors extended time for payment. These plans did not succeed because one creditor who refused to cooperate could force the debtor into bankruptcy. A

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wage-earner. The article explained the procedure, identified the special referee, and extolled the law as a method for this class "to relieve themselves of a burden of excessive debt in a manner at once honorable and satisfactory to their creditors." THE BIRMINGHAM POST, April 25, 1933, at 1.

[94] *See Hearings on H.R. 11219, supra* note 54, at 36–39.

[95] *See generally* Oak Park Trust & Sav. Bank v. Van Doren, 79 F.2d 859 (7th Cir. 1935); McKeever v. Local Fin. Co., 80 F.2d 449 (5th Cir. 1935). This latter case, from the Birmingham Debtor's Court, said the debtor could not bind his future earnings by agreement. *Id.* at 452. Nesbit apparently ignored the ruling and continued to make agreements under which debtors pledged their future earnings.

[96] H.R. REP. NO. 75-1409 Vol. 3, at 53 (1937).

[97] *See id.*; W. HOMER DRAKE, JR. & JEFFREY W. MORRIS, CHAPTER 13 PRACTICE AND PROCEDURE § 1.04 (1996) (explaining act was almost worthless to wage earners and consumers); JACOB I. WEINSTEIN, THE BANKRUPTCY LAW OF 1938–CHANDLER ACT: A COMPARATIVE ANALYSIS 334 (1938) (stating administrative costs were prohibitive); Morgan, *supra* note 59.

[98] *See Hearings on H.R. 1981, supra* note 40, at 33.

[99] *See id*.

[100] *See id*.; *see also* CARMICHAEL ET AL., *supra* note 71, at 84.

[101] *See Revision of the Bankruptcy Act*, *supra* note 63, at 20. On Jan. 19, 1938, three weeks before his death, Nesbit testified before a Senate subcommittee that as of Jan. 1, 1938, debtors had paid to the supervisor the sum of $341,383.30. Nesbit would have received a little over seventeen hundred dollars of this amount. Nesbit was not engaged full-time as Special Referee, evidenced by his continued listing as a practicing attorney in Martindale-Hubbell. *See also* THE MARTINDALE-HUBBELL LAW DIRECTORY 8 (Martindale-Hubbell Law Directory, Inc. Volume I, January, 1934); THE MARTINDALE-HUBBELL LAW DIRECTORY 7 (Martindale-Hubbell Law Directory, Inc. Volume I, January, 1935).

Chicago plan of this sort failed for precisely this reason.[102] Experiments in both Atlanta and Minneapolis also failed.[103] The Debtor's Court succeeded where the other attempts failed.

IV. FROM NESBIT TO CHAPTER XIII

As the Great Depression continued it was apparent that new bankruptcy legislation was needed to supplement the emergency legislation of 1933.[104] This led to the formation of the National Bankruptcy Conference, a body made up of various groups and individuals interested in improving bankruptcy laws.[105] It included the American Bar Association, the National Association of Credit Men, the Commercial Law League, and the National Association of Referees in Bankruptcy and was active in proposing new bankruptcy legislation.[106] According to Professor Skeel, who has written extensively on the history of bankruptcy laws, "The National Bankruptcy Conference had an enormous influence over the shape of the Chandler Act of 1938."[107]

We think that what Professor Skeel meant to say was the National Bankruptcy Conference had an enormous influence over the parts of the Chandler Act dealing with *business* bankruptcy. In reviewing the drafts of legislation proposed by the National Bankruptcy Conference, Referee Poulos, a member of the National Bankruptcy Conference, concludes "the Conference displayed its insensitivity or indifference to the needs of distressed wage earners by not giving any consideration to a section dealing with relief for them."[108]

A. Chandler

Walter Clift Chandler had "enormous influence" over the parts of the Chandler Act dealing with wage earners. So did Val Nesbit.

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[102] *See Hearings on H.R. 8046, supra* note 37, at 65 (testimony of David Teitelbaum).

[103] *See Hearings on H.R. 11219, supra* note 54, at 36-37 (testimony of Professor Charles Clayton).

[104] *See* David S. Cartee, *Surrendering Collateral Under Section 1329: Can the Debtor Have Her Cake and Eat it too?*, 12 BANKR. DEV. J. 501, 505 (1996) (discussing need for statutory provision to help individuals with regular income during Great Depression).

[105] *See* David A. Skeel, Jr., *Vern Countryman and the Path of Progressive (and Populist) Bankruptcy Scholarship*, 113 HARV. L. REV. 1075, 1075 n.79 (2000) (explaining how various groups united to promote bankruptcy reform by founding National Bankruptcy Conference).

[106] *See Hearings on H.R. 8046, supra* note 37, at 2–3 (statement of Representative Walter Chandler).

[107] David A. Skeel, Jr., *The Genius of the 1898 Bankruptcy Act*, 15 BANKR. DEV. J. 321, 341 n.80 (1999).

[108] *In re* Perry, 272 F. Supp. 73, 86 (D. Me. 1967); *cf.* David A. Moss & Gibbs A. Johnson, *The Rise of Consumer Bankruptcy: Evolution, Revolution or Both?*, 73 AM. BANKR. L.J. 311, 351 n.44 ("[T]he 'Act was drawn up to meet the needs of ailing businessmen; the relief for consumers or wage earners [sic] was mostly incidental.'") (quoting Interview with James McLaughlin, in THE WRIT, Sept. 1966 (Washington Univ. School of Law)).

Congressman Lewis proposed new bankruptcy legislation that covered wage earners in 1934.[109] Thereafter, Congressman Chandler proposed five such bills.[110]

Congressman Walter Clift Chandler of Tennessee became the bankruptcy leader in the House. Former City Attorney of Memphis, Chandler entered the House January 3, 1935.[111] Hatton Sumners, Chairman of the House Committee on the Judiciary gave Chandler the task of watching all bills on bankruptcy. He made Chandler the Chairman of the Subcommittee on Bankruptcy and Reorganization of the House Committee on the Judiciary.[112] Sumners gave Chandler a bill submitted by the National Bankruptcy Conference, and Chandler's subcommittee held hearings in 1935 and 1936.[113] As a result of the hearings, changes were made in the bill and further House hearings were held in 1937.[114] The bill, H.R. 8046, was passed by the House on August 10, 1937. Hearings were then held in the Senate in November, 1937, and January and February of 1938.[115] Following amendment and agreement to amendments, the Bankruptcy Act of 1938, The Chandler Act, was passed by the Senate and signed into law on June 22, 1938, taking effect September 22, 1938.[116] Chapter XIII of the Chandler Act deals with wage earners' debts, and is the direct result of the Birmingham Debtor's Court's success.

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[109] *See* H.R. 9227, 73rd Cong. § 78(a)–(b) (1934) (defining wage earner as "a person whose income from wages, salary, and/or hire does not exceed $3000 in a calendar year . . . " and providing wage-earner may file petition to make future payments to amortize balance of debt over period of time not exceeding three years).

[110] *See* H.R. 6439, 75th Cong. § 1(32) (1937) ("'[W]age earner' shall mean an individual who works for wages, salary, or hire at a rate of compensation not exceeding $1,500 per year."); H.R. 1981, 75th Cong. § 74A (2)(a) (1937) ("'[W]age earner' shall mean individual who works for wages, salary, or hire, at a rate of compensation not exceeding $3,600 per year, and such wage earner shall be known as a debtor."); H.R. 12889, 74th Cong. § 1(32) (1936) ("'[W]age earner' shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding $1,500 per year."); H.R. 11219, 74th Cong. § 74A(a)-(b) (1936) ("'[W]age earner' shall mean a person whose income from wages, salary, or hire does not exceed $3,600 per year, and such wage earner for the purpose of this section shall be known as a 'debtor.' Any debtor may file a petition . . . stating that he is insolvent or unable to meet his debts as they mature, and that he desires to effect a composition or an extension of time within which to pay his debts."); H.R. 6140, 74th Cong. § 74A(a)–(b) (1935)

> W]age earner' shall mean a person whose income from wages, salary, and/or hire did not exceed $3,000 in the calendar year next preceding the filing of the petition . . . . Any wage earner may file a petition . . . stat[ing] that the petitioner is insolvent or unable to meet his debts as they mature, but is able . . . to make future payment sufficient to amortize the balance of his indebtedness over a period of not more than three years.

[111] *See* Biographical information on Walter Clift Chandler, *available at* http://bioguide.congress.gov (last visited Oct. 15, 2002).

[112] *See generally* Ruben G. Hunt, *The Progress of the Chandler Bankruptcy Bill*, 42 COM. L.J. 195, 196 (1937) (noting Walter Chandler was appointed to Subcommittee on Bankruptcy and Reorganization).

[113] *See* H.R. REP. NO. 75-1409, pt. 1, at 2 (1937) ("Extensive hearings were held by House Judiciary Committees of the Seventy-fourth and Seventy-fifth Congresses on April 1 and 2, 1935, March 30-April 3, 1936 . . . .").

[114] *See id*. at 2–3 (1937) (statement of Representative Walter Chandler).

[115] *See Hearings on H.R. 8046*, *supra* note 37.

[116] *See* WEINSTEIN, *supra* note 97, at iii–v; *The Chandler Bankruptcy Amendatory Bill Is Enacted*, 12 J. OF THE NAT'L ASS'N OF REFS. IN BANKR. 130, 130–31(July 1938) [hereinafter *Chandler Bill Enacted*].

B. Chandler and Nesbit

Congressman Chandler's interest in wage earner bankruptcy matters grew out of his experience as a City Attorney in Memphis, Tennessee, where employees of the city who were in financial trouble turned to their department heads for help working out extended payment schedules with creditors. He saw that the employees had no protection from garnishments in these matters, and became convinced that this was a proper matter for a bankruptcy court to handle.

When he entered Congress he learned of the success of the Debtor's Court in Birmingham. Chandler corresponded with Valentine Nesbit, submitted proposed legislation to him for his comments, and invited Nesbit to testify before Congress on wage earner legislation.[117] Chandler acknowledged that it was the success in Birmingham that prompted chapter XIII: "the experience of that Special Referee, the late Valentine J. Nesbitt [sic], was so satisfactory that a separate chapter, number XIII, was written and incorporated in the new law . . . ."[118] It is no wonder that chapter XIII has been described as the "direct descendent" of the Birmingham Debtor's Court proceedings.[119]

Valentine Nesbit's contributions to chapter XIII went beyond setting a good example. He also authored the bills that became chapter XIII.

The National Retail Credit Association (NRCA) was a member of the National Bankruptcy Conference,[120] and watched the progress of legislation. In 1935 it examined an early version of the Chandler bill and formulated plans to revise it "to make the 'Birmingham Plan' nationally applicable."[121] The Birmingham court was brought to the attention of the Legislative Committee of the NRCA by Leo M. Karpeles of Birmingham, and:

> After a study of the results obtained in this Court, it was decided to ask the referee, the Hon. Valentine J. Nesbit, who was responsible for so much of the success of the Debtors' Court, to draft provisions which would conform to the procedure in Birmingham.
>
> The Hon. Walter Chandler, a member of the House Judiciary Committee, Mr. R.P. Shealey, Washington Counsel of the National Retail Credit Association, and Judge Nesbit framed the bill which

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[117] *See Hearings on H.R. 11219, supra* note 54, at 1–4.

[118] *See Chandler-Revised*, *supra* note 18, at 931; *see also* Clarence W. Allgood, *Wage Earner Amortizations ... Birmingham's Experience*, XXVII THE CREDIT WORLD NO. 10, 18 (1937) [hereinafter *Allgood-Amortizations*].

[119] *See* DRAKE & MORRIS, *supra* note 97, at 1–10.

[120] *Chandler Bill Enacted*, *supra* note 116, at 125 (stating National Association of Credit Men assisted in investigation into amendments to prevent abuses); *Memorials, Nesbit*, *supra* note 31, at 151.

[121] XXIV THE CREDIT WORLD at 27 (December 1935).

> was introduced in Congress and became known as the Chandler Bill.[122]

In the Senate hearings on Revision of the Bankruptcy Act, Valentine Nesbit's role as the author of various drafts of the bankruptcy bill was recognized by witnesses at the hearings.[123] In much of his own testimony Nesbit advises the Senators on revisions he has drafted.[124] In his Perry opinion, Polous recognized Nesbit's authorship, calling his draft bill "the framework" of chapter XIII.[125]

A comparison of the procedures used by the Birmingham Debtor's Court and the chapter XIII proceedings reflect further the derivative nature of chapter XIII, confirmed by Valentine Nesbit's successor in Birmingham, Clarence Allgood.[126] In both cases the general outline of procedures is the same: Petition is filed, debts compiled, hearings with creditors held, proposal made by debtor and accepted by creditors, plan approved by the court, trustee appointed, plan carried out, debtor discharged.[127] The mechanics of the chapter XIII payment procedure mirrored the Debtor's Court: The trustee and his clerks collect and disburse the payments by debtors, and a percentage of the payments is kept to pay the expenses of the proceedings. Sometimes payments are made by debtors, and sometimes by their employers under arrangement with the court.[128] In no important respect does Allgood's chapter XIII procedure differ from Nesbit's section 74 procedures.

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[122] Morgan, *supra* note 59, at 23; *see generally* XXIV THE CREDIT WORLD (September 1936).

[123] *Hearings on H.R. 11219, supra* note 61 at 53 (testimony of Charles T. Adams, Bankruptcy Referee).

[124] *See id*. at 247–58. The Amendments suggested to the House committee, ultimately included in the bill occupy five pages of congressional hearings text. *Id*. at 254-58. They include the definition of wage-earner, proceedings upon petition, discharge procedures, allowing the court to order an employer to make payments to the bankruptcy court, and setting aside plans for fraud. The key amendment to the House bill that was proposed to the Senate by Nesbit, related to the requirement that allowed debts be free from usurious interest. *See Hearings on H.R. 8046, supra* note 37, at 67–72.

[125] *See In re* Perry 272 F. Supp. 73, 87 (D. Me. 1967) (stating Referee Nesbit, in extensively revising H.R. 6140, produced remarkably comprehensive draft which formed basic framework of chapter XIII as it exists today).

[126] *See* Haden, *supra* note 28, at 583 ("Therefore, when the Chandler Act was written, many of the special procedures developed by the Referees [sic] in Birmingham were adopted and written into the new Chandler Act." [Letter of Referee, later District Judge, Clarence Allgood.]). Allgood was appointed a Referee in bankruptcy AFTER the death of Valentine Nesbit in February, 1938.

[127] *Allgood-Operation*, *supra* note 56, at 579–80 (outlining procedure of Bankruptcy Courts under chapter 13).

[128] *See* Clarence W. Allgood, *Wage Earner Petitions Under Chapter XIII*, 46 COM. L.J. 17, 17 (1941) [hereinafter *Allgood-Petitions*]

> One of the main things which has enabled the trustee to handle his office as efficiently as he has in Birmingham, and which has enabled us to keep collections at the high percentage or rate which we now have, has been the arrangements which have made with the employers of labor in our district, whereby they deduct from the employee's salary or wages, the amount of the payment to be made and mail these deductions into the court once every month.

Id.

After all of his concern for the well-being of the wage earner, his work as a Special Referee and efforts as a legislative draftsman, Valentine Nesbit never saw the fruits of his labor ripen into chapter XIII. Nesbit died on February 7th, 1938, four months before the passage and signing of the bankruptcy revisions he sought.[129]

V. CONSUMER BANKRUPTCY AFTER . . . .

We do not have a short, two-word answer to the question of where chapter 13 should go. Or even a longer *answer*. Our grant proposal to the American Bankruptcy Institute Endowment stated that we would "connect the history and origins of chapter XIII to current practices and trends."[130] We were wrong.[131]

Obviously, what worked in Birmingham, Alabama during the 1930's will not necessarily work throughout the country in the 21st century. Nonetheless, Valentine Nesbit's "debtor's court" raises the following questions:

A. Is there a role for the "stigma of bankruptcy" – for "carrots" instead of "sticks"

One of the "carrots" to encourage a debtor to use section 74 in Val Nesbit's Birmingham was that he would not be a "bankrupt," and he would not appear in bankruptcy court. Thacher and then Congress came up with the idea of calling an individual who pays his creditors through a composition or extension a "debtor" instead of a "bankrupt," Nesbit came up with the idea of a different name for his court. Nesbit's office was in building different from the bankruptcy court[132] and Nesbit called his court "debtor's court" to eliminate the stigma of bankruptcy.

This phrase "debtor's court" is still used in lawyer advertisements in the Northern District of Alabama. An Alabama lawyer will hold herself out as experienced in bankruptcy and in debtor's court.[133]

We have not seen the phrase "debtor's court" in other states. And, of course, you will not see the term "bankrupt" in the Bankruptcy Code. Since 1978, we have had a bankruptcy law without "bankrupts." A person who files for bankruptcy relief

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[129] *See Chandler Bill Enacted*, *supra* note 116, at 124, 131; *Memorials, Nesbit*, *supra* note 31, at 152.

[130] *See* Letter from Samuel J. Gerdano, Executive Director, American Bankruptcy Institute., to David G. Epstein, Chair in Law, University of Alabama Law School (September 27, 1999) (on file with author).

[131] *Cf.* Scott Katz, "The Wrong Song," *available at* http://www.evergo.net/~katz/lyrics.htm#wrong.

[132] The Martindale-Hubbell Law Directory for this time period shows Nesbit's office address as 1115 Webb-Crawford Building. Documents in the representative case file appended to this article show that Nesbit held hearings in his office and elsewhere in the Webb-Crawford building. Martindale-Hubbell for the same time period locates Federal Bankruptcy Referee Edmund H. Dryer in the "Federal Building", not the Webb-Crawford building. Correspondence in the appended file also shows that the Special Referee's Supervisor's office was located in still another building, the Trustee's Loan & Discount Building.

[133] *See* http://www.realpagessites.com/russoandjohnsonpc/; *cf.* Mark D. Owsley and alabamalawyers.com, *Chapter 13* (advertising its experience in representing creditors in debtor's court), *available at* http://www.alabamalawyers.com/Chapter13.htm (last modified May 17, 2001).

is not a "bankrupt." At least, she is not referred to as a "bankrupt" in the Bankruptcy Code. No distinction among users of chapter 7, 11, 12 or 13.

Congress has not only eliminated Nesbit's distinction in what the debtors trying to repay their debts through a court approved plan would be called, it also eliminated Nesbit's distinction in where such debtors go for relief. No "Debtor's Court." At least, the court is not referred to as a "debtor's court" in the United States Code.[134] While title 11 no longer has a "bankrupt," title 28 still has bankruptcy courts, and all "debtors" appear in a bankruptcy court.[135]

And, no one can see the "stigma of bankruptcy" and measure its importance. At least, measure its importance empirically. As recently as 2001, Professor Margaret Howard reported that there is no "statistically valid study of the general population's attitude toward the stigma of bankruptcy."[136] And, Professor Jay Westbrook, a leading bankruptcy empirical scholar, questions whether the role of the stigma of bankruptcy can be tested empirically.[137] So, we simply leave the question of whether Congress should re-visit the question of the role of stigma, should re-visit the question of whether individuals should be induced rather than forced to use chapter 13.

B. Should consumer bankruptcy be done by "real judges?"

Nesbit's Alabama experiences also raise the question of whether Congress should re-visit the question of who should do consumer bankruptcies. While Nesbit was appointed by a federal district judge and was called a "special referee" his description of his work seems similar to the Thacher Report's recommendation of administrators who could makes consumer bankruptcy work.[138]

A Brookings Institute study conducted in the 1960's made a similar

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[134] *See* 28 U.S.C. § 151 (2000) (referring to court as bankruptcy court, not debtor's court). When in practice, the senior author had numerous creditor clients who referred to the bankruptcy court as "debtor's court" – and worse.

[135] *See id*. ("In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district."); 11 U.S.C. § 101(13) (2000) (defining debtor as "person or municipality concerning which a case under this title has been commenced"); *see also* 11 U.S.C. § 101 history and statutory note (2000) (noting change in terminology of 11 U.S.C. § 101(13) from "present law, which identifies the person by or against whom a petition is filed in a straight bankruptcy liquidation case as the "bankrupt," and a person or municipality that is proceeding under a debtor rehabilitation chapter as a "debtor").

[136] Margaret Howard, *Bankruptcy Empiricism: Lighthouse Still No Good*, 17 BANKR. DEV. J. 425, 453 (2001) (book review).

[137] *See* Jay Lawrence Westbrook, *Empirical Research in Consumer Bankruptcy*, 80 TEX. L. REV. 2123, 2140 (2002).

[138] *See* STRENGTHENING OF PROCEDURE IN THE JUDICIAL SYSTEM, S. DOC. NO. 72-65, at 104-07 (1932) (proposing creation of staff of ten full time administrators under Attorney General, and describing their proposed duties), *microformed on* CIS No. 9-9507-65 (Cong. Info. Serv.). *See generally* David A. Skeel, Jr., *Bankruptcy Lawyers and The Shape of American Bankruptcy Law*, 67 FORDHAM L. REV. 497, 513-17 (1998) (noting Donovan and Thatcher reports recommended creating administrator based on British model).

recommendation in a 1971 report.[139] Two years later, the National Bankruptcy Review Commission ("Commission") issued a report recommending the creation of a U.S. Bankruptcy Administration and the treatment of consumer bankruptcy as an administrative matter, rather than as a matter for judges.[140] In his "history of bankruptcy law in America," Professor Skeel provides the following description of the Commission's proposal: "For most consumers, bankruptcy would become an administrative process like social security or Veterans' Administration benefits."[141]

Professor Skeel then provides a more extended description of the efforts by the bankruptcy bench, bankruptcy lawyers and even the consumer credit industry to defeat any proposal that an administrative agency control consumer bankruptcy.[142] In Professor Skeel's words, the "proposal died an early death."[143]

More recently, Professor Ken Klee made a similar proposal to the annual meeting of bankruptcy judges.[144] With a similar response. At least from Judge Robert Martin, former president of the bankruptcy judges' professional organization:[145] According to Judge Martin, "it can't be taken seriously as a blueprint for change . . . . While this might work in some hypothetical nation where people are used to surrendering personal rights under contracts to administrative authority, it would be a radical departure from the social climate of the United States in 1997."[146]

Admittedly, Alabama in the 1930's would be "a radical departure from the social climate of the United States in 1997."[147] Nonetheless, later in his riposte, Judge Martin admits: that in the United States in 1997, judges do not spend time on consumer bankruptcy cases – "The true administration of consumer cases is undertaken by the clerk of the bankruptcy court in each district and this is generally

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[139] DAVID T. STANLEY & MARJORIE GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM (The Brookings Inst. 1971); *see* Lewis Kruger, *Stanley & Girth: Bankruptcy: Problem, Process, Reform,* 73 COLUM. L. REV. 381, 382–85 (1973) (book review) (providing summary of Brookings' Report consumer recommendation).

[140] *See* A REPORT OF THE COMMISSION OF THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137 (1973) (summarizing Commission's principal recommendations, including its recommendations regarding consumer bankruptcy in first chapter, pages 1-31). *See generally* Conrad K. Cyr, *The Bankruptcy Act of 1973: Back to the Drafting Board*, 48 AM. BANKR. L.J. 45 (1974) (providing a critical "summary" of these recommendations by one of the most highly regarded bankruptcy judges of that era).

[141] DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 143 (2001).

[142] *See id.* at 143–46. *See generally* Jeb Barnes, *Bankrupt Bargain? Bankruptcy Reform and the Politics of Adversarial Legalism,* 13 J. L. & POL. 893 (1997); Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act* of 1978, 96 MICH. L. REV. 47 (1997) (both discussing political implications of the Bankruptcy Reform Act of 1978).

[143] SKEEL, *supra* note 141, at 146.

[144] *See generally* Kenneth E. Klee, *Restructuring Individual Debts*, 71 AM. BANKR. L.J. 431 (1997) (proposing restructured system under which court clerks would enter orders confirming plans, without judges' involvement, unless debtor's eligibility or dischargibility of debt is disputed).

[145] *See* Honorable Robert D. Martin, *A Riposte to Klee*, 71 AM. BANKR. L.J. 453, 453 (1997).

[146] *Id*.

[147] *Id.*

done with remarkable skill and efficiency."[148]

C. Should there be more "mud" in consumer bankruptcy?

Professor Ted Janger recently argued for more "mud" in Bankruptcy reform.[149] Relying on Professor Rose's distinction between highly specific "crystalline" statutory drafting and more open-ended muddy statutory drafting,[150] he criticizes pending bankruptcy reform bills as efforts to replace "mud" with "crystals."[151]

There was a lot of mud in Nesbit's Birmingham. Consider this exchange between Nesbit and Congressman Michener:

> Michener: In other words, you are not relying on the law.
>
> Nesbit: You have to have the law in the first place, sir, before you can operate on a common sense basis.
>
> Michener: You have to have the law to get the fellow [the debtor] before you.
>
> Nesbit: Yes, sir; to get the creditors there also.
>
> Michener: And then after you get him there you use your own judgment, regardless of the contracts, and regardless of the law? In other words, you dispense justice and equity as you see fit?
>
> Nesbit: As nearly as I can.[152]

CONCLUSION

We feel cheated. Cheated because we were too late. Too late not only to be able to talk with Valentine Nesbit but also too late to be able to talk with any one who knew him. And cheated because from all we have been able to read about him, Nesbit would have been an interesting person to know.

And, we feel that we have cheated you.[153] Chapter XIII or 13 begins with Valentine Nesbit. And even your reading this article, even after our writing this

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[148] *Id.* at 454.

[149] *See* Ted Janger, *Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design*, 43 ARIZ. L. REV. 559 (2001). Professor Janger is obviously big on "mud." Writing under the name "Edward J. Janger," he also recently argued for more mud in securitization regulation. *See* Edward J. Janger, *Muddy Rules for Securitizations,* 7 FORDHAM J. CORP. & FIN. L. 301, 315 (2002).

[150] *See* Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 603, 609 (1988) (explaining how crystals in statutory drafting often allow for dispute resolution through bargaining while muddy statutory drafting leads to judicial intervention).

[151] Janger, *supra* note 149, at 560 (stating legislators' "infatuation with 'crystalline' statutory drafting" is based on misconception of "muddy rules" and role of judiciary in bankruptcy statutory scheme).

[152] *Hearing on H.R. 11219*, *supra* note 61, at 23 (testimony of Valentine Nesbit), *microformed on* CIS No. 74-HJ-T.26 (Cong. Info. Serv.).

[153] We don't feel like we have cheated the American Bankruptcy Institute Endowment Fund. We have (or at least Tim Dixon has) worked very hard to find every possible direct source relating to the origins of chapter XIII.

article, he remains as mysterious as our inspirational "Cotton-Eyed Joe."[154]

[154] All-together now: "Cotton-Eyed Joe, Cotton-Eyed Joe, where did you come from, where did you go? Where did you come from, where did you go? Where did you come from, Cotton-Eyed Joe?"