



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 35 | Number 4

Article 6

6-1-1957

Bankruptcy -- International Jurisdictional Problems Arising Between the United States and Canada

Henry W. Connelly

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

Henry W. Connelly, *Bankruptcy -- International Jurisdictional Problems Arising Between the United States and Canada*, 35 N.C. L. REV. 476 (1957).

Available at: <http://scholarship.law.unc.edu/nclr/vol35/iss4/6>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

render it doubtful whether this act will be declared constitutional on the basis of preventing fraud. The court quoted from a Kentucky decision involving licensing of real estate brokers as follows:

"If occasional opportunity for fraud is to be the test, then there is no reason why every grocer, every merchant, every *automobile dealer*, every keeper of a garage, every manufacturer, and every mechanic who deals more frequently with the public in general, and whose opportunities for fraud are far greater than those of a real estate agent or salesman, may not be put on the same basis. . . . In our opinion, the right to earn one's daily bread cannot be made to hang on so narrow a thread. Broad as is the police power, its limit is exceeded when the State undertakes to require moral qualifications of one who wishes to engage or continue in a business which, as usually conducted, is no more dangerous to the public than any other ordinary occupation of life.'"³⁰ (Emphasis added.)

The court in cases including *Roller v. Allen* has now clearly established that there is a large category of innocuous occupations the licensing of which will not come within the police power of the state. This attitude, combined with the growing public awareness of the situation, should result in better considered and more appropriate licensing legislation in the future.

HERBERT T. MITCHELL, JR.

Bankruptcy—International Jurisdictional Problems Arising Between the United States and Canada

Since World War II there has been an expanding international development in the economy of the United States.¹ This will give rise to a problem which has been little considered heretofore:² the bankruptcy of an individual or corporation engaged in international operations. Since it is with Canada that our most important economic expansion has taken place,³ this paper will seek to point out some of the jurisdictional

³⁰ *State v. Harris*, 216 N. C. 746, 761, 6 S. E. 2d 854, 864 (1940) quoting from *Rawls v. Jenkins*, 212 Ky. 287, 292, 279 S. W. 350 (1925).

¹ "Since the war, total investments in new foreign plants and facilities amounted to more than \$12 billion, or more than 170% of the investment at the end of World War II." THE AMERICANA, *Foreign Investments* 267 (Annual 1956).

² "Probably in no branch of the law is information in foreign law lacking to such a degree as in the matter of bankruptcy. . . ." Nadelmann, *Recognition of American Arrangements Abroad*, 90 U. P. A. L. REV. 780, 783 (1942).

³ "Canada continued as the most important area for new direct investments, with an indicated volume of \$600 million during 1955, two thirds of which was new United States capital. . . . As a result, American direct investments in that country

problems that will arise in the bankruptcy adjudication of one doing business, having assets, or creditors located in either Canada, the United States, or both.

There is at the present time no treaty or other international agreement dealing with the problem of bankruptcy in effect between these two countries.⁴ Although there has been some modification of the United States Bankruptcy Act⁵ to clarify the international aspects of the Act,⁶ the sufficiency of the present law to cover an international bankruptcy is to be questioned.

It would appear that both the Canadian and the United States courts of bankruptcy have jurisdiction over foreigners, both individual and corporate. It is also apparent that it is possible and indeed feasible in many situations to have concurrent bankruptcies in the two countries.

The jurisdiction of the United States bankruptcy courts is conferred by section 2a of the Bankruptcy Act, which establishes the District Courts of the United States as courts of bankruptcy⁷ with authority to exercise original jurisdiction in proceedings under the act.⁸ That section specifically empowers those courts to:

“(1) Adjudge persons bankrupt [1] who have had their principal place of business, resided or had their domicile within their respective territorial jurisdictions for the preceding six months, or for a longer portion of the preceding six months than in any other jurisdiction, or [2] who do not have their principal place of business, or reside, or have their domicile within the United States, but have property within their jurisdictions, or [3] who have been adjudged bankrupts by courts of competent jurisdiction without the United States, and have property within their jurisdictions, or [4] in any cases transferred to them pursuant to this Act. . . .”⁹
(Numbers in brackets added.)

There is at the present time some conflict as to whether the provisions of section 2a (1) are jurisdictional or venue requirements. It is concluded in a well-known text that this is only a venue provision,¹⁰ and

were estimated to be in excess of \$6.5 billion at the end of 1955.” *The Americana*, *op. cit. supra* note 1.

⁴ For discussions of bankruptcy treaties, see Busler, *Bankruptcy Reciprocity: A Study as to a Treaty with Canada*, 33 A. B. A. J. 1026 (1947); Nadelmann, *Bankruptcy Treaties*, 93 U. PA. L. REV. 59 (1944).

⁵ Bankruptcy Act, 30 STAT. 544 (1898), as amended 11 U. S. C. §§ 1-1103 (1952). Here after footnote references to sections and subsections of this act will be cited as “Bankruptcy Act § —.”

⁶ Act of July 7, 1952, c. 579, 66 STAT. 420 (codified in scattered sections of 11, 24 U. S. C.).

⁷ Bankruptcy Act §1 (10).

⁸ *Id.* § 2a.

⁹ *Id.* § 2a (1).

¹⁰ 1 COLLIER, BANKRUPTCY ¶ 2.14 (14th ed. 1948).

this argument is strengthened by the addition in 1952 of provision [4]¹¹ providing for adjudication of transferred cases. This is the terminology of a venue provision rather than of a jurisdictional one, and it was so argued in a recent district court case.¹² It is, however, submitted by the writer that, as to aliens and nonresidents, *only* where one of the provisions of section 2a (1) [1], [2], [3] were fulfilled would the court have any jurisdiction.

It will be noted that there is an overlapping in the situations enumerated by section 2a (1). All cases of original jurisdiction will be covered by one of the first two classifications. However, the importance of the third provision is now mainly historical. Although it was not enumerated as such when the Bankruptcy Act was first enacted,¹³ an adjudication of bankruptcy or an insolvency proceeding abroad is now to be considered as an act of bankruptcy.¹⁴ However, the inclusion of this third provision originally was needed to make it clear that an adjudication abroad did not prevent the courts of the United States from entertaining a bankruptcy proceedings also.¹⁵ The provision was also helpful in getting around the requirement that the bankrupt be within the territorial limits of the court for the preceding six months. The amendment of 1938¹⁶ has lessened the importance of this at the present time.

A survey of the case law shows that through the application of the various provisions of section 2a (1) the courts of the United States have taken jurisdiction over aliens and nonresidents. In applying provision [1] to an alien the court held that the hotel room of a prize fighter, located within the territorial limits of the court, was his principal place of business and that he was thus amenable to the jurisdiction of the court.¹⁷ Residence at the hotel was not enough for jurisdiction in that case as the debtor did not meet the six month requirement. Today since the 1938 amendment to the Act, both of these provisions could be applied to give the court jurisdiction.¹⁸

The most important of the provisions of section 2a (1) in the international situation is number [2], which provides for adjudication on the

¹¹ 66 STAT. 420, 11 U. S. C. § 11 a (1) (1952).

¹² *Saper v. Long*, 131 F. Supp. 795 (S. D. N. Y. 1955).

¹³ Act of Feb. 5, 1903, c. 487, § 2, 32 STAT. 797, 11 U. S. C. § 21 (1952) amended the original act.

¹⁴ Bankruptcy Act § 3a (5).

¹⁵ Bankruptcy Act § 2a (1) [3], originally enacted 30 STAT. 545 (1898); see *In re Neidecker*, 82 F. 2d 263 (2d Cir. 1936).

¹⁶ The Chandler Act, 52 STAT. 842 (1938), 11 U. S. C. § 11 (1952) changing the time requirement by inserting "or for the longer portion of the preceding six months than in any other jurisdiction," thus doing away with the strict six months requirement.

¹⁷ *In re Carnera*, 6 F. Supp. 267 (S. D. N. Y. 1933).

¹⁸ See note 16 *supra*.

basis of property located within the territorial limits of the court. This provision has been applied and discussed in several international situations before the courts. In *Matter of San Antonio Land & Irrigation Co.*,¹⁹ the court was faced with a very complex international jurisdiction situation. A Texas receiver attempted to have a New York district court vacate its order adjudicating a Canadian corporation bankrupt. The Canadian charter of the company stated that the principal place of business was Toronto, but on the receiver's motion the New York court looked behind this and found as a fact that the principal place of business was in Texas where the corporation was doing business through the operation of two wholly-owned companies. The jurisdiction of the New York trustee had been based on property located within the territorial limits of the New York court. Since it was found that Texas was the principal place of business, it was held that the New York adjudication would be vacated. The court, however, in a dictum discussed the nature of property that is required to bring one under provision [2] :

“ . . . I will say that I think that the meaning of the word ‘property’ under the Bankruptcy Act should be much the same as that under judicial decisions relating to matters of taxation and attachment. In other words, a bankruptcy proceeding is a kind of equitable attachment, which should be held to reach what ever assets any available judicial process can reach. Consequently, the situs of property is not to be determined by general doctrines, such as ‘*mobilia sequuntur personam*’ which may be well applicable in matters like the law of inheritance, but by power of efficient control. Such a view is advantageous, in order to protect creditors. . . .”²⁰

The court did point out that if, as originally assumed, the company had not had its principal place of business within the United States, there would have been grounds for jurisdiction in New York on the basis of property located there. The nature of this property is important. One asset consisted of the company's equity in bonds which it had delivered as a pledge to a trust company located in New York; the other a bank account of \$8.06. Either property interest was said to be sufficient as a basis of jurisdiction. The other asset of the company in New York was a deposit to meet bond coupons which were unpaid; this was ruled a trust deposit and not to be considered as property within the district.

A similar principle was applied in a later case in which it was ruled that as long as the court can, by the use of judicial process, reach the assets of the foreign debtor located within the United States it can

¹⁹ 228 Fed. 984 (S. D. N. Y. 1916).

²⁰ *Id.* at 990.

exercise jurisdiction over him.²¹ An English debtor had executed in London as assignment for the benefit of creditors by which he purported to pass to the English trustee certain property of his which was then located in the United States. The court ruled that the transfer to the foreign trustee was a preference,²² and that the petition of bankruptcy in this country brought within four months would defeat the title of the trustee. The basis of this holding was that although the debtor had purported to transfer his property to a foreign trustee, it was still amenable to the process of the court.

Once the court finds a basis for jurisdiction, must it in all cases exercise jurisdiction or may it refuse to do so? There is no definitive holding on this question. Since the court of bankruptcy is a court of equity, it has been suggested that the court through the exercise of its equitable powers could refuse to exercise jurisdiction in any case that might be inequitable.²³ The use of the doctrine of *forum non conveniens* has been advocated in the situation where all the parties to the proceeding are foreigners and the basis for jurisdiction is merely property located in the United States.²⁴ Just how far the court's discretion should extend or does extend is not clear, but the court should in all events protect the local creditors.²⁵

A slightly different set of problems arise in Canada when its courts encounter bankruptcy cases with foreign elements. The Canadian Bankruptcy Law²⁶ has provisions that would clearly vest the courts of that country with jurisdiction over the foreign or nonresident debtor. There is no single provision in the recent Canadian Bankruptcy Act²⁷ which corresponds with section 2a (1) of the United States Act. In the Canadian act, definitions of the various terms used are so worded that

²¹ *In re Berthood*, 231 Fed. 529 (S. D. N. Y.), *appeal dismissed* 238 Fed. 797 (2d Cir. 1916).

²² See Bankruptcy Act § 60.

²³ 1 COLLIER, BANKRUPTCY ¶ 2.09 (14th ed. 1948).

²⁴ *In re Berthood*, 231 Fed. 529, 534 (S. D. N. Y. 1916): "[I]t must not be understood that the court will necessarily take jurisdiction if the creditors, as well as the alleged bankrupt, are all aliens residing abroad." The court then cites analogous admiralty cases in which all the parties were aliens and in which the courts had chosen not to exercise jurisdiction: *Belgeland v. Jensen*, 114 U. S. 355 (1884); *Watts, Watts & Co. v. Unione Austriaca di Navigazione*, 224 Fed. 188 (E. D. N. Y. 1915), *aff'd*, 229 Fed. 136 (2d Cir. 1916), *rev'd*, 248 U. S. 9 (1918) (reversed as an abuse of the discretion on facts of this case).

²⁵ Nadelmann, *The National Bankruptcy Act and the Conflicts of Laws*, 59 HARV. L. REV. 1025, 1041 (1946).

²⁶ Reference to the Canadian Bankruptcy Law is generally taken to include two distinct statutory provisions: (1) The Bankruptcy Act, CAN. REV. STAT. c. 14 (1952); (2) The Winding Up of Insolvent Companies Act, CAN. REV. STAT. c. 296 (1952). These were enacted by the Parliament of Canada under the authority vested in it by The British North American Act, 1867, 30 VICT. c. 3, § 91.

²⁷ CAN. REV. STAT. c. 14 (1952); Enacted by Parliament 1949, 2d Sess. c. 7 (1949).

the foreign or nonresident debtor will apparently be included within the scope of the act. A debtor is defined as:

“(i) ‘debtor’ includes an insolvent person and any person who, at the time an act of bankruptcy was committed by him, resided or carried on business in Canada and where the context requires includes the bankrupt. . . .”²⁸

A corporation is defined as:

“(f) ‘corporation’ includes any company incorporated or authorized to carry on business by or under an Act of the Parliament of Canada or any of the provinces of Canada, and any incorporated company, wheresoever incorporated that has an office in or carries on business within Canada. . . .”²⁹

The Canadian Winding Up Act³⁰ is also couched in terms that are broad enough by definition to include foreign corporations.³¹ The petition in bankruptcy, under the Canadian Bankruptcy Act, is to be filed in “the locality of the debtor,”³² which is defined as the principal place:

“(i) where the debtor has carried an business during the year immediately preceding his bankruptcy,
 “(ii) where the debtor has resided during the year immediately preceding his bankruptcy,
 “(iii) in cases not coming within subparagraph (i) or (ii), where the greater portion of the property of such debtor was located. . . .”³³

The writer has not found any definitions or other provisions in the Canadian Bankruptcy Law to limit the operation of their law in the international situation.

It would appear to be clear that the Canadian court could exercise jurisdiction over a bankruptcy proceeding brought there even after one had been started in the courts of the United States. Section 20(1)(a) of the Canadian Act³⁴ specifies that the bankrupt’s making an assignment of his property for the benefit of creditors generally, whether the assignment is authorized by the act or not, will be considered an act of bank-

²⁸ CAN. REV. STAT. c. 14, § 2(i) (1952).

²⁹ *Id.* § 2(f).

³⁰ CAN. REV. STAT. c. 296 (1952).

³¹ *Id.* § 2(i) (1952) “(i) ‘trading company’ means any company except railway and telegraph company, carrying on business similar to that carried on by . . . [forty-four different types of business listed.]” (The list would appear to be all inclusive except for the ones excepted above.)

³² CAN. REV. STAT. c. 14, § 21 (1952).

³³ *Id.* § 2(k).

³⁴ *Id.* § 20(1)(a).

ruptcy. Thus, as the instituting of proceedings in one country will be basis for proceedings in the other,³⁵ the concurrent bankruptcy situation is indeed possible under the laws of the United States and Canada at the present time.

No direct holding has been found under Canada's recently revised Bankruptcy Act declaring that jurisdiction over foreigners and non-residents will be taken. However, a United States creditor has been allowed to petition the Canadian court for the adjudication of a Canadian debtor as bankrupt, thus taking part in the Canadian proceeding.³⁶ In the past, the Canadian courts, applying similar provisions to those now in effect, have taken jurisdiction over United States debtors. A Delaware corporation doing business in Canada was adjudged bankrupt upon proof that the corporation had committed an act of bankruptcy.³⁷ Similarly, the Canadian Winding Up Act has been applied in the international situation.³⁸ The Canadian court also has taken jurisdiction over a corporation which was in liquidation in a foreign country at the time that the Canadian proceedings were instituted.³⁹ Another case had clearly pointed out that the jurisdiction which the court exercised in such situations was not ancillary to that of the foreign court but was a separate action under the Canadian law and fully independent.⁴⁰

Since the new Canadian Act, unlike the Bankruptcy Act in this country, does not confer jurisdiction solely on the basis of property located within the territorial limits of the court,⁴¹ the question is raised whether the Canadian creditors of a foreign debtor will be able to reach the debtor's Canadian property if that is his only connection with Canada. Would it be possible to extend the carrying-on-business provision⁴² of the Canadian Act to cover this? If this could be done then the Canadian courts' jurisdiction would appear to be similar to that of the United States courts.

Thus there would appear to be sufficient basis for taking jurisdiction over the foreign or nonresident debtor under both the United States' and

³⁵ United States act: Bankruptcy Act § 3a(5); Canadian act: CAN. REV. STAT. c. 14, § 20(1) (a) (1952).

³⁶ *Re Flora Flocks Ltd.*, [1952] O. W. N. 383, 3 D. L. R. 392 (1952).

³⁷ *In re National Shipbuilding Corp.*, 1 C. B. R. 430 (Que. 1921).

³⁸ *Re Stewart River Gold Dredging Co.*, 22 W. L. R. 315, 7 D. L. R. 736 (1912).
". . . and as the company is a foreign corporation doing business in Canada under a license of the Dominion Government, it is a Canadian company, in my opinion, under federal control, and subject to the provisions of the Dominion Winding Up Act. . . ."

³⁹ *Re Breakwater Co.*, 33 ONT. L. R. 65, 22 D. L. R. 294 (1914).

⁴⁰ *Allen v. Hanson*, 18 Can. Sup. Ct. 667 (1890); for United States case in accord see: *Fincham v. Income from Certain Trust Funds of Cobham*, 193 Misc. 363, 81 N. Y. S. 2d 365 (Sup. Ct. Spe. T. 1948).

⁴¹ Bankruptcy Act § 2a(1).

⁴² CAN. REV. STAT. c. 14, §§ 2(i), (f) (1952).

the Canadian law. However, the complete scope of these provisions have not been determined.

HENRY W. CONNELLY

Constitutional Law—Injunction to Prohibit Use in State Courts of Evidence Illegally Obtained by Federal Agents

A federal narcotics agent seized petitioner's marihuana under a search warrant improperly issued under Rule 41(c) of the Federal Rules of Criminal Procedure. The United States District Court granted a pre-trial motion to suppress this evidence under Rule 41(e), and on the Government's later motion dismissed the federal indictment. The federal agent then swore to a complaint before a New Mexico State judge and caused a warrant for the petitioner's arrest to issue. Petitioner was charged with being in possession of marihuana in violation of New Mexico law. In the United States District Court, petitioner sought to enjoin the federal agent from testifying in the state prosecution and to direct the agent to reacquire the evidence and destroy it or transfer it to other agents. The injunction was denied and the Court of Appeals affirmed.¹ Certiorari being granted, the United States Supreme Court, by five to four decision, reversed and directed that the injunction be granted by the United States District Court. *Rea v. United States*.²

The federal rule excluding evidence illegally obtained by federal officers was originally declared in the case of *Weeks v. United States*.³ Under the *Weeks* decision, evidence obtained by illegal search and seizure in violation of the fourth amendment to the U. S. Constitution is not admissible in federal courts when obtained by the federal government or its agents. Since the fourth amendment protects the right of privacy only from invasion by the federal government, this exclusionary rule does not bar the use in federal courts of evidence illegally obtained by private citizens or state officers who were not acting in collaboration with federal officers. Although many states have adopted the exclusionary rule as applied to evidence illegally obtained by state agents for use in state courts,⁴ the federal constitution does not compel them to do so.⁵

The states adopting the exclusionary rule as a means of suppressing

¹ 218 F. 2d 237 (10th Cir. 1954).

² 350 U. S. 214 (1956); noted in 24 TENN. L. REV. 605 (1956).

³ 232 U. S. 383 (1914).

⁴ A list of states adopting the exclusionary rule may be found in Annot. 50 A. L. R. 2d 531 at 536 (1956).

⁵ *Wolf v. Colorado*, 338 U. S. 25 (1944). The due process clause of the 14th Amendment is not violated by the states' use of illegally obtained evidence provided the method of acquisition is not so harsh as to violate the basic concepts of such clause. *Rochin v. California*, 342 U. S. 165 (1952).