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# Bankruptcy -- Liquidating Agents and the Fifth Act of Bankruptcy

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# NOTES

## Bankruptcy—Liquidating Agents and the Fifth Act of Bankruptcy

Before a creditor can place a debtor into involuntary bankruptcy, he must allege and prove that the debtor has committed an act of bankruptcy.[1] While this requirement has been criticized as being detrimental to the achievement of bankruptcy objectives,[2] it continues to be an essential element in creditors' attempts to invoke bankruptcy proceedings. Section 3a[3] of the Bankruptcy Act[4] lists the six different acts that permit creditors to file a petition in involuntary bankruptcy.[5] If a person, "while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property,"[6] he has committed the fifth act of bankruptcy. In *Blair & Co. v. Foley*[7] the Court of Appeals for the Second Circuit held that the appointment of a liquidating agent under a private liquidation agreement did not constitute the appointment of a receiver or trustee within the meaning of section 3a(5). In so doing, the Second Circuit appears to have given section 3a(5) a construction not intended by Congress.

Because of operating losses and capital shrinkage, Blair & Co., a member of the New York Stock Exchange, decided to undertake a self-liquidation program. To prevent losses to its customers, Blair sought the aid of the Special Trust Fund,[8] established by the New York

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1. This is not the only requirement. The petition for involuntary bankruptcy must be filed by three creditors holding provable claims of at least $500 against a debtor owing $1,000 or more, and the debtor must also be susceptible to an involuntary petition under Bankruptcy Act § 4b, 11 U.S.C. § 22(b) (1970). *See* D. COWANS, BANKRUPTCY LAW AND PRACTICE § 882 (1963) [hereinafter cited as COWANS].

2. *See* J. MACLACHLAN, HANDBOOK OF THE LAW OF BANKRUPTCY §§ 64-66 (1956); Treiman, *Acts of Bankruptcy: A Medieval Concept in Modern Bankruptcy Law*, 52 HARV. L. REV. 189 (1938) [hereinafter cited as TREIMAN]; Note, *"Acts of Bankruptcy" in Perspective*, 67 HARV. L. REV. 500 (1954).

3. 11 U.S.C. § 21(a) (1970).

4. Bankruptcy Act is the short title given to 11 U.S.C. §§ 1-1255 (1970), which governs all bankruptcy proceedings.

5. An act of bankruptcy is not to be confused with the Bankruptcy Act or any other piece of legislation dealing with bankruptcy. It simply refers to one of the six enumerated events which must have occurred before involuntary proceedings can be brought against a debtor. For a discussion of the origins of the act of bankruptcy requirement see TREIMAN.

6. Bankruptcy Act § 3a(5), 11 U.S.C. § 21(a)(5) (1970).

7. 471 F.2d 178 (2d Cir. 1973), *cert. granted*, 93 S. Ct. 1901 (1973) (No. 1154).

8. *See* Constitution of the New York Stock Exchange, art. XIX, § 1, 2 CCH NEW YORK STOCK EXCHANGE GUIDE § 1841 (1972).

Stock Exchange to assist member firms in avoiding bankruptcy. In exchange for loans and guarantees from the Fund, the trustees of the New York Stock Exchange were given the right to appoint a liquidator of their own choosing. The agreement entered into by Blair with the New York Stock Exchange gave the liquidator effective control of the corporation for the purpose of completing the liquidation process.[9] Shortly after the appointment, creditors of Blair filed an involuntary petition in bankruptcy against the corporation in which they alleged that Blair's consent to the agreement constituted the fifth act of bankruptcy.[10] The creditors' motion for summary adjudication was granted by the referee and upheld by the district court.[11] On appeal the Second Circuit reversed, holding that the appointment of a liquidator did not constitute an appointment of a "receiver or trustee" within the meaning of section 3a(5) of the Act.

The appointment of a receiver or trustee to administer the property of an insolvent person was not specified as an act of bankruptcy in section 3a of the Bankruptcy Act of 1898.[12] However, a few courts liberally construed a clause in that section to find that the appointment of such an individual amounted to an assignment for the benefit of creditors (the fourth act of bankruptcy).[13] Expressing approval of these

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9. Paragraph VIII of the agreement described the powers and duties of the liquidating agent as set forth below.

> Immediately following his appointment by the Exchange, the Liquidator shall take control of the business and property of the Corporation for the purpose of liquidating the business of the Corporation and shall proceed as follows in connection with the liquidation:
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> i.) he shall promptly take such steps as he may deem practicable to reduce the Corporation's operating expenses and to dispose of the Corporation's salable assets;
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> ii.) he shall have power to retain independent public accounts, consultants, counsel and other agents and assistants and shall have power to augment and reduce or eliminate the staff of the Corporation;
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> iii.) he shall, as soon as practicable, assert and collect or settle all claims and rights of the Corporation;
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> iv.) he shall pay any claim against the Corporation considered by him to be a valid claim of any customer of the Corporation;
>
> v.) he shall take such other steps as he deems necessary or appropriate to liquidate the business of the Corporation.
>
> It is agreed that consistent with the duty of the Liquidator to effect a fair and orderly liquidation of the business of the Corporation to enable prompt settlement with its customers, the Liquidator shall act in accordance with what he deems to be good business practice.

471 F.2d at 179-80 n.1.

10. Two other acts of bankruptcy were also alleged in the petition but were dismissed by the court as no serious effort had been made to support them before the referee, before the district court, or on appeal to the Second Circuit. *Id.* at 180 & n.2.

11. *Id.* at 180.

12. Ch. 541, § 3a, 30 Stat. 546 (1898).

13. Scheuer v. Smith & Montgomery Book & Stationery Co., 112 F. 407 (5th Cir.

minority decisions, Congress amended section 3a in 1903 specifically to include the appointment of a receiver or trustee as an act of bankruptcy;[14] but the wording of the 1903 amendment created several new problems. It distinguished between voluntary and involuntary receivers, required an examination in some cases of why the receivers were appointed, and left unclear whether insolvency was used in the bankruptcy sense (greater liabilities than assets) or the equity sense (inability to pay one's debts as they mature). In an attempt to remedy these problems, section 3a was once more amended in 1926.[15] Congress again failed to clarify the definition of insolvency, however, which allowed many failing businesses to use equity receiverships to avoid bankruptcy administration. To correct this abuse, Congress put section 3a(5) into its present form by including both definitions of insolvency in the Chandler Act of 1938.[16]

A receiver is typically defined as a person who is appointed by a court for the purpose of collecting, caring for, and administering the property of another, and he is usually regarded as an officer of the court.[17] The normal definition of a trustee is a person who holds legal title for another.[18] Because Blair's liquidator was privately appointed and did not maintain legal title to the property and because a review of the amendments dealing with the fifth act revealed no intent on the part of Congress to extend the words "receiver or trustee" beyond their normally understood definitions, the court reasoned that it could not construe section 3a(5) to include the appointment of a liquidating agent. The court found further support for its reading of section 3a (5) in two other sections of the Bankruptcy Act, section 2a(21)[19] and section 69d.[20] Both sections refer to liquidating agents as well as re-

1901); *In re* Macon Sash, Door & Lumber Co., 112 F. 323 (S.D. Ga. 1901), *rev'd sub nom.* Carling v. Seymour Lumber Co., 113 F. 483 (5th Cir. 1902).

14. Act of Feb. 5, 1903, ch. 487, § 2, 32 Stat. 797.

15. Act of May 27, 1926, ch. 406, § 3, 44 Stat. 662-63.

16. Ch. 575, § 3(a), 52 Stat. 844-45 (codified at 11 U.S.C. § 21(a)(5) (1970)).

17. 1 R. CLARK, A TREATISE ON THE LAW AND PRACTICE OF RECEIVERS § 11a (3d ed. 1959). There are other types of receivers, but the court in *Blair* chose to interpret the word to mean a court-appointed receiver. For a discussion of the different kinds of receivers see *id.* at §§ 11-45.

18. *See* RESTATEMENT (SECOND) OF TRUSTS §§ 2, 3(3) (1959).

19. 11 U.S.C. § 11(a)(21) (1970). This section authorizes the bankruptcy court to "[r]equire receivers or trustees appointed in proceedings not under this Act, assignees for the benefit of creditors, and agents authorized to take possession of or to liquidate a person's property to deliver the property in their possession or under their control" to the bankruptcy court.

20. 11 U.S.C. § 109(d) (1970). The relevant portion reads as follows: "Upon the filing of a petition under this Act, a receiver or trustee, appointed in proceedings not under this Act, of any of the property of a bankrupt, an assignee for the benefit of

ceivers and trustees, indicating to the court that when "the draftsmen desired to cover such an agent, they considered it necessary to say so and knew how to do it."[21]

The Blair court's construction of "receiver or trustee" is a study in contrast to other decisions interpreting section 3a(5). The concern of prior decisions has been with the scope of the appointee's powers and the purpose for which he was put in charge of the debtor's assets. To this end, courts have uniformly defined "receiver" to be simply one who is appointed over all the debtor's property for the purpose of liquidation.[22] Thus, where the receiver was placed in charge of only a portion of the debtor's property[23] or where the receivership was to foreclose on a mortgage or to enforce a lien on particular property,[24] the appointment was held not to constitute an act of bankruptcy under section 3a(5).[25] The courts have likewise defined "trustee" to mean someone who has effective control of a debtor's assets for the purpose of liquidation.[26] In fact, many courts use the words "trustee" and "receiver" interchangeably in discussing section 3a(5).[27]

Significantly, the vesting of legal title does not seem to be crucial to the definition of trustee under the fifth act of bankruptcy. A leading case in this respect is *Bramwell v. United States Fidelity & Guaranty Co.*[28] in which the assets of a bank were placed, by resolution of its directors, under the control of the State Superintendent of Banking for the purpose of liquidation. The United States Supreme Court held that

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creditors of a bankrupt, or an agent authorized to take possession of or to liquidate any of the property of a bankrupt shall be accountable to the bankruptcy court . . . ."

21. 471 F.2d at 183.

22. *E.g.*, Stearns & Foster Co. v. Pacific Bowling & Billiard Co., 391 F.2d 750, 752 (9th Cir. 1968) (noting that the Supreme Court had reserved a ruling on this issue on three separate occasions); Otis Elevator Co. v. Monks, 191 F.2d 1000, 1002 (1st Cir. 1951); Elfast v. Lamb, 111 F.2d 434, 436 (2d Cir. 1940). *But see In re* 211 East Delaware Place Bldg. Corp., 14 F. Supp. 96, 101-02 (N.D. Ill. 1936).

23. Tatum v. Acadian Prod. Corp., 35 F. Supp. 40, 48 (E.D. La. 1940).

24. Central Fibre Prod. Co. v. Hardin, 82 F.2d 692, 694 (5th Cir. 1936); Standard Accident Ins. Co. v. E.T. Sheftall & Co., 53 F.2d 40, 41 (5th Cir. 1931); *cf.* Duparquet Huot & Moneuse Co. v. Evans, 297 U.S. 216, 222-23 (1935).

25. It also seems where the purpose of a receiver is to force removal of the present management of a corporation rather than to liquidate the corporation, the appointment will not be deemed an act of bankruptcy. 1 COLLIER ON BANKRUPTCY ¶ 3.502 n.2, at 499 (14th ed. J. Moore & L. King 1971) [hereinafter cited as Collier].

26. *Id.* ¶ 3.502, at 501; C. NADLER, THE LAW OF BANKRUPTCY § 461 (2d ed. S. Nadler & M. Nadler 1965).

27. C. NADLER, *supra* note 26, § 461; *see, e.g.*, Haubtman & Loeb Co. v. Dunbar Molasses Co., 13 F.2d 335, 336 (5th Cir. 1926); Bramwell v. United States Fidelity & Guar. Co., 299 F. 705, 709 (9th Cir. 1924), *aff'd*, 269 U.S. 483 (1926); *In re* Metallic Bedstead Co., 98 F. 981, 982 (2d Cir. 1899).

28. 269 U.S. 483 (1926).

in so doing the bank had committed the fifth act of bankruptcy. The Court said that the State Superintendent constituted a trustee within the meaning of section 3a(5) because "[a]ppellant's duties were in substance the same as those of a trustee having the legal title of property for the purpose of converting it into money to be paid over to specific persons. . . . Appellant had a power that for present purposes had the same effect as a title, and that is enough."[29]

As in *Bramwell*, Blair's liquidator had the "power that for present purposes had the same effect as a title." He was given complete control of the corporation for the purpose of liquidation and had the power to pass legal title of all the corporation's assets.[30] Under the facts of *Blair* the Second Circuit could have construed "trustee" to include a liquidating agent whose powers were as extensive as Blair's liquidator.

*Blair's* reluctance to construe section 3a(5) liberally stemmed from its interpretation of the policy underlying the requirement of an act of bankruptcy as a condition precedent to involuntary proceedings. The purpose of the requirement, according to the court, is to afford "protection against arbitrary or unjust interference with the property of the debtor by providing that he shall not be amenable to bankruptcy at the instance of creditors unless he has done, or suffered to be done, certain acts, principally concerning his property."[31] The court seemed to fear that if it held Blair's liquidator to be within the scope of section 3a(5), it would be intruding on Blair's right to deal freely with its corporate assets. But once a debtor becomes insolvent, there are other considerations that suggest that a liberal construction of section 3a(5) would be appropriate. One of the principal objectives of the Bankruptcy Act is to preserve the bankrupt's assets in order to provide an equitable distribution of the assets among the bankrupt's creditors through a uniform proceeding administered by the bankruptcy courts.[32] Once insolvent, a debtor's property becomes susceptible to rapid dismemberment by creditors seeking to recover their interests. This typically results in a "first come, first served" liquidation process in which the insolvent's assets are taken by the larger, more efficient creditors at the expense of the smaller ones. If an act of bankruptcy has occurred,

29. *Id.* at 491.
30. *See* note 9 *supra.*
31. 471 F.2d at 180, *quoting* 1 COLLIER ¶ 3.03, at 403.
32. *See, e.g.*, Young v. Higbee Co., 324 U.S. 204, 210 (1945); Lewis v. Fitzgerald, 295 F.2d 877, 878 (10th Cir. 1961); District of Columbia v. Greenbaum, 223 F.2d 633, 636-37 (D.C. Cir. 1955).

the debtor has manifested that he is no longer able or willing to protect his creditors' rights in his property.[33] Thus, one purpose for enumerating the six acts of bankruptcy in section 3a was to provide objective criteria for determining when the debtor should be required to submit to bankruptcy jurisdiction.[34]

The appointment of Blair's liquidator was an indication that the interests of Blair's creditors were endangered. The corporate assets were being liquidated under the control of a representative of the trustees of the New York Stock Exchange[35] whose interest in a failing member firm would be considerably different than the interests of the firm's creditors. The liquidation of an insolvent business was being conducted without the safeguards and uniformity provided by Congress in the Bankruptcy Act for the protection of creditors. If the act requirements are to serve as indicators that creditors' interests are endangered, as well as to protect the debtor's free use of his property, a liberal construction of section 3a(5) appears preferable and more likely to achieve the objectives of the Bankruptcy Act. Such a conclusion was reached twenty years ago in *In re Bonnie Classics, Inc.*[36] In that case the directors of a corporation filed, as required by New York law, for a certificate of dissolution and were appointed trustees of the business for the purpose of making proper distribution of the corporate assets to creditors and shareholders. The directors opposed a petition for involuntary bankruptcy on the grounds that their appointment did not come within the meaning of section 3a(5). The court concluded:

> Any action by one who is insolvent which effectively causes the transfer of his property to another for final liquidation purposes appoints the transferee a "trustee to take charge of his property" under § 3, sub. a(5) . . . . Any other construction would defeat the objectives of the Bankruptcy Act and abort the broad powers of the courts of bankruptcy intended for the uniform administration of insolvent estates.[37]

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33. *Cf.* 1 COLLIER ¶ 3.03, at 402-03: "These acts usually amount either to actual or constructive frauds on creditors, or are tantamount to declarations of insolvency."

34. *See* COWANS § 1063; 1 H. REMINGTON, A TREATISE ON THE BANKRUPTCY LAW OF THE UNITED STATES § 109 (5th ed. 1950); Moore & Tone, *Proposed Bankruptcy Amendments: Improvement or Retrogression?*, 57 YALE L.J. 683, 708 (1948).

35. *See* paragraph VIII of the agreement between Blair & Co. and the Special Trust Fund cited note 9 *supra.*

36. 116 F. Supp. 646 (S.D.N.Y. 1953).

37. *Id.* at 648. The *Blair* court distinguished *Bonnie Classics* by noting that there the directors were given legal title, while Blair's liquidator was not. *But see* text accompanying notes 28-30 *supra.*

The *Blair* court may have felt compelled to define "receiver" and "trustee" narrowly because of its analysis of the history of section 3a (5) and its interpretation of sections 2a(21) and 69d.[38] However, the differences between sections 3a(5), 2a(21), and 69d do not necessarily evidence a Congressional intent to distinguish between receivers, trustees, and liquidating agents. The references to receivers, trustees, assignees, and liquidating agents in both section 2a(21) and section 69d were added to the Bankruptcy Act to clarify the bankruptcy courts' jurisdiction and authority over these non-bankruptcy appointed "liquidation officers."[39] At the time of these legislative additions, there were no reported decisions holding that a privately appointed liquidating agent, who otherwise met the qualifications of section 3a (5), did not come within the meaning of "receiver or trustee."[40] In the absence of uncertainty in regard to section 3a(5) and liquidating agents, such as that which existed in regard to section 2a(21) and section 69d, Congress may not have felt it necessary to amend the fifth act of bankruptcy.[41] The very fact that liquidating agents were grouped with receivers, trustees, and assignees in section 2a(21) and section 69d is significant in this respect. The appointment of any one of the latter three indicates the occurrence of the fourth or fifth act of bankruptcy.[42] This suggests that, in listing all four liquidation officers together, Congress indicated an understanding that the appointment of a liquidating agent was already within one of the acts of bankruptcy just as the other three were.

The Second Circuit adopted a strict construction of section 3a(5)

38. *See* notes 19-21 and accompanying text *supra.*

39. 1 COLLIER ¶ 2.77; 4 *id.* ¶ 69.01[3].

40. This may be due to the fact that many bankruptcy decisions are not appealed from the referee's decisions and thus go unreported.

41. While this might indicate carelessness on the part of Congressional draftsmen, failure to amend uniformly where there is no intent to create discrepancies in meaning is not untypical of the Bankruptcy Act amendments. Witness sections 2a (21) and 69d. Both sections are designed to deal with the same individuals; yet when Congress added liquidating agents to § 2a(21), it failed to do the same to § 69d. It was not until 1952 that Congress corrected this discrepancy. *See* 4 COLLIER ¶ 69.01[3]. There is other evidence suggesting that "receiver or trustee" can be defined to include liquidating agents though the words cannot be read to include such an agent when found in other sections of the Bankruptcy Act. Emil v. Hanley, 318 U.S. 515, 522 (1943) (the Court sanctioned a distributive definition of the word "receiver" when found in different sections of the Act when such an interpretation was necessary to prevent a misreading of Congressional intent). The wording of § 69d reveals further support. In § 69d "receiver" and "trustee" are defined to include a receiver or trustee appointed over only a *portion* of the debtor's property; whereas "receiver" and "trustee" have been defined by the courts to mean only a receiver or trustee put in charge of *all* the debtor's property. Cases cited note 22 *supra.*

42. 11 U.S.C. §§ 21a(4)-(5) (1970).

in *Blair* to conform with the specific policy that it perceived behind the fourth and fifth acts of bankruptcy.[43] Under the court's analysis a receiver is typically viewed as an appointed officer of the court and a trustee is considered to have legal title to the property he holds. Therefore if the debtor's property were in the possession of either individual, the debtor's creditors would be required to proceed in one manner or another against the receiver or trustee as well as the debtor himself. The court noted that this would also be true if there were a general assignment for the benefit of creditors, but not if the person possessing the property were merely an agent. The policy behind section 3a(4) and section 3a(5), the court said, is to allow creditors to invoke bankruptcy relief only if the debtor has allowed such an obstacle to be placed in the way of his creditor's claims.[44] Since the appointment of a liquidating agent has been held not to be an assignment for the benefit of creditors[45] and the policy behind the fourth and fifth acts was allegedly the same, the court failed to see why the appointment of a liquidating agent should constitute the fifth act.[46]

The problem with the court's analysis is that sections 3a(4) and 3a(5) are separate and distinct acts of bankruptcy. They are designed to cover two different events that affect the debtor's property. The conclusion that if a liquidating agent were not an assignee, he would also not be a receiver or trustee seems to ignore a distinction specifically recognized by Congress. The court's policy argument also suggests that the court believed creditors were in a stronger position than bankruptcy courts when it came to pursuing a claim against a debtor's liquidating agent, an opinion not shared by Congress. If a liquidator is truly nothing more than an agent of the debtor, the bankruptcy court's jurisdiction over the debtor would provide the requisite jurisdiction over his agent.[47] Yet sections 2a(21) and 69d were added to the Bankruptcy Act in 1938 because "there was a real necessity for stating clearly what status non-bankruptcy liquidation officers occupy . . . and the extent of the bankruptcy court's control over them."[48] If, as

43. 471 F.2d at 181-82.

44. *Id.*

45. *In re* Ambrose Matthews & Co., 229 F. 309 (D.N.J.), *aff'd*, 236 F. 539 (3d Cir. 1916). *But see In re* R.V. Smith, 38 F. Supp. 57 (W.D. Okla. 1941), which held that the appointment of a liquidating trustee was an assignment for the benefit of creditors. *Blair* found its reasoning unpersuasive but did not say why.

46. 471 F.2d at 181-82.

47. *See* Reifsnyder v. B. Levy & Sons, 88 F.2d 287 (3d Cir. 1937); *In re* Muncie Pulp Co., 139 F. 546 (2d Cir. 1905).

48. 4 COLLIER ¶ 69.01, at 1065.

*Blair* reasoned, a liquidating agent presents no obstacles to ordinary creditor's remedies, then one is left with the question of why Congress felt it necessary to give bankruptcy courts jurisdiction over liquidating agents. The answer appears to be that liquidating agents do present an obstacle to ordinary creditor remedies. As in the case of receivers, trustees, or assignees, Blair's liquidator had authority, by virtue of the agreement between the corporation and the Special Trust Fund, to liquidate the corporate assets as he saw fit and not according to Blair's dictates.[49] Therefore, it would seem reasonable to treat the appointment of a liquidating agent whose powers were as extensive as Blair's as the equivalent of a receiver or trustee.[50]

While private liquidation agreements of brokerage firms are not likely to present a section 3a(5) issue in the future,[51] the *Blair* decision appears to have opened a door to a procedure which will permit insolvent businesses to defeat the broad objectives of the Bankruptcy Act. The court's decision will permit insolvent businesses to place effective control of the business's assets in the hands of private liquidating agents and allow the liquidation process to be accomplished without the safeguards and uniformity of administration provided for by the Bankruptcy Act. The decision indicates that Congress will have to amend section 3a(5) if it wants to prevent the subversion through private liquidation agreements of the creditors' ability to invoke bankruptcy proceedings.

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## Civil Procedure—A Possible Solution to the Problem of "Sewer Service" in Consumer Credit Actions

Notice of a lawsuit is one of the most important elements of an individual's right to due process of law under the fourteenth amendment.[1] Nevertheless, each day in large cities thousands of default judgments

49. *See* note 9 *supra.*

50. *See* 1 COLLIER ¶ 3.503, at 503.

51. Future problems involving the insolvency of brokerage firms will be handled by the Securities Investor Protection Act of 1970, 15 U.S.C. §§ 78aaa-*lll* (1970). *See* Note, *The Securities Investor Protection Act of 1970: A New Federal Role in Investor Protection*, 24 VAND. L. REV. 586, 606-13 (1971).

1. *See* Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 313-16 (1950).