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The Three Giants of Bankruptcy Law in St. Louis

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Three Washington University School of Law alumni made enormous contributions to the development and practice of bankruptcy law in the past 125 years. Jay L. Torrey, a commercial lawyer based in St. Louis, drafted legislation that eventually became the Bankruptcy Act of 1898 (the "1898 Act"), the nation's first permanent bankruptcy statute. Walter D. Coles, St. Louis' first bankruptcy referee under the 1898 Act, held that position for nearly thirty-six years, overseeing many high profile business failures and publishing extensively on bankruptcy law and practice in the early twentieth century. Barry S. Schermer was appointed a bankruptcy judge in 1986, a few years after the Bankruptcy Code of 1978 ("1978 Code") was passed; he has presided over some of the nation's most complex business reorganizations while also serving as an appellate judge and teaching law to generations of Washington University School of Law students. On the occasion of Judge Schermer's thirtieth anniversary on the bench, it is time to reflect on the accomplishments of these three giants of bankruptcy law.

Bankruptcy has existed since the founding of the Republic. The U.S. Constitution authorizes Congress to enact uniform laws on the subject of bankruptcy.[1] The framers thought a federal bankruptcy law would prevent dishonest debtors from moving their assets across state lines to avoid payment of just debts.[2] Yet, while Congress had the right to enact federal bankruptcy legislation, it did so only sporadically in the nineteenth century. Congress passed three federal bankruptcy statutes in the 1800s, but repealed each only a few years after enactment.[3] Of the first 109 years after the Constitution was ratified, the nation had a federal bankruptcy statute for only sixteen of them.[4] These temporary federal statutes were

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1. U.S. Const. art. I, § 8, cl. 4.
2. THE FEDERALIST No. 42 (James Madison) ("The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question.").
3. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 ABI L. Rev. 5, 16-20 [hereinafter "Tabb I"].
4. *Id*. at 14.

decidedly creditor-friendly. For instance, each of the temporary federal statutes required the debtor to repay some minimum amount to creditors in order to receive a discharge of the remaining debt.[5]

The last of the temporary federal statutes was repealed in 1878.[6] A year or so earlier, a young man named Jay L. Torrey graduated from St. Louis Law School, which later became known as Washington University School of Law.[7] Mr. Torrey was destined to become the driving force behind the United States' first permanent bankruptcy statute, the Bankruptcy Act of 1898.

I. JAY L. TORREY

Jay L. Torrey was born in Illinois, attended college at the University of Missouri, and worked his way through law school as a newspaper delivery boy. Although he continued to deliver newspapers for a time after graduating from law school,[8] Torrey soon found the practice of law more lucrative than delivering newspapers. He earned $1500 in his first full year of practice,[9] specializing in commercial law.[10] Like many lawyers before and after him, Torrey joined numerous civic and community organizations, rising to leadership positions in several of them: president of the Mercantile Club for three years; a leader of the Old Flambeau Club, which held very popular parades; an officer in the Missouri National Guard; and a member of the Elks Club.[11] Local

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5. *Id.* at 24.

6. *Id*. at 18-20.

7. *The Law School Alumni*, ST. LOUIS POST-DISPATCH, June 11, 1880 at 1. The Washington University School of Law was founded in 1867, but it was officially known as St. Louis Law School for several decades thereafter, even though it was affiliated with Washington University from the beginning. In 1909, the then-Chancellor of Washington University favored a erecting a sign on a new building housing the law school that identified it as the "Law Department of Washington University." The dean of the law school protested, saying graduates thought of their alma mater as the St. Louis Law School. Nevertheless, the official name of the school was eventually changed to the Washington University School of Law in 1918. *See generally*, CANDACE O'CONNOR, WASHINGTON UNIVERSITY SCHOOL OF LAW, 1867-2000: A PROUD HERITAGE 6 (2000).

8. *J.L. Torrey: The History of a Self-Made Man*, ST. LOUIS POST-DISPATCH, Oct. 29, 1884 at 2.

9. *The Makers of Missouri, No. 11: Colonel Jay L. Torrey*, UNIV. MISSOURIAN, May 24, 1912, at 2.

10. *Id. See also Col. Jay L. Torrey, a St. Louis Paper Carrier Who Became a Lawyer, Promoted the Bankruptcy Law and Commands Rough Riders*, ST. LOUIS POST-DISPATCH, July 3, 1898, at 18

11. *All Torrey Missed Was Being Born in a Log Cabin*, ST. LOUIS POST-DISPATCH, July 12,

newspapers clearly were enamored with Torrey's connection to their industry — in one early profile of him, the *St. Louis Post-Dispatch* gushed that Torrey's face "is a strong one, with a prominent nose, alert eyes and a frame of hair and beard in which the sunlight had rioted until there is the faintest suggestion of redness therein."[12]

In addition to these leadership positions, Torrey became a leader in a nascent national movement to enact a permanent bankruptcy statute. Creditors began calling for a new federal bankruptcy statute almost immediately after the repeal of the third federal act in 1878. In 1880, a federal judge named John Lowell drafted pro-creditor legislation that came to be known as the Lowell Bill.[13] In 1881, the National Boards of Trade endorsed the Lowell Bill at a convention held in Washington.[14] At another convention three years later, the National Association of Commercial Bodies, which focused on federal bankruptcy legislation, elected Torrey Chairman of the organization.[15] Torrey traveled back to Washington in 1886 to lobby Congress in favor of the Lowell Bill.[16] In 1884, the Lowell Bill passed in the Senate, but failed in the House.[17] Still, the momentum for reform was in full swing by the late 1880s. In February of 1889, the Associated Wholesale Grocers sponsored a convention in St. Louis "for the purpose of drawing up bankruptcy laws for presentation to Congress for passage."[18] One attendee noted that "business men of the United States were almost unanimously in favor of the passage by Congress of a bill to remove the evils from which the commercial world now suffers."[19]

1918, at 3; *Fourth of July!, Grand Sham Battle!,* ST. LOUIS POST-DISPATCH, June 28, 1879, at 4. Torrey eventually became a lieutenant colonel in the U.S. National Guard and was thereafter often referred to as "Colonel Torrey" in the press. *Id*.

12. *J.L. Torrey: The History of a Self-Made Man*, *supra* note 8, at 2.

13. Lowell was a sitting judge when he drafted the bill, an occurrence that is impossible to imagine today.

14. Bradley Hansen, *Commercial Associations and the Creation of a National Economy: The Demand for Federal Bankruptcy Law*, 72 BUS. HIST. REV. 86, 98 (1998).

15. *The Makers of Missouri, No. 11: Colonel Jay L. Torrey*, *supra* note 9, at 2. Torrey was elected chairman of this convention despite the fact he was the youngest attendee.

16. *Capital Gossip,* ST. LOUIS POST-DISPATCH, May 20, 1886, at 7.

17. DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 3-37 (2001) [hereinafter "SKEEL I"].

18. *A Bankruptcy Law, the Work of Obtaining One Well Under Way*, ST. LOUIS POST-DISPATCH, Feb. 24, 1889, at 8.

19. *All Want Equal Chances; Dissatisfaction with the Bankruptcy Laws*, N.Y. TIMES, Mar. 1, 1889, at 2.

Torrey was again chairman of the convention, and the attendees considered a proposed bill drafted by Torrey.[20] A second meeting was held later in the year in Minneapolis.[21] At the Minneapolis meeting, the group unanimously endorsed Torrey's bill.[22] Torrey also met with President Benjamin Harrison in late 1889, who confirmed his support for "permanent legislation upon the subject of bankruptcy, instead of a temporary law to simply relieve certain unfortunates who had been affected by a panic."[23]

Torrey's legislation, commonly known as the Torrey Bill, passed the House in 1890, but it bogged down in the Senate.[24] The Torrey Bill thereafter was introduced in each of the next several sessions, but did not make it out of committee until 1896, when it again passed in the House but failed in the Senate.[25] Torrey traveled to Washington every term in the 1890s to urge its passage. Torrey was such a Washington regular that he even attended an official White House dinner in 1894, where he and his brother dined with President and Mrs. Cleveland and the ministers of Turkey and Mexico.[26] Torrey was a tireless advocate for bankruptcy reform. He wrote papers for trade associations[27] and gave interviews to pro-reform newspapers such as the *New York Times*.[28] He also spoke before groups all over the country in favor of reform. One local Chicago paper covered Torrey's speech before a group of "prosperous-looking, well-dressed, and rotund gentlemen" where the attendees first discussed their dinner and then bankruptcy reform.[29]

Bankruptcy reform was a very controversial subject in the 1890s. Congressman from the South and West typically opposed the Torrey Bill, often denouncing it in the most florid language. Rep. William H. Denson

20. S. DOC. NO. 55-126, at 1 (1889).
21. S. DOC. NO. 54-237, at 102 (1896) (statement of Jay L. Torrey).
22. S. DOC. NO. 54-237, at 102 (statement of the Associated Wholesale Grocers of St. Louis).
23. *National Bankruptcy Law*, N.Y. TIMES, Nov. 19, 1889, at 2.
24. Charles J. Tabb, *A Century of Regress or Progress? A Political History of Bankruptcy Legislation in 1898 and 1998*, 15 BANKR. DEV. J. 343, 362 (1999) [hereinafter "Tabb II"].
25. *Id.*
26. *Gold Lace in the Blue Room*, N.Y. TIMES, Feb. 4, 1894, at 8.
27. *J.L. Torrey on Bankruptcy: Paper by the Author of the Long-Pending Bill Read at the Board of Trade Meeting*, N.Y. TIMES, Oct. 21, 1897, at 12.
28. *Nelson's Bankruptcy Bill: Judge J.L. Torrey Tells Why It Should Not Become National Law*, N.Y. TIMES, May 17, 1897, at 7.
29. S. DOC. NO. 54-237, at 29 (1896).

of Alabama called it an "infernal engine of ruin, slavery, and destruction" and predicted that it was "the last stroke necessary to destroy free institutions and drive home the last screw in the coffin of liberty."[30] There was also plenty of lingering resentment in the old Confederacy about the administration of the 1867 Act after the Civil War. Although the *Richmond Dispatch* editorialized in favor of the Torrey Bill, it noted that "the very name of 'bankrupt law' stinks in the nostrils of many very worthy people . . ." because the 1867 Act was associated with "the days of 'carpetbaggery' and 'scalawaggery.'"[31] Many critics were wary of the Torrey Bill's provision permitting the states to enact their own exemption statutes.[32] Indeed, this provision was a reluctant concession by the Bill's supporters to gain needed support from the states' rights advocates.[33]

Although the Torrey Bill was fiercely debated throughout the 1890s, Torrey himself was admired by those on both sides of the issue. One congressman said on the House floor that he "had never known a measure more intelligently, industriously, and persistently lobbied."[34] Democrat William Jennings Bryan, an opponent of the Torrey Bill, nevertheless praised Torrey, saying, "I have never known of any person interested in the passage of a bill who seems to be so fair in the presentation of a case."[35] Others remarked about Torrey's powers of persuasion: "Colonel Torrey could start out with a petition to have the President hung and come in with a good fair line of signatures."[36]

Upon William McKinley's inauguration in 1897, the Republicans controlled both houses of Congress and the presidency for the first time in several years. The momentum for reform soon gained steam, and the House and Senate passed different versions of the Torrey Bill in 1897. A conference committee met for four months to reach a compromise acceptable to both chambers.[37] The legislation that was ultimately enacted

30. CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 136 (1935).
31. S. DOC. NO. 54-237, at 241-42 (1896).
32. S. DOC. NO. 55-156 at 42 (1898).
33. *Id.* (Torrey predicted that states with large exemptions would eventually reduce them to more closely match other states).
34. Hansen, *supra* note 14, at 100.
35. Skeel I, *supra* note 17, at 37.
36. S. DOC. NO. 54-237 at 29 (1896) (Statement of J.K. Armsby Company's Price List, Chicago).
37. Skeel I, *supra* note 17, at 42. *See also* Tabb II, *supra* note 24, at 377-79.

was considerably more debtor-friendly[38] than the original Torrey Bill, but "most congressmen continued to believe it was, at its core, still the Torrey [B]ill."[39] Ironically, after laboring tirelessly for passage of bankruptcy legislation for a decade, Torrey himself was absent from Washington when the bill was finally signed because he was busy mustering a Rough Rider regiment to fight in the Spanish-American War.

The 1898 Act introduced, or at least refined, many features that remain in today's law, including the fresh start principle, voluntary and involuntary bankruptcies, personal exemptions, recovery of certain avoidable transfers, and discharge of indebtedness.[40] The Act also provided for the appointment of bankruptcy referees, selected by the local federal district court, to preside over the administration of bankruptcy cases. The district court referred bankruptcy matters to the referee and most decisions of the referee were subject to review by the district court. The referees were compensated in part on a commission of the assets brought into the estate.[41]

The passage of the 1898 Act did not end the sectional and partisan differences about federal bankruptcy law. Almost immediately after its passage, a creditor challenged the 1898 Act's constitutionality on the grounds that the state law exemptions violated the Bankruptcy Clause's uniformity requirement, but the U.S. Supreme Court denied the challenge.[42] Some of the Southern Democrats and states' right advocates mounted a serious effort in 1902 to repeal the law that ultimately failed.[43] On the other side, the Republican-controlled House Judiciary Committee advocated repeal in 1905, but nothing came of it.[44]

Despite progress on federal bankruptcy legislation, Torrey was not content with the life of a commercial lawyer and lobbyist. At some point in the early 1890s, Torrey moved to Wyoming where he became a rancher

38. Tabb II, *supra* note 24, at 367-68.

39. Hansen, *supra* note 14, at 106.

40. David S. Kennedy and R. Spencer Clift, III, *An Historical Analysis of Insolvency Laws and Their Impact on the Role, Power, and Jurisdiction of Today's United States Bankruptcy Court and Its Judicial Officers*, 9 J. BANKR. L. & PRAC. 165, 175 (2000).

41. *Id.* at 176.

42. Hanover Nat'l Bank v. Moyses, 186 U.S. 181 (1902).

43. Hansen, *supra* note 14, at 108.

44. Skeel I, *supra* note 17, at 44.

who sold horses to the U.S. Cavalry.[45] While in Wyoming, he obtained at least two patents, one for a saddle blanket and another for a type of spoon.[46] He also was elected to the Wyoming House of Representatives, where he was soon selected Speaker of the House.[47] Beyond politics, he evidently embodied the masculine ideals of the time: one admiring newspaper said of him, "he weighs 240 pounds, measures four feet around the chest, and his biceps are of a size and hardness that challenge the admiration of every lover of muscular Christianity."[48] But, Torrey's relocation to Wyoming did not dim his ardor for bankruptcy reform. Throughout the 1890s, he tended to his ranch in the summer and traveled to Washington in the winter to lobby Congress.[49]

The passage of the Torrey Bill in 1898 was not Torrey's only newsworthy accomplishment that year. In February of 1898, the U.S.S. *Maine* was sunk in Cuba, and Spain was blamed for the incident.[50] Torrey met with President McKinley three weeks after the incident and advocated for a "cowboy regiment" to fight the Spaniards in the upcoming war.[51] Torrey told the McKinley that these regiments would be composed of "hardy men and perfect horsemen, able to cope with all difficulties and competent to care for themselves under all circumstances."[52] Congress eventually authorized three cowboy regiments, one of which Torrey commanded.[53] Succumbing to the casual racism and name calling that was so prevalent then, Torrey boasted to a Philadelphia newspaper that his cowboys and their horses had "great lung expansion" because of

45. James McClain, *Late Philanthropist Founded Several Ozark Towns*, THE COLUMBIA EVENING MISSOURIAN, Jan. 4, 1921, at 4.

46. U.S. Patent No. 530,864 (issued Dec. 11, 1894). U.S. Patent No. 32,726 (issued May 29, 1900).

47. *Talk of Western Candidates: Irving M. Scott to Make a Campaign – Senator Warrant Working for Col. Torrey,* N.Y. TIMES, June 14, 1900, at 2.

48. *Why He Loves Them*, THE TIMES (Philadelphia), Feb. 13, 1898, at 19.

49. *The Makers of Missouri, No. 11: Colonel Jay L. Torrey*, U. MISSOURIAN, May 24, 1912, at 3.

50. *The Maine's Men Declare That the Battleship Was Torpedoed*, ST. LOUIS POST-DISPATCH, Feb. 17, 1898, AT 1.

51. J.G. Harbord, *A Torrey Rough Rider: General Harbord Outlines Colonel Shanton's Service Record*, N.Y. TIMES, Oct. 7, 1930, at 28.

52. *Regiment of Cowboys Favored by Gen. Miles*, ST. LOUIS POST-DISPATCH, Mar. 10, 1898, at 2.

53. *The Cowboy Regiments: Theodore Roosevelt's Journey West Postponed Through Pressure of Business at Navy Department*, N.Y. TIMES, May 1, 1898.

Wyoming's altitude and would thus be superior warriors in sea level Cuba. Besides, added Torrey, "all of the cowboys hate 'greasers' and would like to get at 'em."[54]

Torrey's unit, sometimes called "Torrey's Terrors," traveled from Wyoming to Jacksonville, Florida where they were scheduled to depart for Cuba.[55] The unit encountered many problems en route, including a stampede of several hundred of the unit's horses through the streets of Cheyenne after they were spooked by a train whistle and accidents in St. Joseph, Missouri and St. Louis, the latter of which followed a stop at a local brewery.[56] The most serious accident occurred in Tupelo, Mississippi, where several of the men died and both of Torrey's feet were injured.[57] The train's engineer fled the scene shortly after the accident, which was evidently a good decision as the men were debating "whether he should be hanged like a criminal or shot like a cur."[58]

One of the other cowboy regiments arrived in Cuba before Torrey's unit could regroup. Led by Teddy Roosevelt and known as the Rough Riders, this regiment participated in the decisive battle at San Juan Hill on July 1, 1989.[59] The war soon ended and Torrey's unit was disbanded before it saw action. Torrey returned to Wyoming and spent part of 1899 unsuccessfully pursuing Butch Cassidy and the Hole in the Wall Gang.[60]

The high point of Torrey's national fame was in 1900. Torrey was sometimes said to have been one of two finalists to be President McKinley's vice presidential running mate.[61] The other finalist, Theodore Roosevelt, was ultimately selected, but Roosevelt at first equivocated on

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54. *Two Cowboy Regiments*, THE TIMES (Philadelphia), Apr. 25, 1898, at 3.

55. JERALD R. HOFFMAN, COLONEL JAY L. TORREY AND HIS ROUGH RIDER REGIMENT 72 (1967).

56. *Id.*

57. *Torrey's Train Wrecked: Four of the Rough Riders Killed and Fifteen Injured, One Fatally,* N.Y. TIMES, June 27, 1898, at 2. *See also* HOFFMAN, *supra* note 55, at 68.

58. HOFFMAN, *supra* note 55, at 71.

59. David A. Skeel, *The Genius of the 1898 Bankruptcy Act*, 15 BANKR. DEV. J. 321, 341 (1999) [(hereinafter," Skeel II"]. The Battle of San Juan Hill took place on the same day that the 1898 Act became effective. *Id.*

60. Lively Hunt Through the Western States for the Dare-Devil 'Hole in the Wall' Bandits, THE S.F. CALL, July 2, 1899, at 22.

61. James McClain, *Late Philanthropist Founded Several Ozark Towns*, THE COLUMBIA EVENING MISSOURIAN, Jan. 4, 1921, at 4.

whether to accept the offer.[62] Torrey was quickly summoned to a meeting of national committeemen to discuss his possible nomination, but Roosevelt finally accepted President McKinley's offer.[63] Roosevelt, of course, became president himself after McKinley was assassinated in 1901.

Torrey returned to Missouri in 1906 and eventually assembled a 10,000-acre fruit orchard near West Plains, named Fruitville, where he prospered.[64] After Missouri's capitol building was destroyed by a fire, he unsuccessfully lobbied the General Assembly to move the state capitol to Fruitville, offering 1,000 acres and $1 million to the state.[65] Torrey became one of Missouri's leading citizens in the last two decades of his life: he was on the Board of Curators for the University of Missouri, he served on a commission reforming Missouri's courts, he also served on the State Immigration Board, and even ran for the United States Senate in 1918.[66] Torrey fell ill in 1920 while attending a dinner party at the home of a prominent West Plains widow named Francis Reiley. Reiley cared for Torrey during the last six weeks of his life. Torrey had asked Reiley for her hand in marriage several times before he fell ill, but she finally accepted while he was on his death bed.[67] They were married and Torrey died shortly thereafter.[68] It was surely a mark of the fullness of Torrey's life that several of his obituaries barely mentioned his role in drafting the 1898 Act.

Passage of the 1898 Act "ended a century of instability and made federal bankruptcy law a permanent fixture on the legislative landscape."[69]

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62. *Id.*

63. *Id.* While the account in the text of Torrey's flirtation with the vice president was recounted, in one form or another, in articles about Torrey written years after the 1900 convention, there is no contemporaneous support for Torrey almost becoming the vice-presidential candidate. It is clear beyond dispute that Torrey was Wyoming's favorite son for the nomination and received some support around the country, but it is not at all clear that he came so close to receiving the nomination.

64. *Id.*

65. *All Want Missouri Capital, Col. Torrey Offers 1,000 Acres and $1,000,000 for Fruitville*, N.Y. TIMES, Feb. 8, 1911, at 1.

66. *James McClain, Late Missouri Philanthropist Founded Several Ozark Towns*, THE COLUMBIA EVENING MISSOURIAN, January 4, 1921, at 4.

67. *Torrey Estate to His Widow and Secretary*, ST. LOUIS POST-DISPATCH, Dec. 28, 1920, at 1. *See also* HOFFMAN*, supra* note 55, at 134-35.

68. *Id.*

69. Skeel II, *supra* note 59, at 341.

The law, which was not repealed until 1978, outlived Torrey by almost sixty years. The 1898 Act went into effect on July 1, 1898, and on the same day a young St. Louis lawyer named Walter D. Coles was sworn into the newly-created position of bankruptcy referee.

II. WALTER D. COLES

Walter D. Coles hailed from a very prominent family in the antebellum South. His great grandfather was Governor of Virginia and his grandfather was the Secretary of the Navy under President Zachary Taylor and one of Virginia's senators in the Confederate States of America.[70] Coles' father was a major in the Confederate Army, where he served as a surgeon.[71] Coles' mother died when Walter was very young, but his father later remarried to Elizabeth Childs Pendleton, and the family moved to St. Louis.[72]

The senior Coles' medical practice flourished in St. Louis, and he eventually became head of the St. Louis Medical Society. In a reminder that medical knowledge was less advanced in the nineteenth century, Dr. Coles told the *St. Louis Post-Dispatch* in 1883 that he "[c]onsider[ed] the combination of Coca and Tobacco very desirable." He believed coca was "an excellent tonic" and "valuable in overcoming the depressive effect of nicotine on the system."[73]

The younger Coles graduated from the University of Virginia in 1888 and returned to St. Louis where he attended what was to eventually become the Washington University Law School. After graduation, he joined a local law firm and began private practice. Tragedy soon

70. UNIVERSITY OF VIRGINIA: ITS HISTORY, INFLUENCE EQUIPMENT AND CHARACTERISTICS 272 (Paul Brandon Barringer & James Mercer Garnett eds., 1904); Edward C. Mean, *Virginia Heraldry, Prominent Families of the Old Dominion*, BALTIMORE SUN, Nov. 6, 1904 at 8.

71. A RECORD OF THE MEMBER OF THE KAPPA ALPHA SOCIETY AND A CITY AND TOWN DIRECTORY, 1825-1913 209.

72. Edward C. Mean, *Virginia Heraldry, Prominent Families of the Old Dominion*, BALTIMORE SUN, Nov. 6, 1904 at 8. Coles' half-sister later married George C. Marshall, the famed general and United States Secretary of State for whom the Marshall Plan to rebuild Europe after World War II was named. THE PAPERS OF GEORGE CATLETT MARSHALL, VOL. 1: "THE SOLDIERLY SPIRIT" DECEMBER 1880-JUNE 1939 14 (Baltimore and London: The Johns Hopkins University Press, 1981).

73. Walter Coles, *Coca; Its Physiological Properties*, ST. LOUIS POST-DISPATCH, Oct. 3, 1883, at 5.

followed, however. In 1892, Coles' father committed suicide in his office by shooting himself in the head. [74] The *St. Louis Post-Dispatch* reported the news on its front page, even reprinting Dr. Coles' instructions to the coroner in his suicide note: "Death in my case is from a pistol shot fired by my own hand. You will arrive at this conclusion, I hope, without any unnecessary sawing or carving . . . ."[75]

Despite his personal loss, young Coles' legal career flourished. By 1894, he was an Assistant Attorney General for the Eastern District of Missouri.[76] On July 1, 1898, the very same day the Bankruptcy Act of 1898 went into effect, Coles was appointed St. Louis' first bankruptcy referee.[77]

The first high profile St. Louis bankruptcy case filed after the 1898 Act's passage involved E.J. Arnold & Company. E.J. Arnold Co. was a so-called "turf investment" company that solicited members of the public via circulars and newspaper ads to deposit money with the company in exchange for "profit" payments of between two percent and five percent *per week*.[78] At first, depositors could withdraw their deposits at any time. The company used the depositors' money to breed race horses and to wager on them at the track. Over 13,000 people invested in the company before it suspended the automatic right of withdrawal in 1903, causing a "load of humanity" to ride the elevators to the sixth floor of the Benoist Building in downtown St. Louis to demand return of their deposits.[79] Someone passed out white satin, red-lettered badges to the disappointed investors that read, "SMILE! I told you so."[80]

The company was placed into bankruptcy and Coles was the bankruptcy referee. Enough assets were sold to generate a distribution to creditors. One of the depositors filed a proof of claim for his lost deposit. Another creditor, a printing company, objected to the depositor's claim, arguing that the depositor knowingly invested in a highly speculative

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74. *With a Pistol, Dr. Walter Coles Kills Himself this Morning*, ST. LOUIS POST-DISPATCH, Aug. 9, 1892, at 1.

75. *Id.*

76. *Prisoners Held at Ironton*, ST. LOUIS POST-DISPATCH, Sept. 8, 1894, at 3.

77. *Referee Coles Retires*, ST. LOUIS POST-DISPATCH, Feb. 1, 1934, at 16.

78. *In re* E.J. Arnold & Co., 133 F. 789, 790 (1904).

79. *Scenes in the Palatial Offices of E.J. Arnold & Co. Today*, ST. LOUIS POST-DISPATCH, Feb. 10, 1903, at 2.

80. *The "I Told You So's" Were Around Arnold's*, ST. LOUIS REPUBLIC, Feb. 12, 1903, at 2.

gambling enterprise. The depositor responded that the printing company hardly had clean hands itself since it printed the circulars used to solicit the deposits. Coles ruled in favor of the printing company, thereby effectively disallowing the claims of all of the depositors.[81] The district court reversed and held that creditors and depositors were entitled to share in the distributions on a pro rata basis. The district court observed:

> [T]he bankrupts at all times paid the so-called weekly profits out of the money received from depositors and that their ability to continue paying the so called weekly profits and to meet the demands of the withdrawing depositors, depended upon there securing a constant increase in the amount received from depositors.[82]

It is difficult to imagine a more succinct description of a Ponzi scheme, albeit one written more than fifteen years before Charles Ponzi hatched his ill-fated business plan.[83] In fact, St. Louis was plagued by a number of similar "turf investment companies" at the time. E.J. Arnold's collapse led to a similar fate for several other companies. The rush by depositors to collect from one turf investment company, International Investment Co, was so chaotic that some tenants feared the stairs to the company's offices at Sixth and Olive Street were going to collapse.[84]

Beyond his role as bankruptcy referee, Coles traveled in elite company within the St. Louis community. He invested in the company that sponsored the 1904 World's Fair.[85] He was also an early investor in a local golf course that closed in 1909, and then unsuccessfully attempted to reopen as a club solely for women, an idea apparently well ahead of its

81. *In re E.J. Arnold & Co.,* 133 F. at 789

82. *Id.*

83. Coles was a fierce opponent of racetrack gambling. He was convinced that "a large number of failures are brought about by losses incurred in gambling at the race tracks." Race track gambling, he said, is "attended with every evil incident to unbridled indulgence in gambling is one of its worst and most ruinous forms." Walter D. Coles, *Many Business Failures Result of Racetrack Gambling, Says Authority*, ST. LOUIS POST DISPATCH, Jan. 1, 1905, at 1.

84. *I Got Mine a Favorite Song at International Office*, ST. LOUIS POST-DISPATCH, Feb. 11, 1903, at p. 2.

85. *Personal Subscription: Names of Those Pledged to Shares of the Word's Fair Fund, Independent of Business*, ST. LOUIS POST-DISPATCH, Apr. 25, 1910, at 2

time.[86] Coles fared better with his second golf club investment, however. He was among the incorporators of the Bellerive Country Club in 1910,[87] a club that has since hosted both the US Open and the PGA Championship.[88]

Coles lived in the Pendennis Club, an apartment house occupied solely by "bachelors of the exclusive set."[89] The rule of the house was that "no women were to be employed or entertained there."[90] On the morning of December 15, 1911, a fire started in one of the apartments and the occupants were forced to fight the blaze in their pajamas, a scene that generated much mirth in the newspapers of the day. William Chauvenet, wearing "a charming creation of baby blue" helped raise the ladder, and Professor O.S. James, attired in "a conservative but abbreviated lavender toilette," carried buckets of water in both hands.[91] Coles, wearing stripes, "refereed" (pun clearly intended) the fire hydrant. No one was hurt and only minor damage was done to the building.[92]

Coles soon encountered one of St. Louis' most flamboyant rogues, E.G. Lewis. Lewis was a publisher, real estate developer, and serial entrepreneur. He is perhaps remembered today as the founder of University City, Missouri, a suburb of St. Louis. But for the first dozen or so years in the twentieth century, he cut a very wide swath in the St. Louis business community. In 1901, he started *The Woman's Magazine* and within four years he claimed it had a circulation of 1.6 million.[93] He also acquired a publication called the *Women's Farm Journal*[94] and started a bank, the People's United States Bank, which he later claimed had about

86. *Women to Rule New Field Club; Will Censor Men*, ST. LOUIS POST-DISPATCH, Jan. 2, 1910, at 10.

87. *Bellerive Country Club Is Incorporated in the County: Purpose Is Physical and Mental Development for Not More Than 400 Members*, ST. LOUIS POST-DISPATCH, Apr. 9, 1910, at 1.

88. *Our Story*, BELLERIVECC.ORG, https://www.bellerivecc.org/story (last visited Nov. 9, 2017).

89. *Poor Children Are Bachelors' Guests: Society Girls Help Members of Pendennis Club to Entertain Twenty Little Ones*, ST. LOUIS POST-DISPATCH, Dec. 25, 1904, at 10.

90. *Bachelors Parade in Pajamas at Apartment Blaze*, ST. LOUIS POST-DISPATCH, Dec. 15, 1911, at 1.

91. *Id.*

92. *Id.*

93. E.G. LEWIS, FRAUD OR FRIEND 1 (Wilkens Creative Printing 1967). Lewis wrote this brief, curiously titled autobiography while in federal prison in the 1920s. It was not published until 1967.

94. *Id*.

3,000 shareholders.[95] But, Lewis soon found himself fighting a multi-front battle against the state and local governments. He was indicted at least three times for postal fraud in St. Louis, but he was never convicted.[96] Eventually, the State of Missouri moved to appoint a receiver for the bank. The first receivership was dismissed after seven days, but the second one resulted in the liquidation of the bank.[97]

Lewis also founded the American Woman's League, a group advocating a shadow government run exclusively by women that was to be headquartered, conveniently enough, in University City.[98] Notwithstanding his support of the American Woman's League, Lewis was not exactly a political seer — in 1911 he wrote, "I do not believe in equal suffrage. It would be wrong to place the ballot in the hand of women to control national business affairs. But the greatest advance in social ideas ever made will be the establishment of a government by women in which women's affairs can be decided by women."[99]

Lewis' publishing and real estate empires collapsed in 1911, and he agreed to hand over all of his assets to a board of trustees in April of that year. [100] The board was charged with running the businesses for five years so that they could regain their financial footing.[101] Lewis' creditors objected, and filed an involuntary bankruptcy petition against the companies.[102] One of their complaints was that $6,000 per week was budgeted to support the American Women's League during this five year period. Coles was appointed to oversee the case, which was clearly the largest ever filed in St. Louis at that time. Forty-two representatives of 3,500 creditors, most of whom were lawyers, attended the first meeting of creditors for the publishing companies' cases.[103]

95. *Id*. at 2.

96. Lewis claimed that he was indicted fourteen times during this period, which was probably the total number of counts in the three indictments. *Id*. at 3.

97. *State ex rel.* Hadley v. People's U.S. Bank, 94 S.W. 953 (Mo. 1906). *See also*, E.G. LEWIS, *supra* note 93, at 3.

98. *108 Magazines to Pick Trustee for Lewis Properties*. ST. LOUIS POST-DISPATCH, Apr. 12, 1911, at 4.

99. *Id*.

100. *Id*.

101. *Id.*

102. *Lewis Receiverships for All His Co's: He Wins Libel Suit*, ST. LOUIS STAR, July 20, 1911, at 1.

103. *3500 Creditors of Lewis Seeking to Pick Trustee*, ST. LOUIS POST-DISPATCH, Mar. 15, 1912,

Lewis Publishing owned a seventy-five percent interest in the *St. Louis Star* one of St. Louis' many daily newspapers at the time.[104] Throughout 1911 and 1912 the local newspapers chronicled the many efforts to sell Lewis' interest in the Star. At one point W. Randolph Hearst was rumored to be interested.[105] Eventually Lewis' interest in the *Star* was sold to Nathan Frank, a former congressman, from whom Lewis purchased the interest in 1908.[106]

Lewis later left St. Louis and moved to California, where he established the city of Atascadero. He eventually reentered the magazine publishing business, but he soon ran afoul of the U.S. Postal Service, and was indicted again. This time he was convicted and spent several years in federal prison. His old newspaper, the *St. Louis Star*, observed that Lewis "raised $30 million in twenty-five years without one venture a complete success."[107]

Lewis was not the only scofflaw Coles encountered. David Jones & Co. manufactured washing machines and dryers for laundry services. The company's eponymous ex-bartender proprietor, David "Purity" Jones, sold the laundry machines to local laundries on credit, taking back a note from the laundry owner. Purity then sold the note to a finance company for less than face value.[108] After a time, Purity would convince the laundry owner to sign a new note to replace the old one.[109] Purity would then sell the new note to another commercial lender, but never retrieve the original note from the original lender. One laundryman testified that he owed only $48,000 on his machines but had notes against them totaling $125,000.[110] The bankruptcy trustee sued some of the defrauded laundries for violating the automatic stay, including one that obtained $15,000 of equipment on the same day the bankruptcy was filed after the defrauded creditor's

at 2.

104. *108 Magazines to Pick Trustee for Lewis Properties*. ST. LOUIS POST-DISPATCH, Apr. 12, 1911, at 4.

105. *Hearst Plans to Print Newspaper Here This Fall*, ST. LOUIS POST-DISPATCH, August 1, 1911, at 1.

106. Frank v. C.I.R., 13 B.T.A. 964 (Tax. App. 1928).

107. *E.G. Lewis Is Guilty: Faces 47 Year Term*, ST. LOUIS STAR, Sept. 10, 1927, at 1.

108. *How One Victim Got $15,000 Out of 'Purity' Jones*, ST. LOUIS POST-DISPATCH, Nov. 5, 1927, at 3.

109. *Id.*

110. *Id.*

lawyer allegedly told Purity in a low tone of voice that Jones' conduct appeared to raise some criminal law issues.[111] Jones victimized a total of 187 laundries, several of which were forced out of business.[112] The *St. Louis Post-Dispatch* memorably referred to Jones as "a merchant of hot air and laundry machines."[113] Jones eventually pled guilty, served seventeen months in federal prison, and started a similar business after he was released.[114] He was in trouble again in 1939 for selling worthless mortgages, but claimed he was being persecuted by the "same crowd that got me in trouble before." He cautioned the press, however, to "tell the truth, but remember, the name is David Jones, not Purity Jones."[115]

Not all of Coles' cases were so high profile. He was asked to determine whether $1,000 won on an election bet on President Wilson's re-election should be included in the bankruptcy estate of one Robert Friend.[116] Sadly, his decision on the issue is lost to history. Coles also sought to hold in contempt two men who sold a building for $3,250, immediately cashed the check, and traveled to East St. Louis where they falsely claimed they lost all of the money in a craps game.[117] He also granted a discharge to a well-known man about town, Dr. D.C. Bryan, who managed to amass $206,000 in debts while accumulating assets of just $1.75.[118]

Coles operated out of a suite of five offices in the Security Building at the corner of Fourth and Locust avenues in downtown St. Louis, a building that still stands.[119] The office was a private business, and Coles

111. *Id*. The lawyer in question denied the criminal prosecution threat, but his own client insisted it was true.

112. "*Purity Jones" Gets Three Years for $1,000,000 Fraud*, *Seller of Laundry Machines Pleads Guilty in Federal Court on Advice of His Associates,* ST. LOUIS POST-DISPATCH, Oct. 31, 1928, at 1.

113. *Jones Silenced by His Lawyer on Surrender*, ST. LOUIS POST-DISPATCH, Jan. 22, 1927, at 2.

114. *General Alarm Blaze at Plant of 'Purity' Jones*, ST. LOUIS STAR AND TIMES, Mar. 12, 1931, at 3.

115. '*Purity' Jones in Trouble Again Over Mortgages*, ST. LOUIS POST-DISPATCH, Aug. 17, 1939, at 1.

116. *$1,000 Won in $50 Bet on Wilson in Dispute*, ST. LOUIS STAR, Jan. 12, 1917, at 3.

117. *Says Part of Assets of Firm Were Lost at Dice: Referee in Bankruptcy Asks that Partners Be Cited for Contempt*, ST. LOUIS STAR, Nov. 16, 1921, at 3.

118. *Dr. D.C. Bryan A Bankrupt, Former St. Louisan Is Discharged From His Heavy Obligations*, ST. LOUIS POST-DISPATCH, Dec. 29, 1899, at 2.

119. *St. Louis Low Comparatively in Bankruptcies: Records on Basis of Population in Larger Cities Compiled by Referee Walter D. Coles*, ST. LOUIS POST DISPATCH, Jan. 11, 1925, at 12.

paid the rent and his staff of three clerks from the fees collected.[120] The referee's office received a fee of one percent of all moneys disbursed to creditors and one-half of one percent of all money received by creditors on a successful composition,[121] together with a $15 fee for every case and $.25 for every claim filed by creditors.[122] In a lament that is recognizable to modern practitioners, Coles completed a study in 1925 showing that the St. Louis region had far fewer bankruptcies per capita than New York, Chicago, or even Kansas City.[123]

Coles published and spoke extensively on bankruptcy-related topics. He wrote one of the first scholarly articles on the 1898 Act.[124] He defended the 1898 Act before the American Bankers Association in 1901.[125] Much later in his career, Coles assumed a major role in a national debate on whether the 1898 Act should be reformed. After a major scandal involving the bankruptcy bar in Manhattan, the Association of the Bar of the City of New York commissioned a report from a leading member of the New York Bar, William J. (Wild Bill) Donovan.[126] While Coles found much to like in Donovan's report, he disputed that the abuses of the system in Manhattan were widespread nationally.[127] He also complained about the practice of collection agents obtaining proxies from creditors and electing the trustee at the first meeting of creditors.[128] He said that it is likely that the attorney for the trustee "will be of mediocre caliber, as the best attorneys, generally speaking, are not associated with collection agencies."[129]

In July of 1930, President Hoover instructed his Attorney General, under the direction of the Solicitor General, to "undertake an exhaustive

120. *Id.*

121. A "composition" was a voluntary compromise of claims under the 1898 Act.

122. *See St. Louis Low Comparatively in Bankruptcies supra*, note 119, at 12.

123. *Id.*

124. Walter D. Coles, *The Bankrupt Law of 1898—Its Merits and Defects*. 7 AM. L. 283 (1899).

125. *Talk on Bankruptcy, W.D. Coles of St. Louis Addressed Bankers*, ST. LOUIS POST-DISPATCH, Oct. 17, 1901 at 5.

126. Walter D. Coles, *The Donovan Report on the Bankruptcy Law and Administration*, 16 A.B.A. J. 431 (1930). Donovan had a legendary legal, military, and political career. He is probably best known for heading up America's intelligence services during World War II and is often called the "Father of the CIA."

127. *Id.* at 432.

128. *Id.*

129. *Id.*

investigation into the whole question of bankruptcy law and practice."[130] Coles harshly criticized the resulting report, particularly its finding that many people avoided bankruptcy because of the stigma attached with a filing.[131] The Solicitor General's report suggested changing the label from "bankrupts" to "debtors" to lessen the stigma.[132] Coles was unimpressed, saying, "If it is discreditable or humiliating to go through bankruptcy as a 'bankrupt' it is difficult to see how it could be any less so to undergo the same experience as a 'debtor.'"[133]

Coles clearly enjoyed the respect of the local bar. On the thirtieth anniversary of his appointment, the St. Louis Bar Association held a dinner in his honor attended by more than 200 attorneys.[134] It was the first time in its history that the Bar Association had honored "a living man of lesser rank than a Federal Judge."[135] One speaker observed that it was truly remarkable that one man had been reappointed fifteen times, by both Democrats and Republicans.[136] In his remarks, Coles said that he had ruled on over 10,000 fee applications in his career, thereby "dashing the hopes of more lawyers than any other living man."[137]

Coles resigned his position in 1934, almost thirty-six years after his appointment. Lawyers at the time speculated that his income was $15,000 per year, more than any other local federal employee. The stories about his career noted his dry wit. On one occasion, an employee of a hat company testified that his job duties were two-fold: design of the hats and maintenance of the machines that produced the hats. Coles remarked, "I have often seen women wearing hats that looked as though they were designed by machinists, but I never knew that the practice actually existed."[138] Coles, who rode the streetcar, would say to debtors, "I

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130. Walter D. Coles, *The Solicitor General's Bankruptcy Report and New Bankruptcy Bill*, 18 A.B.A.J. 293 (1932).

131. *Id*. at 294.

132. *Id.*

133. *Id*. at 294. Coles' article contained some interesting statistical analysis. For instance, Coles cited a study that the average administrative fees and costs nationwide equaled 22.09% of available assets. In the Southern District of New York, however, the costs were 49.65%.

134. *Bar Association Honors Referee Coles*, ST. LOUIS POST-DISPATCH, June 12, 1928, at 10.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Walter D. Coles Quits as Referee in Bankruptcy, Turns in Resignation After 35 Years in Federal Job in Eastern District of Missouri,* ST. LOUIS POST-DISPATCH, Jan. 26, 1934, at 15.

suppose you do own a car — it seems nowadays a man can't seek bankruptcy without at least one automobile."[139]

Despite his vast experience, Coles never presided over a major corporate reorganization. While the 1898 Act provided for creditor compositions — the voluntary settlement of obligations between a debtor and its creditors — these provisions were seldom used. During the late 1800s and early 1900s, large corporations attempting to reorganize used so-called equity receiverships, which were primarily based in the common law.[140] One-half of the major United States railroads went through some sort of equity receivership between 1890 and America's entry into World War I.[141]

In 1933, however, Congress for the first-time codified railroad reorganizations.[142] The Missouri-Pacific Railroad Company filed for bankruptcy in St. Louis less than one month after the law was enacted. The railroad's efforts to reorganize without a trustee failed,[143] and the district court appointed a local lawyer named Guy A. Thompson as the trustee in June of 1933.[144] Mr. Thompson would serve as trustee for the next twenty-three years until the railroad finally emerged from bankruptcy in 1956.[145] Only when Mr. Thompson abandoned his previous position of neutrality among the creditors and actively began to advocate for a particular reorganization plan did the district court confirmed a plan.[146] Even then, however, eight objectors appealed the order confirming the plan. [147] The Eighth Circuit overruled the objections in 1955, and the plan,

139. *Former Judge Coles Dies in Richmond, VA*, ST. LOUIS POST-DISPATCH, July 17, 1936, at 3A.

140. Skeel I, *supra* note 17, at 57-69.

141. Stephen J. Lubben, *Railroad Receiverships and Modern Bankruptcy Theory*, 89 CORNELL L. REV. 1420 (2004).

142. Act of March 3, 1933, Pub. L. No. 72-420, 47 Stat. 1474, (codified as amended at 11 U.S.C. §§ 1161 to 1174 2012)). The bill was passed on the last day of President Herbert Hoover's term.

143. The case was filed on March 31, 1933 and by June of that year the judge presiding over the case observed that creditors that were owed $350 million were "urging in a very kind way" that a trustee be appointed.

144. The court actually appointed a co-trustee who resigned shortly thereafter. Guy Thompson served as the sole trustee for almost all of the twenty-three-year duration of the case.

145. Thompson originally thought the case would take approximately two years. *Guy A. Thompson Lawyer, 82 Dies, Mo. Pac. Ex-Trustee*, ST. LOUIS POST-DISPATCH, Jan. 27, 1958, at 13.

146. *Id.*

147. Missouri Pac. R.R. Co. 5 ¼% Secured Serial Bondholders' Comm. v. Thompson, 225 F.2d 761, 764 (8th Cir. 1955).

which involved the merger of three railroads, was finalized in 1956.[148]

Coles was not quite finished with public life after he stepped down from the referee position. In 1935, he was appointed to the Missouri Supreme Court to complete the term of a judge who died four days after his election.[149] At the time, Coles confided to a reporter that he accepted the new job partly because of his sister: "she has never thought a referee in bankruptcy amounted to much and I am confident that she would like to say her brother is a [Missouri] Supreme Court judge."[150] Coles soon developed his own health problems, however, and resigned from the Missouri Supreme Court after only a few months on the job.[151] He died in 1936 while visiting his sister in Virginia.[152] He had amassed a considerable estate for the time, including an extensive collection of letters from early American luminaries such as Abraham Lincoln, James Madison, John Monroe, John Quincy Adams, Henry Clay, Jefferson Davis, and Daniel Webster.[153] Coles made bequests to many institutions, including one to the Washington University School of Law, which established the Walter D. Coles Professor of Law in his honor.[154]

Walter Coles served as bankruptcy referee for nearly thirty-six years, a seemingly unbeatable tenure. However, another jurist, Judge Barry S. Schermer, just celebrated his thirtieth year on the bench with no signs of stopping anytime soon.

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148. *Guy A. Thompson Lawyer, 82 Dies, Mo. Pac. Ex-Trustee*, ST. LOUIS POST-DISPATCH, Jan. 27, 1958, at 13.

149. *W.D. Coles Named to State Supreme Court, Governor Appoints Former Referee in Bankruptcy to Office Vacated by Death of John T. Fitzsimmons*, ST. LOUIS STAR, Jan. 5, 1935, at 1.

150. *Former Judge Coles Dies in Richmond, VA, Bankruptcy Referee in City for 35 Years, Funeral in St. Louis Tomorrow*, ST. LOUIS POST-DISPATCH, July 17, 1936, at 17.

151. *Gov. Park Names J.C. Collett to Supreme Bench, Chairman of the Missouri Public Service Commission Will Assume Post on September 1*, ST. LOUIS POST-DISPATCH, Aug. 20, 1935, at 1.

152. *Former Judge Coles Dies in Richmond, VA, Bankruptcy Referee in City for 35 Years, Funeral in St. Louis Tomorrow*, ST. LOUIS POST-DISPATCH, July 17, 1936, at 17.

153. *Walter D. Coles Left Estate of $240,174, Principal to Go to Three Educational Institutions After Sister's Death*, ST. LOUIS POST-DISPATCH, Dec. 9, 1936, at 21.

154. *Id.*

III. BARRY S. SCHERMER[155]

Barry S. Schermer is a native St. Louisan who grew up in University City, Missouri, the same suburb founded by E.G. Lewis whose publishing and real estate empires collapsed in 1911. Schermer graduated from the University of Colorado and after a brief stint in the military attended the Washington University School of Law, graduating in 1972. He joined the firm Susman, Schermer, Rimmel & Parker after graduation.

The bankruptcy practice Schermer encountered upon graduation was on the verge of a major change. By that time, the 1898 Act was widely acknowledged as ill-suited for modern commerce. The most recent major reform of the statute was nearly forty years earlier, in 1938, when the Chandler Act authorized non-railroad corporate reorganizations. [156] One academic described the forty years between passage of the Chandler Act and the eventual repeal of the 1898 Act as the "dark ages of U.S. bankruptcy law."[157]

The number of consumers filing bankruptcy rose sharply in the 1960s, probably because of the increased availability of consumer credit. In 1960, there were 88.8 personal bankruptcy filings per 100,000 persons. [158] By 1970, the rate was 142.2 filings per 100,000 persons, an increase of about sixty percent in a decade.[159] Congress authorized the National Bankruptcy Review Commission in 1970 and it issued its report in 1973, initiating several years of congressional debate on bankruptcy reform.[160] In 1978, Congress finally repealed the 1898 Act and replaced it with a brand-new Bankruptcy Code.[161] A new golden era of bankruptcy practice was just beginning.

The firm that the young Barry Schermer joined after law school had long counted bankruptcy as among its primary specialties. Within two years or so of graduating, Schermer began work on the Mansion House

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155. The author has known Judge Schermer for three decades and some of the information in this Section is based on personal knowledge.

156. Skeel I, *supra* note 17, at 4.

157. *Id.*

158. *Id*. at 136-40.

159. *Id.*

160. *Id.*

161. *Id.*

matter, a high-profile St. Louis business insolvency that eventually spawned a twelve-year federal receivership case and bankruptcy cases filed under both the 1898 Act and 1978 Code. The Mansion House development consisted of three high-rise buildings with an unobstructed view of the Mississippi River and the Gateway Arch. [162] The limited partners in the project included Henry Ford II, Harold S. Geneen (then-president of ITT) and C.S. Harding Mott (heir to the General Motors fortune), together with many local St. Louisans of considerable means.[163] The limited partners were drawn to the project because of their ability to use the project's paper losses to shield other income.[164] This tax shelter program was part of an initiative at the time to encourage investment in urban areas.[165]

The development struggled from the very beginning. In fact, it never made a single mortgage payment to the original private lenders, forcing the Department of Housing and Urban Development (HUD) to purchase the private lenders' notes and mortgages in 1972 and to force out the original general partner. The new general partner was Maurice B. Frank, described by a HUD official as "a short little ruddy-faced man . . . [who] affects the humility of a crocodile eating a fish."[166] Mr. Frank soon ran afoul of HUD, allegedly billing the cost of 1700 toilet seats to the project that should have been paid for by a local hotel, among other more substantial financial irregularities.[167] At HUD's request, the local district court appointed Gerald Rimmel, a long-time bankruptcy lawyer and a senior partner in Schermer's firm, as the receiver for the hotel construction project; Rimmel held this position for the next twelve years, eventually earning more than $2.3 million in fees.[168]

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162. Karen Koman and Claudia MacLachlan, *Mansion House: New Chapter Unfolds in an Old Epic*, ST. LOUIS POST-DISPATCH, July 24, 1988, at 1E.

163. *Id.*

164. *Id.*

165. *Id*.

166. John McGuire, *Frank A Confusing Figure in a Complicated Transaction*, ST. LOUIS POST-DISPATCH, Aug. 25, 1975, at 33.

167. *Id*. *See generally* U.S. v. Mansion House Ctr. N. Redevelopment Co., 419 F.Supp. 85 (E.D. Mo. 1976).

168. Karen Koman & Claudia MacLachlan, *Mansion House: New Chapter Unfolds in an Old Epic*, ST. LOUIS POST-DISPATCH, July 24, 1988 at 8E. The Mansion House receivership faced many operational challenges during his tenure, including a small role in a deadly struggle between rival factions of the local St. Louis mob. On October 16, 1981, Sonny Faheen, the supervisor of courtroom

Rimmel's most tenacious opponent was clearly Maurice Frank, the general partner of the Mansion House entities under Rimmel's receivership. Rimmel's appointment divested Maurice Frank from day-to-day control of the project, but the limited partnerships still nominally owned the project. Shortly after Rimmel was appointed, Frank filed multiple reorganization cases under the 1898 Act in Florida and argued that the receiver had to step aside.[169] Rimmel responded that only he, as receiver, had authority to commence a bankruptcy case.[170] These reorganization cases were ultimately dismissed in 1977. HUD finally began foreclosure proceedings against the project in 1979 and Frank again caused the three limited partnerships to file Chapter 12 petitions in July of 1979, just weeks before the 1978 Code's effective date.[171] These bankruptcy cases, surely among the last ever filed under the 1898 Act, were soon dismissed, but HUD again postponed the foreclosures.[172] Maurice Frank filed a personal bankruptcy case in his native Florida (under the new 1978 Code), and Schermer represented Rimmel in persuading the bankruptcy court to deny Frank's discharge.[173] Frank also owned a small water and sewer company in Florida, for which Schermer was appointed the trustee. Schermer was able to sell the utility and its creditors were paid in full. Schermer took Frank's deposition several times in connection with these lawsuits. Frank, who was well over seventy years old at the time, was invariably hooked up to a blood pressure monitor and accompanied by a nurse at the depositions.

The Mansion House saga continued for several more years, even after Schermer was appointed federal bankruptcy judge for the Eastern District of Missouri in 1986. A new owner, Frank Darcy, emerged in 1986, but he was unable to reach an agreement with HUD.[174] HUD began foreclosure

clerks in St. Louis Circuit Court and the nephew of an underworld boss who had been killed by a car bomb in 1980, was himself killed when a bomb exploded under his red Volkswagen in the Mansion House garage. The slain man's only child sued the Mansion House, alleging that it failed to provide adequate security, but the case was ultimately dismissed. *Court Rejects Family's Suit in Bomb Case*, ST. LOUIS POST-DISPATCH, July 30, 1987, at 7

169. U.S. v. Mansion House Ctr. N. Redevelopment Co., 426 F. Supp. 479 (E.D. Mo. 1977).

170. *Id.*

171. U.S. v. Mansion House Center, 455 F.Supp 434 (E.D. Mo. 1978).

172. *Id.*

173. *In re* Frank, 14 B.R. 166 (Bankr. S.D. Fla. 1981).

174. William H. Freivogel, *Mansion House Foreclosure Nears*, ST. LOUIS POST-DISPATCH, Dec.

proceedings, and Darcy, like Frank before him, caused the project owners to file bankruptcy, this time under Chapter 11 of the 1978 Code. After these last-minute Chapter 11 filings were dismissed in 1988, HUD finally completed the foreclosure — but not before the first sale was voided when the successful bidder turned out to be an indigent individual who happened upon the sale in progress and decided to bid $31 million without any financing.[175] The sale was thereafter re-noticed, this time with stringent pre-qualification requirements for prospective bidders.[176]

The Mansion House cases provided Schermer with a wealth of experience in the first few years of practice. He was exposed to federal receiverships, commercial litigation, and bankruptcy, under both the old and new law. Schermer capitalized on this experience and soon became one of St. Louis' leading bankruptcy practitioners. He represented Morris Shenker, a legendary local trial lawyer, in what is probably still the largest individual Chapter 11 case in St. Louis history.[177] Schermer briefly represented the *St. Louis Globe-Democrat*, a century-old daily newspaper, in its last ditch efforts to reorganize.[178] He also represented creditors' committees in *Easton Tire*, *Wisconsin Barge Line*, and *9-0-5 International Stores*.[179]

The position of a bankruptcy referee has evolved over the years. The old practice of compensating referees on a commission basis was eliminated in 1946 in favor of salary-based compensation.[180] The title "referee" was jettisoned in 1973 in favor of "judge," and with the change

13, 1988, at 30.

175. Claudia MacLachlan, *Mansion House: It's No Sale Yet: High Bidder Fails to Put Up Deposit*, ST. LOUIS POST-DISPATCH, Apr. 29, 1988, at 3.

176. *Id.* The author acknowledges the assistance of Lloyd Palans with the text in this paragraph. Mr. Palans represented the Mansion House partnerships in the short-lived Chapter 11 cases and was present at the ill-fated foreclosure sale.

177. Shenker was a larger than life character who first achieved national fame when he represented several suspected high ranking organized crime figures before the so-called Kefauver hearings in the United States Senate. Shenker also represented Jimmy Hoffa, the Teamsters Union president who disappeared without a trace in 1975. He invested heavily in the Las Vegas and Atlantic City casino and real estate markets.

178. Jay Torrey delivered the *Globe-Democrat* on his paper route.

179. The *9-0-5* case involved a chain of liquor stores in the Midwest. The debtors' counsel could not resist the temptation to file the *9-0-5* case at precisely 9:05 a.m.

180. Tabb I, *supra* note 3, at 25. *See also* Act of June 28, 1946, ch. 512, § 40, 60 Stat. 323, 326-28.

in title came far more judicial power[181] On appeal, the findings of a bankruptcy judge were reviewed on a clearly erroneous standard, instead of de novo review.[182] Bankruptcy courts became a de facto court of original jurisdiction.[183] The 1978 Code eliminated the old summary vs. plenary jurisdiction issues that bedeviled practice under the 1898 Act.[184] When Judge Robert Brauer stepped down from the bench in 1986, Barry Schermer replaced him. Schermer was not yet forty years old, but he was about to draw one of the most complex Chapter 11 cases yet filed under the 1978 Code.

In 1987, Apex Oil Company was the fifth largest privately held corporation in the United States. Apex was involved in a diverse array of businesses, including oil trading, oil refining, coal mining, real estate development, pipelines, and shipping. For good measure, the Apex companies also owned about 1,000 retail gasoline stations and the Copper Mountain ski resort.[185] The two principals of Apex were Sam Goldstein, age sixty-eight, who had married the daughter of the founder of the company, and Paul A. (Tony) Novelly, a brash forty-four year old who ran the companies on a day-to-day basis. One former employee told the *St. Louis Post-Dispatch* that Novelly kept "track of the smallest details in the smallest subsidiaries."[186]

Apex was enormously successful until about 1981 when it acquired Clark Oil & Refining Corporation ("Clark Oil"), which owned refineries and retail gasoline stations.[187] The year before the Clark Oil acquisition, total revenues for the Apex companies were approximately $3 billion. The year after the acquisition, revenues were $13 billion.[188] The acquisition was financed with a $740 million loan from a group of twelve lenders.[189]

181. Kennedy and Clift, *supra* note 40, at 185
182. *Id*. at 177.
183. *Id.* at 185.
184. *Id*. at 178.
185. *In re* Apex Oil Co., 92 B.R. 847, 848-51 (Bankr. E.D. Mo. 1988).
186. John Curley, *Persistence Finally Pays Off for Apex Oil,* ST. LOUIS POST-DISPATCH, Feb. 1, 1987, at E1.
187. *In re Apex Oil*, 92 B.R. at 849-50.
188. Examiner's Statement of Investigation of Causes of Action Available to the Estates, *In re* Apex Oil Company, et al., Case No. 87-03804-BKC-BSS at 18 [hereinafter "*Examiner's Report"*].
189. *In re Apex Oil*, 92 B.R. at 850.

The Clark Oil acquisition made Apex a fully integrated oil company, but the timing of the acquisition could not have been worse. The early-to-mid 1980s brought inordinately high interest rates, low oil prices, shrinking profit margins and lower demand.[190] Apex Oil's losses mounted and eventually the twelve-member lender group grew nervous.[191] The loan was restructured several times and the lender group urged Apex to divest assets.[192] Novelly had discussions with a number of potential buyers, including several wealthy Arab investors, that never panned out.[193] The lender group questioned Novelly's seriousness and came to refer to the Arab investors as "Tony's sheik of the week."[194] At one point, during a particularly stormy bank meeting in New York, "Novelly abruptly ended the session when he got up from his chair, raised his fist at the assembled bankers and pushed out his middle finger [and] he then strode out of the room."[195] On December 21, 1987, the lender group published a notice of foreclosure and notified Apex's account debtors to remit payments to the lender group, instead of Apex.[196] Apex and about fifty affiliates filed Chapter 11 three days later, on Christmas Eve.[197] A battery of lawyers began filing the cases at the clerk's office at about 11:30 a.m. and office personnel "stamped and filed court documents non-stop in assembly-line fashion."[198] When they finished, everyone involved broke into applause.[199] Undeterred by the imminent holiday, Judge Schermer conducted the first day hearings late into the afternoon on Christmas Eve.[200]

The toxicity of the relationship between the lender group and Apex spilled over into the bankruptcy cases immediately. On the very same day

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190. *Examiner's Report*, *supra* note 188, at 14.

191. *Id.* at 13-46. *See also* Claudia MacLachan, *Report Details Efforts to Sell Apex*, ST. LOUIS POST-DISPATCH, Oct. 16, 1988, at E1.

192. Claudia MacLachan, *Report Details Efforts to Sell Apex*, ST. LOUIS POST-DISPATCH, Oct. 16, 1988, at E1.

193. *Id.*

194. *Id.*

195. *Id*.

196. Karen L. Koman and Tim Poor, *Apex Oil Co. Files for Bankruptcy*, ST. LOUIS POST-DISPATCH, Dec. 25, 1987, at 17.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id*.

that the cases were filed, the lender group filed an emergency motion to substantively consolidate Clark Oil Trading Co. (COTC), a non-debtor, into the debtors. [201] In the motion, which was filled with words like "fraudulent," "deceitful," and "improper," the lender group accused Apex of establishing COTC to siphon assets away from the borrowers and put them beyond the reach of the lender group's liens.[202]

Faced with the extraordinary contentiousness between the principal parties, Judge Schermer ordered the appointment of an examiner. Under the 1978 Code, an examiner may conduct an investigation into the debtor, including investigations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in management of the debtor.[203] Lloyd Palans, a St. Louis bankruptcy lawyer, was named the examiner. The order appointing the examiner gave Palans a wide berth, saying he could take "any necessary and appropriate actions in furtherance of assisting the Court and parties in bringing these proceedings to a just, prompt and economic disposition."[204] Judge Schermer focused the examiner's immediate efforts on "preventing further deterioration of the debtor/creditor relationships between Apex and the [l]ender [g]roup, restoring use of working capital for Apex's businesses, and, most importantly, preventing costly, uncertain and bitter litigation between Apex, COTC and the [l]ender [g]roup."[205]

Palans immediately weighed in on the pending motion to substantively consolidate COTC into the bankruptcy proceedings. Palans mediated settlement discussions between the parties that culminated in an agreement in August of 1988, where COTC agreed to provide financial support to the debtors in exchange for not being substantively consolidated into the existing cases. [206] In the first year after the settlement, COTC contributed

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201. Claudia MacLachan and Karen Koman, *Apex Used Subsidiary to 'Loot' Funds, Banks Charge*, ST. LOUIS POST-DISPATCH, Dec. 30, 1987, at 1.

202. *Id.*

203. 11 U.S.C. §1104(c) (2012).

204. *In re* Apex Oil Co., 111 B.R. 235, 237 (Bankr. E.D. Mo. 1990), *rev'd sub nom*. Apex Oil Co. v. Palans, 132 B.R. 613 (E.D. Mo. 1991), *aff'd in part, rev'd in part sub nom. In re* Apex Oil Co., 960 F.2d 728 (8th Cir. 1992).

205. *Id.*

206. Disclosure Statement dated February 12, 1990 at 11, *In re* Apex Oil Company, et al., Case No. 87-03804-BKC-BSS [hereinafter Disclosure Statement].

$11,560,000 to the debtors.[207] Judge Schermer later wrote that the COTC settlement was "critically important" to the resolution of the Apex case, a view that was shared by everyone involved.[208]

After the bankruptcy filing, Apex continued to market for sale its Clark Oil refinery and gas station assets. It reached an agreement to sell the assets only a few weeks after the COTC settlement was announced.[209] Subject to approval by Schermer, the assets were to be sold to a subsidiary of Horsham Corp. of Toronto.[210] In exchange, the Horsham subsidiary promised to purchase the lender group's claims for $396 million in cash (a discount of over $150 million), to assume another $85 million in other debts, to pay $22.5 million to the estates, and to provide other financial considerations, all of which yielded a total purchase price of $536.5 million.[211]

Getty Oil Company objected to the proposed sale. Getty submitted an offer that it valued at $588.5 million, some $50 million more than the Horsham offer.[212] Getty also attacked the proposed Horsham transaction because it benefitted Novelly and Goldstein, who themselves acquired an option to purchase 49.9% of the stock of the Horsham subsidiary.[213] Getty's offer had one major problem: Apex, Novelly and Goldstein would release the lender group from potential lender liability lawsuits only if the lender group sold its claims against Apex to the Horsham subsidiary, and the lender group was unwilling to sell its claims to Getty without a release.[214] Getty argued that the sale to Horsham should be denied because Novelly and Goldstein were not acting in good faith with the best interests of the estate in mind.[215] After a several day hearing, Schermer found that Novelly and Goldstein's self-interest in the Horsham transaction did not rise to the level of a breach of duty, and he approved

207. *Id.*

208. *In re Apex Oil*, 111 B.R. at 239-40.

209. Disclosure Statement, *supra* note 206 at 15.

210. *Id*. at 15-18. *See also* David, Nicklaus, *Apex Asset Sale to Horsham OK'd*, ST. LOUIS POST-DISPATCH, Nov. 8, 1988, at 6C.

211. David Nicklaus, *Apex Asset Sale to Horsham OK'd*, ST. LOUIS POST-DISPATCH, Nov. 8, 1988, at 6C.

212. *Apex Oil*, 92 B.R. at 870-72.

213. *Id.*

214. *Id.*

215. *Id.*

the sale.[216] The opinion approving the sale remains, almost thirty years later, Schermer's most frequently cited opinion.

The Clark Oil sale removed the lender group from the case, thereby ratcheting down the contentiousness considerably for a time. However, Palans began investigating whether the Apex estates held any causes of action against insiders due to their pre-petition conduct. This investigation took several months and Palans submitted a 262-page examiner's report that concluded the debtors had several possibly meritorious claims against insiders, including Goldstein and Novelly.[217] The insiders promptly responded by denying almost every allegation (factual or otherwise) in the examiner's report.[218] Once again, however, calmer heads eventually prevailed and Apex submitted a plan of reorganization in early 1990. The examiner's report was credited with being a "material contributing factor" to the formulation of the plan.[219] Schermer confirmed the plan in August of 1990, less than three years after the Apex cases were filed.[220]

While there have been a handful of St. Louis bankruptcy cases since *Apex Oil* that may have involved more debt, it is safe to say that none have been as complicated. Schermer also had to decide dozens of issues with a material bearing on the cases, including whether the examiner's report could be filed under seal,[221] the applicability of the automatic stay to Department of Energy administrative proceedings,[222] and the bankruptcy court's ability to exercise jurisdiction over a claim filed by the U.S. Customs Service.[223]

Perhaps the most lasting impact of the *Apex* case may be Schermer's creative use of an examiner to facilitate almost all aspects of the case. The most common role for an examiner is to investigate discrete causes of action and then file a report with the court. An example of such a role is the examiner report analyzing potential fraudulent transfer causes of action

216. *Id.*
217. Disclosure Statement, *supra* note 206, at 22.
218. *Id.*
219. *Apex Oil*, 111 B.R. at 243.
220. *In re* Apex Oil Co., 118 B.R. 683, 687-88 (Bankr. E.D. Mo. 1990).
221. *In re* Apex Oil Co., 101 B.R. 92, 95-96 (Bankr. E.D. Mo. 1989).
222. *In re* Apex Oil Co., 92 B.R. 860 (Bankr. E.D. Mo. 1988).
223. *In re* Apex Oil Co., 122 B.R. 559, 560 (Bankr. E.D. Mo. 1990), *aff'd in part and rev'd in part*, 131 B.R. 712 (E.D. Mo. 1991).

in the *Revco* case.[224] Palans' role in the *Apex* cases was much more akin to former Judge Ralph Mabey in the A. H. Robins cases in the late 1980s.[225] Palans was part-mediator *and* part-investigator. He mediated the COTC settlement and a number of personal injury claims asserted against the debtors under the Jones Act.[226] He also investigated Novelly and Goldstein's good faith in the Clark Oil transaction and prepared the examiner's report on the insider claims.[227] This notion of an "examiner with expanded powers" remains controversial, but examiners have been used in many of the largest cases ever filed under Chapter 11.[228]

The *Apex* cases represented a sort of baptism by fire for Schermer. His profile in the national bankruptcy community skyrocketed because of his skillful handling of an enormously complicated case. He was invited to speak at the most prestigious national conferences and even began hearing cases as a visiting judge around the country, including Denver, Colorado, Miami, Florida, and Albany, New York.

Schermer continued to make his mark in large Chapter 11 cases. Trans World Airlines (TWA) filed a Chapter 11 case in St. Louis in 1995, and Schermer drew the case. A lifelong aviation buff, Schermer wrote a lengthy history of TWA into the order confirming its plan.[229] Sadly, TWA survived only six more years when it filed another Chapter 11 case, this time in Delaware, and American Airlines purchased all of its assets. Thermadyne Holdings was one of the world's largest welding tool suppliers when it filed Chapter 11 in 2001. The company had almost $1 billion in debt incurred primarily because of a series of acquisitions.[230] It eventually confirmed a plan that eliminated about $600 million of debt.[231]

224. Daniel J. Bussel, *A Third Way: Examiners as Inquisitors*, 90 Am. Bankr. L.J. 59, 67 (2016). Another example of a more traditional examiner role is that performed by the examiner in the *Interco* cases in the early 1990s, pending in St. Louis before Judge James J. Barta.

225. *Id*. at 67.

226. *Apex Oil*, 111 B.R. at 240-41.

227. *Id*.

228. For instance, examiners were appointed in the Chapter 11 cases of Enron Corp., Worldcom, Inc., Lyondell Chemical Co., Washington Mutual, Inc., Lehman Bros. Holdings, Inc., The Chicago Tribune, and Caesar's Entertainment. *See* Jonathan C. Lipson and Christopher Fiore Marotta, *Examining Success*, 90 Am. Bankr. L.J. 1, 5 (2016).

229. *In re* Trans World Airlines, Inc., 185 B.R. 302, 304-7 (Bankr. E.D. Mo. 1995).

230. Gregory Cancelada, *Thermadyne Is Forced into Bankruptcy by Huge Debt*, ST. LOUIS POST-DISPATCH, Nov. 20, 2001, at 13.

231. Gregory Cancelada, *Thermadyne Can Emerge from Bankruptcy, Judge Rules*, ST. LOUIS

In 2016, Schermer drew the Chapter 11 case of Peabody Energy Corporation, the world's largest private sector coal company by volume with $8.8 billion in debt, and the largest case in St. Louis history.[232] Aided by an unexpected rebound in coal prices, Peabody confirmed a plan less than a year after filing that shaved more than $5 billion in debt off its balance sheet.[233]

Schermer also presided over several other large Chapter 11 cases where he wrote opinions on significant legal issues, including of Falcon Products, Inc. (a commercial furniture maker),[234] Union Financial Services, Inc. (commercial collection services),[235] and Noranda Aluminum, Inc. (mining and smelting company).[236] Schermer also wrote the trial court opinion in the case that ultimately decided the issue of whether individuals not engaged in a business could file Chapter 11. Sheldon B. Toibb was an unemployed lawyer who owned a minority interest in a startup energy company. After Mr. Toibb filed a Chapter 7 case, the board of directors of the energy company offered to purchase the shares from Toibb's bankruptcy trustee.[237] Toibb converted his case to Chapter 11 in an attempt to save the stock.[238] At the time, the lower courts were split on whether individuals not engaged in a business could be a Chapter 11 debtor. Following the Eighth Circuit's existing precedent on

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POST-DISPATCH, Apr. 4, 2003 at 33. *See also In re* Thermadyne Holdings, Inc., (No. 01-52840-399), 2002 WL 32827396 (Bankr. E.D. Mo. 2002), *aff'd sub nom. In re* Thermadyne Holdings Corp., 283 B.R. 749 (B.A.P. 8th Cir. 2002) (indemnity provisions in investment banker retention agreement).

232. Declaration of Amy B. Schwetz, Executive Vice President & Chief Financial Officer of Debtor Peabody Energy Corporation, in Support of First Day Motions of Debtors and Debtors in Possession at 3, 11-12; *In re* Peabody Energy Co., et al., Case No. 16-42529.

233. Order Confirming Second Amended Joint Plan of Reorganization of Debtors and Debtors in Possession As Revised on March 15, 2017 (Docket no. 2763).

234. *In re* Falcon Prod., Inc., No. 05-41109-399, 2005 WL 3416130 (Bankr. E.D. Mo. 2005), *aff'd*, 354 B.R. 889 (E.D. Mo. 2006), *aff'd*, 497 F.3d 838 (8th Cir. 2007) (involving distress termination of pension plans).

235. *In re* Union Fin. Servs. Grp., Inc., 303 B.R. 390 (Bankr. E.D. Mo. 2003) (plan confirmation).

236. *In re* Noranda Aluminum, Inc., 549 B.R. 725 (Bankr. E.D. Mo. 2016) (rejection of executory contract with the other counterparty was a debtor in possession in another case).

237. Toibb v. Radloff, 501 U.S. 157 (1991); Barry Meier, *A High Court Victory, but an Empty Pocket,* N.Y. TIMES, July 13, 1991, at 1. One of the other shareholders was G. William Miller, the former Secretary of the Treasury in President Jimmy Carter's administration.

238. *Toibb*, 501 U.S. at 159.

the issue, Judge Schermer dismissed Toibb's Chapter 7 case. The Eighth Circuit agreed with Judge Schermer, but the U.S. Supreme Court reversed, holding that individuals with no business to reorganize could nevertheless file Chapter 11.[239]

Schermer runs a very efficient courtroom. He enters the court precisely at the appointed time — except for those occasions in which he is a minute or two early. Counsel learns quickly that there is no need to repeat anything in the papers because Judge Schermer has read every word and probably understands the arguments better than the author. He locks eyes with the speaker and listens intently; he is never reluctant to ask questions that peel away the extraneous layers of an argument and focus on what is necessary to reach a decision. If counsel strays into irrelevance, Schermer quickly intervenes to put the argument back on track. All bankruptcy judges must endure lengthy dockets that are packed with consumer cases, but Judge Schermer is particularly proficient in balancing the due process rights of the parties with a swift and sure brand of justice, often sitting on the bench for hours at a time, dispensing of dozens of cases in a single docket.

Despite this hyper-efficiency, there are plenty of lighter moments in Judge Schermer's courtroom. Out-of-town counsel appearing for the first time is likely to be questioned in depth about the fortunes of the counsel's local sports teams. In particular, attorneys from Chicago are required to declare their allegiance, Cubs or White Sox, with a disapproving cluck from Judge Schermer for those who prefer the Cubs.[240] Local lawyers are likely to be quizzed about their opinions on trades, free agent signings or the state of the Cardinals' bullpen. Counsel must also remain on high alert, even when their case is not being discussed, because Judge Schermer may solicit anyone's opinion about some legal issue at any time. When the bankruptcy courts were temporarily housed for a few years in a private building with very high ceilings, Schermer used his own funds to festoon his chambers with a full size basketball hoop. At 5:00 p.m., the Judge and

239. *Toibb*, 501 U.S. at 157-59 (1991). *See also* Meier *supra* note 237, at 1.

240. As of this writing, the St. Louis Cardinals have won eleven World Series championships in the past 109 years. The Cubs have won one. Chad Yoder, *Cubs vs. Cards: All 2,363 Games in Five Charts*, CHI. TRIB., Oct. 9, 2015, http://www.chicagotribune.com/sports/baseball/cubs/ct-cubs-cardinals-by-the-numbers-20151009-htmlstory.html.

his law clerks could be heard playing pickup games.

In 1996, Schermer became an original member of the Eighth Circuit Bankruptcy Appellate Panel (BAP), a position that he still holds. His work at the BAP has enabled him to demonstrate the range of his legal acumen as several of his consumer bankruptcy opinions have helped shaped the development of the law. For instance, he wrote the BAP's opinion in *In re Colsen*,[241] holding that a debtor's delinquent tax returns, filed after the Internal Revenue Service had assessed tax liabilities, were valid for purposes of discharging tax obligations. There is currently a split in the circuits and a decision by the Supreme Court at some point seems likely. He also wrote the opinion in *In re Fisette*,[242] permitting a Chapter 13 debtor to strip off a wholly unsecured lien even if the debtor did not earn a discharge. And, of course, no discussion of Judge Schermer's work on the BAP would be complete without mention of *In re Hurd*,[243] where the court determined that a debtor who lived in a six-foot by twenty-foot horse trailer could not claim the trailer as a homestead exemption.

Schermer also developed a niche in mediating disputes arising in cases before other judges. For instance, US Fidelis sold vehicle service contracts of dubious value to hundreds of thousands of consumers. After US Fidelis' business collapsed and it ended up in Chapter 11, Schermer agreed to mediate a liquidation plan that divided the company's remaining assets among its secured creditors, commercial unsecured creditors, consumers,[244] and WARN Act[245] claimants. At the conclusion of the first long day of mediation the exhausted participants went to bed believing that no settlement was possible. Judge Schermer, however, stayed up well into the night and presented a proposal the next morning that was acceptable to all of the stakeholders. He also mediated a dispute in another case between a borrower and its lender where the lender misplaced rare coins it was holding as collateral, with a value of many millions of dollars.

241. 322 B.R. 118 (B.A.P. 8th Cir. 2005), *aff'd* 446 F.3d 836 (8th Cir. 2006).

242. 455 B.R. 177 (2011).

243. 441 B.R. 116 (B.A.P. 8th Cir. 2010).

244. Consumers were represented by an informal committee of state attorneys general. First Amended Disclosure Statement for the First Amended Plan of Liquidation for US Fidelis, Inc. Dated June 5, 2012 Proposed by the Official Committee of Unsecured Creditors at 8, *In re* U.S. Fidelis, Inc., No. 10-41902 (2012).

245. This refers to the claims of former employees who were not given the advanced notice required by the Workers Adjustment and Retraining Notification Act.

Schermer joined the adjunct faculty at the Washington University School of Law, his alma mater, in 1988. For the past twenty-eight years he has taught basic bankruptcy courses and Chapter 11 seminars to thousands of students. He has been named the outstanding adjunct faculty member on several occasions and in 2005 he received the school's Distinguished Alumni Award. He has also mentored his law clerks through the years, many of whom have decided to make bankruptcy law their life's work. Barry Schermer celebrated his thirty-first year on the bankruptcy bench on October 1, 2017. He is scheduled to eclipse Walter Coles' longevity record in May of 2022.

CONCLUSION

Bankruptcy law has come a long way in the past 120 or so years. In the 1890s, as in most of the nineteenth century, there was no federal bankruptcy statute, and both debtors and creditors were left to the vagaries of state law. Now, however, bankruptcy is such an accepted part of the financial landscape that the current President of the United States frequently boasts of his business acumen in using the bankruptcy courts on four occasions to restructure his own businesses. The three men profiled in this article span the entire era: Jay L. Torrey wrote one of the most significant business statutes in United States history and then navigated the partisan battles in Washington for a decade until it was passed; Walter Coles was one of the nation's most consequential bankruptcy referees in the early years after the 1898 Act's passage, shaping the law and practice under the new statute and leading the scholarly debate in the first three decades after its passage; and Barry Schermer is truly a Renaissance man, handling both consumer and business cases with equal facility, while supplementing his trial duties with over twenty years as an appellate judge, and teaching at an elite law school.