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APPEALS IN BANKRUPTCY: TRAPS FOR THE UNWARY

by ROBERT KRATOVIL* and RAYMOND J. WERNER**

IN GENERAL

The Bankruptcy Act¹ and the procedure surrounding it contain many traps which may ensnare the uninitiated practitioner who relies upon the law as it appears in the United States Code. The Act offers many instances in which the law is not what the statutes say it is. This article attempts to explain some of those uncertainties in the law. Special emphasis is placed on the problems related to review of the orders of the referee and the judge.²

THE BANKRUPTCY RULES — PRECEDENTS ESTABLISHED BY THE FEDERAL RULES OF CIVIL AND APPELLATE PROCEDURE

The Federal Rules of Civil Procedure offer an illustration of the type of trap discussed herein. When Congress empowered the Supreme Court to prescribe these rules,³ it set a precedent for the approach to be followed in establishing other procedural

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1. For the purposes of the ensuing discussion, the Bankruptcy Act, 11 U.S.C. § 1 *et seq.* (1964), may hereinafter be cited as the Act. Similarly, the Federal Rules of Civil Procedure will hereinafter be cited as the Civil Rules, and the Federal Rules of Appellate Procedure will likewise be cited as the Appellate Rules. Finally, the Rules of Bankruptcy Procedure, 411 U.S. 995 (1973), will hereinafter be cited as the Bankruptcy Rules.

2. The new rules add the term "Bankruptcy Judge" which is defined to include the referee and the district judge when the latter acts in certain specified capacities. RULES OF BKY. P., Rule 901(7). The usage of "referee" and "judge" in this article, however, corresponds to the traditional meanings of those terms as defined in sections 1(26) and 1(20) of the Bankruptcy Act.

The Bankruptcy Act contains the following relevant definitions:

Bankruptcy Act, § 1(9), 11 U.S.C.S. § 1(9), "Court" shall mean the judge or the referee of the court of bankruptcy in which the proceedings are pending.

Bankruptcy Act, § 1(20), 11 U.S.C.S. § 1(20), "Judge" shall mean a judge of a court of bankruptcy, not including the referee.

Bankruptcy Act, § 1(26), 11 U.S.C.S. § 1(26), "Referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred or anyone acting in his stead.

3. 28 U.S.C.S. § 2072.

rules.⁴ The Civil Rules, by reason of the statute authorizing their adoption, displaced and superseded all earlier conflicting laws.⁵ In effect, this was a statutory recognition of the doctrine of implied repeal, a form of repeal which creates traps for the unwary practitioner. Because no listing or express repeal of superseded statutes was undertaken,⁶ the possibility exists that a statute which remains on the books was repealed by the adoption of the Federal Rules of Civil Procedure. Even though the Judicial Code of 1948 purported to eliminate from its text "the statutes made obsolete by the promulgation of the Federal Rules,"⁷ the thoroughness of this housekeeping job is doubtful.⁸ If this is so with respect to the Judicial Code itself, the specter is raised that other statutes scattered throughout the entire Code may also be "obsolete."

Mention should be made of another trap. A practitioner might conclude that a given statute has been impliedly repealed by one or more of the Federal Rules of Civil Procedure, for example. If, however, Congress were later to amend that statute, a question could well arise as to whether it had ever been repealed. Furthermore, statutes enacted subsequent to adoption of the Federal Rules of Civil Procedure can modify or supersede

4. Pub. L. No. 89-733, § 1, 80 Stat. 1323 amended 28 U.S.C.S. § 2072 to include the authorization to prescribe rules of "practice and procedure of the . . . court of appeals . . . [and for] admiralty and maritime cases and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and the judicial review or enforcement of orders of administrative agencies, boards, commissions and officers."

5. 28 U.S.C.S. § 2072 provides in part:

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

See also *Penfield v. S.E.C.*, 330 U.S. 585 (1947). The historical development of the superseding effect of the Federal Rules of Civil Procedure is explained in somewhat greater detail in 2 J. MOORE, *FEDERAL PRACTICE* ¶ 1.02(1) *et seq.* (2d ed. 1973). At this point there is an opportunity to point out the danger of relying upon headnotes. Headnote number two of *In re Northern Transatlantic Carriers Corp.*, 423 F.2d 139 (1st Cir. 1970) states, "Federal Rules of Civil Procedure do not repeal by implication conflicting statutes." That is not what the case says, and the law as stated in the headnote is incorrect.

6. The rationalization for the failure of Congress to expressly repeal those statutes impliedly repealed by the adoption of the Federal Rules of Civil Procedure are set forth in 2 J. MOORE, *FEDERAL PRACTICE* ¶ 1.02(5) 129 (2d ed. 1973). In brief, it was felt that the task of ferreting out all sections of the U.S. Code repealed by the Rules was of such magnitude that oversights were certain to occur. This, in turn, provides an insight into the magnitude of the burden thrust upon the practitioner.

7. 2 J. MOORE, *FEDERAL PRACTICE* ¶ 1.02(5), at 131 (2d ed. 1973). No attempt was made to ferret out other sections of the United States Code impliedly repealed by the Rules.

8. In 2 J. MOORE, *FEDERAL PRACTICE* ¶ 1.02(5), at 131 (2d ed. 1973) it is said:

Although a basically conservative revision, the 1948 Judicial Code contained several important changes, and, *for the most part* eliminated the statutes made obsolete by the promulgation of the Federal Rules (emphasis added).

conflicting Federal Rules.⁹ As will later appear, the same problem is presented by the Appellate Rules.

SUPERSEDING EFFECT OF THE NEW BANKRUPTCY RULES — IN GENERAL

Without specific reference to the matter of appeals, the ensuing discussion deals with the general proposition of the implied repeal of existing statutes by adoption of the Bankruptcy Rules.

It has been noted in the preceeding discussion that the Federal Rules of Civil Procedure superseded inconsistent procedural statutes.¹⁰ This implied repeal was accomplished without listing or expressly repealing the procedural statutes thus superseded. The same approach was taken with the adoption of the Federal Rules of Appellate Procedure and with respect to the Bankruptcy Rules.¹¹ To the extent that the rules conflict with pre-existing statutory law, the Bankruptcy Rules prevail.¹² Although it has been said "that a 'repealer' will delete from the act all provisions which have found their way into the rules, leaving but a skeleton of the Act as it stands today,"¹³ the task of expressly repealing the superseded statutes has never been carried out. Many provisions repealed by implication remain in the United States Code to mislead the unwary lawyer. Thus, to repeat, the Bankruptcy Rules have impliedly repealed many statutes, and the practitioner is faced with the possibility that many sections of the United States Code, sections which bear no evidence of being repealed, are no longer operative.

Still another problem persists in that once a possibly inconsistent statute is identified, it may be difficult or impossible to absolutely determine, without judicial interpretation, whether in fact the provision is inconsistent with the rules and therefore ineffective.¹⁴

Thus the attorney practicing in the bankruptcy courts must be aware of three sets of rules of practice: (1) the Bankruptcy Rules, (2) the Federal Rules of Civil Procedure, and (3) the Fed-

9. 2 J. MOORE, *FEDERAL PRACTICE* ¶ 1.02(5), at 128 (2d ed. 1973).

10. See note 5 *supra* and accompanying text.

11. 28 U.S.C.S. § 2075. This statute, which gives the court the power to prescribe the bankruptcy rules, provides in part, "[a]ll laws in conflict with such rules shall be of no further force or effect after the rules have taken effect." Another portion of this same section makes it clear that the rules are not to "abridge, enlarge or modify any substantive right."

12. 28 U.S.C.S. § 2075. TREISTER & TROST, *RESOURCE MATERIALS FOR FEDERAL BANKRUPTCY PROCEDURE UNDER THE NEW BANKRUPTCY RULES* 4 (1973); Levit, *The New Bankruptcy Rules*, 57 MARQ. L. REV. 1, 2 (1973); Treister, *The New Bankruptcy Rules*, 48 CALIF. ST. B.J. 522, 524 (1973).

13. Herzog, *The Impact of the Proposed Bankruptcy Rules on the Court*, 45 AM. BKY. L.J. 363, 364 (1971).

14. See Treister, *The New Bankruptcy Rules*, 48 CALIF. ST. B.J. 522, 524 (1973).

eral Rules of Appellate Procedure. All three of these sets of rules are beset, to varying degrees, with the problems created by the implied repeal of prior inconsistent statutes. Presumably, as these rules are expanded or modified the dilemma caused by implied repeal will become more acute.

Furthermore, the determination that a pre-existing statute is inconsistent with the Bankruptcy Rules does not end the inquiry. Conceivably, a statute might not be repealed even though it is blatantly inconsistent with the rules. When the Supreme Court was given the power to prescribe these rules, that power was limited to matters of procedure as opposed to matters of substance.¹⁵ The difficulty of course arises from the fact that the line between substance and procedure is not always easily drawn.¹⁶ The fact remains, however, that if a Bankruptcy Rule is deemed to be substantive it is outside of the powers of the court and thus invalid, having no effect upon a prior inconsistent statute.¹⁷

APPLICABILITY OF FEDERAL RULES OF CIVIL PROCEDURE TO BANKRUPTCY PRACTICE

Historically, under the practice as it existed prior to the adoption of the new Bankruptcy Rules, the Federal Rules of Civil Procedure applied to bankruptcy proceedings.¹⁸ The Civil Rules were applicable to bankruptcy actions not by their own terms,¹⁹ but rather by reason of the language of the Bankruptcy Act²⁰ and General Order 37.²¹ The Civil Rules did not, however, apply

15. 28 U.S.C.S. § 2075 provides in part:
Such rules shall not abridge, enlarge, or modify any substantive right.
Bankruptcy Rules, rule 1 also provides: "the rules and forms in this Title 1 governs the *procedure* in courts of bankruptcy in bankruptcy cases . . ." (emphasis added).

16. Levit, *The New Bankruptcy Rules*, 57 MARQ. L. REV. 1, 2 (1973). An excellent discussion of the substance—procedure problem is found in Landers, *The New Bankruptcy Rules: Relics of the Past as Fixtures of the Future*, 57 MINN. L. REV. 827 (1973).

17. See generally Note, 70 HARV. L. REV. 1471 (1957). Obviously adoption of the Rules by the Supreme Court cannot be regarded as an adjudication of the validity of the Rules.

18. 9 AM. JUR. 2d *Bankruptcy* § 109 (1963). See also Yankwich, *The Impact of the Federal Rules of Civil Procedure on Bankruptcy*, 29 REF. J. 75 (1955).

19. FED. R. CIV. P. 81(a)(1) reads: these rules . . . do not apply to proceedings in bankruptcy . . . except in so far as they may be made applicable by rules promulgated by the Supreme Court of the United States. See also 6A J. MOORE, *FEDERAL PRACTICE* ¶ 59.04(12), at 59-28 (2d ed. 1973).

20. Bankruptcy Act, § 21(k), 11 U.S.C.S. § 44(k).

21. General Orders and Forms in Bankruptcy, 172 U.S. 653 (1898). General Order 37 reads:

In proceedings under the Act . . . the Rules of Civil Procedure for the District Courts of the United States shall, in so far as they are not inconsistent with the Act . . . or with these general orders, be followed as nearly as may be.
See also General Order 22.

to the extent that they were inconsistent with the Act or the general orders.²² General Order 37 caused some difficulties since it was not always easy to "decide whether and to what extent a particular civil rule [was] 'inconsistent' or applicable."²³

To rectify this problem the Bankruptcy Rules are more certain as to the applicability of the Federal Rules of Civil Procedure. The drafting committee sought to conform bankruptcy procedure to that set forth in the Civil Rules.²⁴ Although the nature of bankruptcy procedure made it impossible to completely follow the Civil Rules, the policy expressed in abrogated General Order 37²⁵ was carried out and, where practicable, the Bankruptcy Rules follow the Civil Rules "as nearly as may be."²⁶

Many of the Federal Rules of Civil Procedure have been adopted in whole, in part, or with modification.²⁷ The Bankruptcy Rules contained in Part VII,²⁸ for example, are largely adaptations of the Federal Rules of Civil Procedure.²⁹ The correlation exists to such extent that even the numeration of the Bankruptcy Rules in this part corresponds to the equivalent rule of Civil Procedure.

APPEAL FROM A REFEREE'S ORDER — TIME FOR APPEAL

Prior to the Bankruptcy Rules, section 39c of the Bankruptcy Act³⁰ allowed the "person aggrieved"³¹ by a referee's order the opportunity to obtain review by filing a petition with the judge³²

22. Levit, *The New Bankruptcy Rules*, 57 MARQ. L. REV. 1 (1973). A good outline of which Federal Rules of Civil Procedure did and did not apply in bankruptcy proceedings is found in WRIGHT & MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 1016 (1969).

23. Treister, *A Practicing Lawyer's Primer to the Proposed New Bankruptcy Rules*, 45 AM. BANKR. L.J. 343, 348 (1971). The lack of uniformity in bankruptcy procedure prior to the adoption of the new rules, in spite of the existence of General Order 37, is discussed in Herzog, *The Impact of the Proposed Bankruptcy Rules on the Court*, 45 AM. BANKR. L.J. 363 (1971).

24. Seligson, *The New Bankruptcy Rules*, 76 COM. L.J. 383, 385 (1971).

25. The Supreme Court order of April 24, 1973, which promulgated the new bankruptcy rules, also abrogated General Orders 22 and 37. Bankruptcy Rules and Official Bankruptcy Forms, 411 U.S. 989, 991 (1973).

26. Seligson, *The New Bankruptcy Rules*, 76 COM. L.J. 383, 385 (1971).

27. Herzog, *The Impact of the Proposed Bankruptcy Rules on the Court*, 47 AM. BANKR. L.J. 363, 364 (1971). See, e.g., Bankruptcy Rules, rules 762, 765, 916, 923 and 924.

28. Bankruptcy Rules, rules 701 et seq.

29. Seligson, *The New Bankruptcy Rules*, 76 COM. L.J. 383, 389 (1971).

30. 11 U.S.C.S. § 67(c).

31. 2A COLLIER ON BANKRUPTCY ¶ 39.19 at 1492 (14th ed. 1974) discusses the meaning of this term.

32. See note 2 *supra*.

within ten days of the entry of the order or within any extension of that time period.³³ If the petition for review was not filed within the allotted time, the referee's order became final.³⁴ The absolute nature of the ten-day limitation stemmed from legislation enacted in 1960,³⁵ and the courts have required strict adherence to the mandatory provisions of this section.³⁶ A referee's order not brought before the judge for review within the ten-day period was final notwithstanding the aggrieved party's failure to receive notice of the entry of the order.³⁷ The harshness of this rule was justified because "it is incumbent upon creditors to follow the record of the administration of the bankruptcy estate and discover for themselves orders which they may want to challenge."³⁸ The rule was needed. Stability was required for the benefit of the estate, the creditors and the bankrupt.

In 1960 when section 39c was amended to clearly spell out the mandatory nature of the requirement that a petition for review be filed within ten days from the entry of the questioned order,³⁹ it was thought that this modification fixed the time limits for review of a referee's order with finality.⁴⁰ One minor loophole was left, however, since by express provision the time for filing such petition could be extended indefinitely. When the order questioned involved property, no one could act with safety until the extension period had expired. Hopefully this area of uncertainty has been removed by the new Rules of Bankruptcy Procedure.

The Bankruptcy Rules make the procedure of bankruptcy appeals roughly equivalent to that under the Federal Rules of Appellate Procedure,⁴¹ even to the effect that the terminology is changed to coincide with traditional appellate notions. For example, what was formerly a petition to review a referee's order

33. Treatment of the review of a referee's order under former practice is described in Hunt, *Appeals in Bankruptcy Cases*, 10 S. CAL. L. REV. 296 (1937).

34. Bankruptcy Act § 39c, 11 U.S.C.S. § 67(c).

35. *Id.*

36. *In re Imperial "400" National, Inc.*, 391 F.2d 163 (3rd Cir. 1968).

37. *In re Abilene Flour Mills Co.*, 439 F.2d 937, 939 (10th Cir. 1971); *In re General Insecticide, Inc.*, 403 F.2d 629, 630-31 (2d Cir. 1968); *St. Regis Paper Co. v. Jackson*, 369 F.2d 136, 141-42 (5th Cir. 1966). This latter case contains a discussion of the history of the ten-day rule.

38. *In re General Insecticide, Inc.*, 403 F.2d 629, 630 (2d Cir. 1968). See also *In re Lewis Jones, Inc.*, 369 F. Supp. 111, 118 (1973).

39. The 1960 amendment was a response to *Pfister v. Northern Illinois Finance Corp.*, 317 U.S. 144 (1942) which held that the District Court could review a referee's order notwithstanding the fact that the petition for review was filed after the expiration of the ten-day period. See S. Rep. No. 1689, 86th Cong., 2d Sess. (1960), 2 U.S. CODE CONG. & AD. NEWS 3194-97.

40. See 2A COLLIER ON BANKRUPTCY, ¶ 39.20[4.1] (14th ed. 1974).

41. See generally Treister, *The New Bankruptcy Rules*, 48 CALIF. ST. B.J. 523, 603 (1973); Levit, *The New Bankruptcy Rules*, 57 MARQ. L. REV. 1, 20 (1973).

is now a notice of appeal, and this document must, as before, be filed within ten days.⁴²

A timely motion of the type described in the Bankruptcy Rules,⁴³ on the order appealed from, suspends the running of the ten-day period. Further, a twenty-day extension of the time for filing the notice of appeal may be obtained upon motion of a party.⁴⁴ That request for extension must, however, be filed before the ten-day period has expired "except that a request made after the expiration of such time may be granted upon a showing of excusable neglect if the judgment or order does not authorize the sale of any property."⁴⁵

The quoted language, while helpful, still contains an ambiguity. Two conflicting interpretations have been expressed. It has been stated that "an extension of time may not be granted if the judgment or order authorized the sale of real estate."⁴⁶ That position is in conflict with the one taken in the Advisory Committee's Notes which state:

When the judgment or order appealed from authorizes the sale of property, it becomes final 10 days after its entry unless within the 10-day period a . . . request for extension is filed.⁴⁷

In any event, the maximum time within which an appeal may be filed is thirty days.⁴⁸ The stability of transactions involving a sale of property is attained by requiring the party seeking re-

42. Bankruptcy Rules, rule 802(a).

43. Bankruptcy Rules, rule 802(b). Effect of a Motion on Time for Appeal. The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed with the referee by any party pursuant to the rules hereafter enumerated in this subdivision. The full time for appeal fixed by this rule commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment notwithstanding the verdict under Rule 115(b)(4); (2) granting or denying a motion under Rule 752(b) to amend or make additional findings of fact, whether or not an alternation of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 923 to alter or amend the judgment; or (4) denying a motion for a new trial under Rule 923.

44. Bankruptcy Rules, rule 802(c).

45. Bankruptcy Rules, rule 802(c). Compare FED. R. APP. P. rule 4(a) which contains a provision for the extension of the time for filing a notice of appeal in civil cases upon a showing of "excusable neglect" but includes no reference to orders that authorize a sale of property.

46. Bessman, *The New Rules of Procedure in Straight Bankruptcy*, 46 WISC. BAR. BULL. 7, 19 (Dec. 1973). See also Levit, *The New Bankruptcy Rules*, 57 MARQ. L. REV. 1, 20 (1973). It is unclear why lessees and lenders were not accorded similar protection. Borrowings on receiver's certificates often run into substantial figures, for example.

47. Advisory Committee's Notes to Rules of Bankruptcy Procedure, rule 802. This position is reaffirmed in the Advisory Committee's Notes to Rule 11-62 and Proposed Rule 10-801. See also King, *The Proposed Chapter XI Rules and Official Forms*, 47 AM. BANKR. J. 127, 144-45 (1973); Treister, *The New Bankruptcy Rules*, 48 CAL. ST. B.J. 523, 603 (1973); Treister, *A Practicing Lawyer's Primer on the Proposed New Bankruptcy Rules*, 45 AM. BANKR. L.J. 343 (1971).

48. See Advisory Committee's Notes, RULES OF BKY. PRO. rule 802.

view to file his request for extension within the ten-day period or be bound by the finality of the referee's order.⁴⁹ This same scheme is followed in the rules for Chapter XI⁵⁰ and the Proposed Rules for Chapters X, and XII.⁵¹

Another problem relates to the time periods established by the Rules of Bankruptcy Procedure for filing briefs on appeal to the district court.⁵² The Bankruptcy Rules allow fifteen days from the docketing of the appeal for the filing of the appellant's brief, a like period for the filing of the appellee's brief and five days for the filing of a reply brief. An uncertainty develops in that the time periods may not be uniform from district to district since allowance is made for different periods if local rules so state.⁵³ While this provision recognizes the desirability of allowing local variations,⁵⁴ it creates problems for the practitioner who fails to consult the local rules.

TOLLING THE TEN-DAY PERIOD — OTHER CHANGES EFFECTED BY THE BANKRUPTCY RULES

Aside from the possibility of collateral attack upon the referee's order, case law prior to the adoption of the Bankruptcy Rules had developed other limitations upon the applicability of section 39c. Many of these concepts dealt not with review of the referee's directives by the judge, but rather with reexamination of orders by the referee himself.⁵⁵ One such limitation stemmed from the inherent power of the referee to reconsider his own orders.⁵⁶ In fact, the referee by the terms of his order often reserved to himself the power of modification. This power, by its very nature, implied that it might be exercised after the ten-day period expired.

Further limitation was once found in the principle that section 39c was not applicable "when the referee's order being questioned is of a type usually characterized as 'administrative.'"⁵⁷

49. See Bankruptcy Rules rule 803. See also Treister, *The New Bankruptcy Rules*, 48 CALIF. ST. B.J. 523, 604 (1973).

50. See Bankruptcy Rule 11-62.

51. See Proposed Bankruptcy Rules, rules 10-801 and 12-61.

52. Bankruptcy Rules, rule 808.

53. *Id.*

54. See Advisory Committee's Notes to Bankruptcy Rules, rule 808.

55. See, e.g., *Thomas Corp. v. Nicholas*, 221 F.2d 286 (5th Cir. 1955).

56. *In re Meter Maid Industries, Inc.*, 462 F.2d 436, 439 (5th Cir. 1972). See also 2A COLLIER ON BANKRUPTCY ¶ 38.09(3) and 39.17 (14th ed. 1974).

57. *Flaxman, Coleman, Gorman & Rosoff v. Cheek*, 355 F.2d 672 (9th Cir. 1966), cert. denied 384 U.S. 954 (1966). 2A COLLIER ON BANKRUPTCY ¶ 39.18 (14th ed. 1974) points out that this exemption from the ten-day period applied only to those orders which were entered "informally and without notice or hearing." For a description of the types of orders

Thus, there were countless types of ministerial orders which the referee himself could have reviewed either sua sponte or upon motion of the parties,⁵⁸ and that review could have been carried out after the ten-day period had expired. Of course, once the estate was closed, the order was beyond revision.⁵⁹

The Bankruptcy Rules put an end to this practice.⁶⁰ The application of rule 59 of the Federal Rules of Civil Procedure through Bankruptcy Rule 923 requires that the initiative for modification or amendment be taken within ten days after the entry of an order.⁶¹ The indefiniteness which existed prior to the adoption of the rules no longer exists. If the order is not modified within the ten-day period, it is beyond change, except as allowed by other provisions of the Bankruptcy Rules.⁶² The same time limitation would be applicable whether the modification is suggested by a party or by the referee himself.

Another problem which had developed under the former practice revolved around what had come to be termed the "unentertained" petition for rehearing. The nature of this peculiar animal is probably best described in *Pfister v. Northern Illinois Finance*.⁶³ The initial task undertaken by the court or referee upon the filing of a petition for rehearing is the consideration of whether "the petition sets out, and the facts—if any are offered—support, grounds for opening the original order. . . ."⁶⁴ At this point the court may determine that no grounds exist for such reexamination. If that be the case the petition is "unentertained." On the other hand, the court may grant the petition

which may be characterized as "administrative," see Copenhaver, *Rehearing and Review in Bankruptcy*, 42 REF. J. 101 (1968).

58. 2A COLLIER ON BANKRUPTCY ¶ 39.18 (14th ed. 1974).

59. *Flaxman, Coleman, Gorman & Rosoff v. Creek*, 355 F.2d 672, 674 (9th Cir. 1966), cert. denied 384 U.S. 954 (1966); *Fazakerly v. E. Kahn's Sons Co.*, 75 F.2d 110 (5th Cir. 1935). See also 2A COLLIER ON BANKRUPTCY ¶ 39.18 (14th ed. 1974).

60. Advisory Committee's Notes, Bankruptcy Rules, rule 924 state:

These rules do not preserve the features of the practice pertaining to so-called "administrative orders," which have been regarded as subject at any time to reconsideration by the referee or to review by the district court without regard to the limitations of § 39c of the Act.

61. This statement must, of course, be read in light of FED. R. CIV. P. 60, which is made applicable to Bankruptcy procedure by Bankruptcy Rule 924, allowing motions to be made after the expiration of the ten-day period. For a discussion of the intricacies involved in the practice under these rules see 6A & 7 J. MOORE, *FEDERAL PRACTICE*, Ch. 59-60 (2d ed. 1974); Annot. 13 A.L.R. Fed. 794 (1972); Annot. 14 A.L.R. Fed. 309 (1973); Annot. 15 A.L.R. Fed. 193 (1973). See also Note, 25 TEMP. L.Q. 77 (1951); Comment, 17 U. CHI. L. REV. 664 (1950); Note, 61 YALE L.J. 76 (1952); Copenhaver, *Rehearing and Review in Bankruptcy*, 42 REF. J. 101-102-107 (1968).

62. See Bankruptcy Rules, rule 924.

63. 317 U.S. 144, 150-51 (1942). See Annot. 10 A.L.R.2d 1075 (1950). See also Annot. 148 A.L.R. 795 (1944).

64. 317 U.S. at 150.

for rehearing and reexamine the issues of the original order, thereafter entering an order either denying or allowing modification of the original order.⁶⁵ This would be an "entertained" petition for rehearing.

The only reliable tool for determining whether or not the petition for rehearing was "entertained" or "unentertained" is the order entered upon the disposition of the petition. It will either state that the court refused to allow the petition for rehearing or it refused to modify the original order.⁶⁶ Of course, if the original order is modified, the court entertained the petition. The crucial nature of this inquiry results from the impact of the order on the unentertained petition for rehearing upon the time allowed for review of the referee's order. If the petition for rehearing had been entertained, the time for review would have begun to run anew from the entry of the order on the petition. If, however, the petition had not been entertained, the time for review would not have been enlarged. This is pointed out in *Wayne United Gas Co. v. Owens-Illinois Glass Co.*,⁶⁷ where the court stated:

A defeated party who applies for a rehearing and does not appeal from the judgment or decree within the time limited for so doing, takes the risk that he may lose his right of appeal, as the application for rehearing, if the court refuses to entertain it, does not extend the time for appeal.⁶⁸

Since the Court was only setting forth a rule of law under which the lower court decided the case, this language is clearly *dictum*. Nonetheless, the statement has led one author to conclude that the time for filing notice of appeal is not tolled by a petition for rehearing when the court refuses to entertain that motion.⁶⁹ Another author has taken a contrary view,⁷⁰ a view based upon a footnote in *Pfister* which reads:

Where a petition for rehearing is filed before the time for a petition for review has expired, it tolls the running of the time, and limitation upon proceedings for review begins from the date of denial of the petition for rehearing.⁷¹

Whatever may be the correct view, the task remains to analyze the language of the court in *Pfister* and determine whether the

65. *Id.* at 149.

66. *Id.* at 150.

67. 300 U.S. 131 (1936).

68. *Id.* at 137.

69. 9 J. MOORE, *FEDERAL PRACTICE* ¶ 204.12[6], at 966 (2d ed. 1973). See also 2A *COLLIER ON BANKRUPTCY* ¶ 25.08[1] fn.6 at 929 (14th ed. 1974).

70. Copenhaver, *Rehearing and Review in Bankruptcy*, 42 *REF. J.* 101, 104 (1968).

71. 317 U.S. 144, 149 n.7 (1942). The belief is stated in Copenhaver, *supra* note 67, that the court seemed to make a special point of indicating that the rule stated in *dictum* in *Wayne* was no longer applicable.

rules there set forth were affected by the adoption of the Rules of Bankruptcy Procedure.

Pfister involved the following factual situation⁷² which arose out of a farm debt relief proceeding.⁷³ On August 13, 1940, the conciliation commissioner⁷⁴ entered an order which fixed rental payments to be made by the debtor and also ordered a stay or moratorium which related back to April 26. An order of sale was entered on September 7. On September 16, a petition for rehearing of the August 13 order was filed and four days later a similar petition was filed directed at the order of September 7. The petition for rehearing of the September 7 order was denied on September 30, and nine days later a petition for review of the order was filed. Rehearing of the August 13 order was denied on November 28 and on that same day a petition for review of that order was filed. The district court dismissed the petition for review, grounding its decision on the concept that it had no jurisdiction to hear the cases.⁷⁵

The Supreme Court in *Pfister* made statements which, although valid at the time made, were in part modified or overturned by the subsequent adoption of the Bankruptcy Rules. Those statements are analyzed as follows:

Where a petition for rehearing of a referee's order is permitted to be filed, after the expiration of the time for a petition for review, and during the pendency of the bankruptcy proceedings, as here, they may be acted on, that is, they may be granted 'before rights have vested on the faith of the action'. . . .⁷⁶

Note is made of the fact that the *Pfister* court stated that untimely petitions for review of referee's orders may be granted in the discretion of the court.⁷⁷ Congress, some eighteen years later, amended section 39c⁷⁸ to clarify the limitation on review of a referee's order.⁷⁹ This amendment, enacted to bring stability and exactitude to the time periods allowed for the filing of a petition for review by the judge, had no express impact upon the time period for the filing of a petition for rehearing by the referee.⁸⁰ Thus, there was no statutory change in the uncertainty

72. The *Pfister* opinion contains a somewhat garbled factual statement. A better chronology is found in the opinion of the lower court in *In re Pfister*, 123 F.2d 543 (7th Cir. 1941).

73. Section 75 of the Bankruptcy Act, 11 U.S.C.S. § 203 *et seq.*

74. A referee appointed by the district court to handle agriculture compositions. See the Bankruptcy Act, § 75(a), 11 U.S.C.S. § 203(a).

75. 317 U.S. at 147.

76. *Id.* at 149.

77. *Id.* at 153.

78. Pub. L. No. 86-662, 74 Stat. 528.

79. S. Rep. No. 1689, 86th Cong., 2d Sess. (1960), 2 U.S. CODE CONG. & AD. NEWS 3194-3195.

80. See Copenhaver, *Rehearing and Review in Bankruptcy*, 42 REF. J. 101, 106 (1968) where it is stated:

This is borne out by the Senate Judiciary Committee Report on this

caused by the above-quoted statement. The petition for rehearing could result in the original order being modified even if filed out of time. The new Bankruptcy Rules make the procedure more rigid.

Rule 923 makes rule 59 of the Federal Rules of Civil Procedure applicable to bankruptcy. This clarifies a conflict which existed among the circuits.⁸¹ Rule 59 (a) allows a new trial to be granted as to all or some of the parties and as to all or some of the issues for any of the reasons for which rehearings had been granted in suits in equity.⁸² The motion for new trial, formerly a petition for rehearing, must be made "not later than ten days after the entry of the judgment."⁸³ The application of this rule to bankruptcy matters in effect overrules the above-quoted statement from the Civil Rules. Now the petition for rehearing must be filed within ten days of the entry of the order.⁸⁴

Another statement of the Court in *Pfister* also dealt with untimely petitions for rehearing:

[W]here out of time petitions for rehearing are filed and the referee or court merely considers whether the petition sets out,

amendment, from which report it would not appear that there was any design to disturb the fairly well settled rules respecting motions or petitions for reconsideration or rehearing.

81. This conflict is described in Advisory Committee's Notes to Rule 923 as follows:

Rule 59 of the Federal Rules of Civil Procedure has generally been deemed applicable to a "petition for rehearing" of an order entered in bankruptcy cases. See, e.g., *Claybrook Drilling Co. v. Divanco, Inc.*, 336 F.2d 697, 700 (10th Cir. 1964) (petition for rehearing of orders invalidating security interest, reducing unsecured claim, and refusing to compel compliance with Chapter X plan held timely under Fed. R. Civ. P. 59(b)); *In re Marachowski Stores Co.*, 188 F.2d 686, 688-89 (7th Cir. 1951) (motion for rehearing of orders dismissing involuntary bankruptcy petition and directing payment of fees and expenses to custodian held not timely under Fed. R. Civ. P. 59(b) and denial thereof not appealable); *Copenhaver, Rehearing and Review in Bankruptcy*, 42 Ref. J. 101, 103 (1968). But cf. *American United Life Ins. Co. v. Haines City, Fla.*, 117 F.2d 574, 576 (5th Cir. 1941) (Fed. R. Civ. P. 59 deemed inapplicable to order confirming a plan under Chapter IX of the Act); 2 *Collier Par.* 25.07[2] (1969); 6A *Moore Par.* 59.04[12] (1954). This rule resolves the doubts as to the applicability of the rule in bankruptcy, but it does not restrict the discretion vested in the court by Rule 307 to reconsider an order allowing or disallowing a claim.

See also *Drake, Contested Matters and Ex Parte Procedure in Bankruptcy*, 19 *MERCER L. REV.* 318, 331 (1968).

82. "Court of Bankruptcy are courts of equity without terms." *Pfister v. Northern Illinois Finance Corp.*, 317 U.S. 144, 152 (1942).

83. *FED. R. CIV. P.* 59(b). See also *FED. R. CIV. P.* 6(b).

84. But see *Copenhaver, Rehearing and Review in Bankruptcy*, 42 *REF. J.* 101, 105 (1968) which states that the quoted rule of *Pfister* "is somewhat the same in effect as the motion under Rule 60(b)." The foggy area of practice under Rules 59 and 60 of the Federal Rules of Civil Procedure is discussed in 6A & 7 J. *MOORE, FEDERAL PRACTICE*, ch. 59 & 60 (2d ed. 1974); *Annot.* 13 *A.L.R. Fed.* 794 (1972); *Annot.* 14 *A.L.R. Fed.* 309 (1973); *Annot.* 15 *A.L.R. Fed.* 193 (1973). See also *Note*, 43 *NOTRE DAME LAWYER* 98 (1967); *Note*, 25 *TEMP. L.Q.* 77 (1951); *Comment*, 17 *U. CHI. L. REV.* 664 (1950); *Note*, 61 *YALE L.J.* 76 (1952).

and the facts—if any are offered—support, grounds for opening the original order and determines that no grounds for a reexamination of the original order are shown, the hearing upon or examination of the grounds for allowing a rehearing does not enlarge the time for review of the original order.⁸⁵

As noted above, the application of rule 59 of the Federal Rules of Civil Procedure to bankruptcy cases requires the petition for rehearing to be filed within ten days. The untimely filing would not have any effect upon the time allowed for the filing of a notice of appeal. If the time has passed, so has the opportunity for review.

The next considered statement of the *Pfister* court reads:

Where a petition for rehearing is filed before the time for a petition for review has expired, it tolls the running of the time, and limitation upon proceedings for review begins from the date of denial of the petition for rehearing.⁸⁶

The same result obtains under the new Bankruptcy Rules. A motion in the traditional form of a petition for rehearing will, if timely filed, toll the running of the limitations period on appeals. The period will begin to run anew from the date of the order disposing of the petition or motion.

As noted above, the new Bankruptcy Rules expressly apply rule 59 of the Federal Rules of Civil Procedure to bankruptcy practice.⁸⁷ The notes of the Advisory Committee indicate that this is the rule under which petitions for rehearing would be filed. The Bankruptcy Rules further provide that the filing of a timely motion terminates the time for filing notice of appeal.⁸⁸ The full time for appeal then commences to run from the entry of an order granting or denying such motion.⁸⁹ This form of practice in effect preserves the rule enunciated in *Pfister*.

For the same reason, the last remaining rule of *Pfister* is also preserved. The court said:

When such a petition for rehearing is granted and the issues of the original order are reexamined and an order is entered, either denying or allowing a change in the original order, the time for review under 39(c) begins to run from that entry.⁹⁰

A like result follows under today's practice. The filing of a timely motion tolls the running of the period of appeal, which will begin to run anew from the time the order is entered disposing of the motion.⁹¹

85. 317 U.S. at 150.

86. *Id.* at 149 n.7.

87. Bankruptcy Rules, rule 923.

88. Bankruptcy Rules, rule 802(b).

89. *Id.*

90. 317 U.S. at 149.

91. See FED. R. CIV. P. 59; Bankruptcy Rules, rule 802.

PRESERVATION OF THE STATUS QUO DURING
THE PENDENCY OF THE APPEAL

The new Bankruptcy Rules call attention to another question. When an appeal is taken from a referee's order which authorizes the sale of property, and the appellant takes no steps to preserve the status quo during the pendency of that appeal, does a third party purchaser take subject to the outcome of the appeal? Unfortunately, absent statutory clarification, this area of the law is shrouded in doubt and the results one encounters are inequitable.⁹² This doubt was evidently recognized and dealt with as an afterthought in the Chapter XI rules which provide:

Unless an order approving a sale of property or issuance of a certificate of indebtedness is stayed pending appeal, the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal *whether or not the purchaser or holder knows of the pendency of the appeal*.⁹³

This rule makes it incumbent upon the appellant to obtain a stay to preserve the status quo pending appeal if he wishes to preserve the fruits of his appeal, an action which may require that the appellant file a bond.⁹⁴

Unfortunately, this provision was not included in the rules for straight bankruptcy⁹⁵ or for Chapter XIII,⁹⁶ the other rules which are currently in force. What result then follows under these chapters? Indeed, what result follows upon appeal from the district court to the Circuit Court of Appeals? It is feared that the appellant will in effect have the fruits of the appeal preserved for him without having to post a bond to secure the successful appellee.⁹⁷ Where a referee's order directs the sale of property and the property is sold to a good faith purchaser pending an appeal from the order of sale, the rules should make it clear that the purchaser's title is not affected by a reversal unless a bond has been posted and the effect of the order of sale has been stayed.

If the appellant wants protection, it would not be unreasonable to require that he give security to the appellee who would, absent the taking of the appeal, be free to act upon the validity of the referee's order. Though the drafters of the Chapter XI rules recognized this fault and made appropriate changes, no

92. Kratovil & Werner, *Appeals and Reversals—A Vast Wasteland*, 49 NOTRE DAME LAWYER 844 (1974).

93. Bankruptcy Rules, rule 11-62(2).

94. Bankruptcy Rules, rule 805. This rule is made applicable to Chapter XI proceedings by Bankruptcy Rules, rule 11-62.

95. See Bankruptcy Rules, rule 805.

96. See Bankruptcy Rules, rule 13-801.

97. *Supra* note 91.

similar changes were made to the Bankruptcy Rules already adopted.

APPEAL FROM THE DISTRICT COURT
TO THE CIRCUIT COURT

Just as the Federal Rules of Civil Procedure and the new Rules of Bankruptcy Procedure supersede prior conflicting statutes,⁹⁸ the adoption of the Federal Rules of Appellate Procedure has the same effect.⁹⁹ Thus, these rules in fact repeal many statutes which, on their face, bear no evidence of being repealed. With specific application to the Bankruptcy Act, the lawyer involved in an appeal from a district judge's order will come upon section 25a¹⁰⁰ which provides that the appeal can be taken within thirty days from the time written notice had been served upon the aggrieved party. Relying upon this section, he would feel confident in the continued existence of the order after he had waited for the requisite period of time¹⁰¹ to pass with no appeal having been taken. His reliance would be misplaced, however, as for all practical purposes section 25a does not even exist. It is one of the statutes which was superseded by the adoption of the Federal Rules of Appellate Procedure.¹⁰² Accordingly rule 4a of the Federal Rules of Appellate Procedure must be referred to rather than section 25a of the Bankruptcy Act.

Although the time period of thirty days for filing a notice of appeal under this rule is the same as that under the superseded section of the Bankruptcy Act, there are two important differences. First, if the United States is a party to the proceeding, and it frequently is in bankruptcy proceedings, the time for filing notice of appeal is sixty days, not thirty. Secondly, the thirty-

98. See notes 5, 11 *supra* and accompanying text.

99. 28 U.S.C.A. § 2072 empowered the Supreme Court to prescribe rules of practice and procedure of the Courts of appeals. That section reads in part:

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

See also 9 J. MOORE, *FEDERAL PRACTICE* ¶ 201.07, at 533-34 (2d ed. 1973).

100. 11 U.S.C.S. § 48(a).

101. The thirty-day period is extended to forty days if the notice is not served.

102. 2 *COLLIER ON BANKRUPTCY* at 891 (14th ed. 1974). See also Advisory Committee's Notes, *FED. R. APP. P.*, 4a. The reader is cautioned in that the note was prepared before the rules had been adopted and speaks in the appropriate tense for the time it was written. It is this fact that explains the note's assertion that section 25a is still in existence. Today's reading of that note should be done under the realization that the then present has passed. This note also describes the historical problems with section 25a. As a matter of historical interest, the reader may be interested in Hunt, *Appeals from the District Courts to the Circuit Courts of Appeals in Bankruptcy Cases*, 42 *COMM. L.J.* 131 (1937). See also Selverstone, *Appeals in Bankruptcy*, 41 *CORP. REORG. & AM. BKY. REV.* 338 (1938); Hunt, *Appeals in Bankruptcy Cases*, 10 *S. CAL. L. REV.* 296, 307 (1937).

day period may be extended for an additional thirty days. Although this extension is conditioned upon a "showing of excusable neglect,"¹⁰³ it may be granted pursuant to a motion made after the original thirty-day period has expired. The net result of all of this is the fact that the attorney who has, in reliance upon section 25a of the Bankruptcy Act, waited the prescribed thirty or forty-day period before advising his client to change position, may well have inadvertently advised his client to embark upon a perilous course of action. An appeal may thereafter be filed, and if successful, it may modify or reverse the decree upon which the client has acted.¹⁰⁴

A somewhat related problem, caused by the adoption of the new Bankruptcy Rules, revolves around the procedure to be followed upon appeal from a district judge's order in bankruptcy cases. Under the practice as it existed prior to the adoption of the bankruptcy rules, General Order 36 made it clear that the Federal Rules of Appellate Procedure governed.¹⁰⁵ The General Order which created this certainty was abrogated by the order which prescribed the straight bankruptcy rules.¹⁰⁶

Discussion of the mode of appeal from the district court to the Circuit Court of Appeals in bankruptcy matters rests on the supposition that such appeals are governed by the Federal Rules of Appellate Procedure. Nowhere is there a totally convincing categorical statement that this is the case. Indeed, the language one encounters is muddy. The statute authorizing the adoption of the Federal Rules of Appellate Procedure gave the Supreme Court the power to prescribe the "practice and procedure of the . . . courts of appeals of the United States in *civil actions*"¹⁰⁷ Moore notes that the term "'civil actions' has never embraced *proceedings authorized by the Bankruptcy Act*."¹⁰⁸ However, although his language is not clear, Moore apparently concludes that the Federal Rules of Appellate Procedure do in-

103. FED. R. APP. P. 4(a).

104. Procedure for review to the United States Supreme Court is set forth in 2A COLLIER ON BANKRUPTCY ¶ 25.35 *et seq.* (14th ed. 1974). Historical reference may also be made to Hunt, *Appeals in Bankruptcy Cases*, 10 S. CAL. L. REV. 296, 322 (1937).

105. Former General Order 36, 305 U.S. 698 (1939), reads:

Appeals shall be regulated, except as otherwise provided in the Act, by the rules governing appeals in civil actions in the courts of the United States, including the Rules of Civil Procedure for the District Courts of the United States.

106. Supreme Court order of April 24, 1973, 411 U.S. 991 (1973).

107. 28 U.S.C.S. § 2072 (emphasis added).

108. 9 J. MOORE, FEDERAL PRACTICE ¶ 201.06[3] (2d ed. 1973) (emphasis added) (citations omitted). But see 2A COLLIER ON BANKRUPTCY § 25, at 893 (14th ed. 1974). Note: FED. R. APP. P. 4(a) applies to "civil case[s]" which the rule defines to include "a proceeding in bankruptcy or a controversy arising therein." See also the committee note to rule 4(a) which states, "Since this subdivision governs appeals in all civil cases, it supersedes the provisions of section 25 of the Bankruptcy Act."

deed apply to appeals from the district court in bankruptcy proceedings.¹⁰⁹ The Federal Appellate Rules themselves, in stating their scope, do not explicitly extend their application to proceedings under the Bankruptcy Act.¹¹⁰ However, a noted commentator concludes that the Federal Rules of Appellate Procedure apply to appeals in bankruptcy.¹¹¹

Attention is also directed to the fact that prior to the adoption of the Appellate Rules, rules 73 and 76 of the Civil Rules¹¹² attempted to govern the taking of an appeal from the district court to the Circuit Court of Appeals. It was held in *Scott v. Jones*¹¹³ and *Coursey v. International Harvester Co.*¹¹⁴ that appeals to the Circuit Court in bankruptcy cases were governed by those rules. The adoption of the Appellate Rules, however, brought about the abrogation of Civil Rules 73 to 76.¹¹⁵ In lieu

109. 9 J. MOORE, *FEDERAL PRACTICE* ¶ 201.06[3], (2d ed. 1973) reads: As a matter of history, the term "civil actions" has never embraced proceedings authorized by the Bankruptcy Act. The authority of the Supreme Court to prescribe rules for proceedings authorized by the Act is found in 28 U.S.C. § 2075, not in 28 U.S.C. § 2072, which contains the authority to make rules in civil actions. Section 2075 authorizes the Court "to prescribe by general rules the forms of process, writs, pleadings and motions, and the practice and procedure under the Bankruptcy Act." While Section 2075 does not expressly mention appellate procedure, appeals in bankruptcy proceedings, which are authorized not by the general law but by Section 24 of the Bankruptcy Act, have always been regarded as an integral part of the proceedings in Bankruptcy, and the legislative history of Section 2075 makes it clear that the authority that the statute grants to the Supreme Court includes the power to make rules respecting appeals. [footnotes omitted].

110. *FED. R. APP. P.* 1(a), which reads:

Scope of rules. These rules govern procedure in appeals to United States courts of appeals from the United States district courts and the Tax Court of the United States; in proceedings in the courts of appeals for review or enforcement of orders of administrative agencies, boards, commissions and officers of the United States; and in applications for writs or other relief which a court of appeals or a judge thereof is competent to give.

111. 2A *COLLIER ON BANKRUPTCY* § 25 (14th ed. 1974) states:

The Federal Rules of Appellate Procedure, effective July 1, 1968, were prescribed pursuant to Sections 3771 and 3772 of Title 18, United States Code, and Sections 2072 and 2075 of Title 28, United States Code to govern the procedure in appeals to United States courts of appeals from the United States district courts. As the "courts of bankruptcy" referred to in § 24 of the Bankruptcy Act, *supra*, include the United States district courts, these Federal Rules of Appellate Procedure apply to appeals under that section.

In *Ward, The Federal Rules of Appellate Procedure*, 54 A.B.A.J. 661 (1968) it is said that the Federal Rules of Appellate Procedure "regulate practice and procedure in all proceedings that may be brought in a United States court of appeals." (emphasis added). See also Henckenstein, *Significant Changes in the Federal Rules of Appellate Procedure*, 19 *FED. INS. COUNSEL Q.* 51 (Winter, 1968-1969). See also 11 U.S.C.S. § 47(b) which provides that Appellate jurisdiction in bankruptcy proceedings shall be "in the form and manner of an appeal."

112. *FED. R. CIV. P.* 73-6.

113. 115 F.2d 133, 134 (10th Cir. 1940).

114. 109 F.2d 774, 777 (10th Cir. 1940).

115. Supreme Court Order, December 4, 1967, 43 F.R.D. 61, 115-16. See *Ward, The Federal Rules of Appellate Procedure*, 28 *FED. B.J.* 100 (1968).

of the abrogated rules we have the Federal Rules of Appellate Procedure.

Even though they are based on rules which have been abrogated, the holdings of *Scott*¹¹⁶ and *Coursey*¹¹⁷ are not totally without use. Both may be presently interpreted as authority for the proposition that the Federal Appellate Rules, the rules which have replaced those upon which the cases were decided, apply to bankruptcy proceedings.

CONCLUSION

We have seen that grave difficulties arise under the new Bankruptcy Rules. Gaps remain wherein it is not clear which mode of procedure, if any, governs a particular factual situation. Inconsistent coverage exists in that the rules for one chapter cover certain eventualities, but the rules for other chapters leave the matter untouched. Worst of all, the implied repeal of inconsistent statutes causes gray areas to exist. The attorney cannot predict in advance whether a particular statute has been repealed by the rules or not. He must advise his client to take a position in litigation and hope that the court will agree with his interpretation of the law.

This, of course, is not the end of the road. Good and dedicated men have spent long hours drafting the rules as they were proposed. Now these rules are submitted to the practicing bar to test them in the courtroom. After that experience is reported and digested, necessary modifications can be made.

In any event, counsel is well advised to tread carefully in this area of practice because danger lurks therein.

116. See note 17 *supra*.

117. See note 17 *supra*.