CHAPTER XII

THE ROLE OF THE BANKRUPT CORPORATION

The method followed by the bankers' lawyers in putting the St. Paul company into the hands of the court required not only the loan of a friendly creditor's name, but also the use of the bankrupt company's name. The attorney for the St. Paul appeared in court for it as an ostensible defendant. The attorney admitted that everything of which the creditor complained, as detailed in the document prepared by the bankers' lawyers, was true. And the attorney for the railway joined Mr. Shaw, as attorney for the friendly creditor, in asking that the railway property be placed in the hands of receivers.

With the appointment of receivers the directors recognized that their powers as a board had come to an end. One of them, Mr. Buckner, the head of New York Trust Company, expressed in more detail the view to which various of his co-directors also testified. He said: "I understood that when the receivers came in, the directors more or less dropped out of the picture. While we were nominally directors, we had no authority. . . ." He referred to the fact that the Harkness lawyer, Mr. Fisher, resigned from the board the week before the receivership. Mr. Gates "was elected to fill Mr. Fisher's place, and I don't think he had been called to a meeting up to date." Mr. Buckner was giving this testimony in the Commission investigation more than a year after the receivership had been instituted. He continued: "I cannot help laughing about it, because he came in just at the time of the receivership. He is one of our vice-presidents, and he is put in there, very frankly, as a convenience, and he has been so afraid of being subpœnaed to come here, because he hasn't anything to tell."

The general acceptance, by those on the inside, of the fact that the functioning of the board was at an end even in form, as it had for some considerable time been in fact, was illustrated by the discontinuance of the annual stockholders' meetings to elect directors. A month after the receivership was instituted, President Byram replied to a security-holder that "under existing circumstances the date of the annual meeting has not been set and it is doubtful if such a meeting will be held."

But although the corporation which had the name of Chicago, Milwaukee & St. Paul Railway Company had become an empty shell, and its directing board too, the legal procedure used by the bankers' lawyers had made the corporation a so-called party to the receivership. Nominally, the two principal parties to a half-billion-dollar receivership proceeding turned out to be an ostensible two-hundred-dollar creditor and a corporation which for practical purposes had breathed its last. Yet on occasion the name of this corporation was invoked to serve partisan purposes, just as was the name of the friendly creditor. This was done, in court, by persons appearing as attorneys for the defunct corporation.

The attorney who on behalf of the company went to Judge Wilkerson's chambers with Mr. Shaw on March 18 and joined with him in asking for a receivership of the property was one of the men on the legal staff of the railway, Mr. Dynes. On the same day, however, he was appointed by court order to act as attorney for the receivers, and withdrew his name as company attorney. Another lawyer appeared in his place. Who had authorized him to do so was not shown on the court records. The defunct corporation was preserved as a party to the receivership case.

Many months later, when the independent stockholders' com-

mittee asked the court to let it also become a party to the case, the St. Paul corporation was brought to life again. Who brought it to life was not disclosed. A new lawyer came to court and said he was special attorney for the corporation. No one disclosed who had selected this lawyer or who was going to pay him. He said he was in court to oppose the application of the independent committee.

The board of directors was not functioning, so it could not have employed him. The president of the company was one of the receivers and could not with propriety have acted in a dual capacity in thus hiring somebody to go to court and take sides against security-holders, on behalf of a practically extinct board of directors. It is not to be assumed that the bankers hired this special lawyer for the company, since Mr. Hanauer testified in the Commission investigation, in another connection, that "we felt that . . . in a receivership the board of directors has no more powers. . . ." It may of course be that the bankers' lawyers directly or indirectly had some connection with the matter, in view of the fact that many important matters handled by them, both before and after the commencement of the receivership, were stated by Mr. Hanauer to have been without his knowledge at the time.

Whatever the source of his appointment may have been and whatever the source of his instructions to oppose the independent committee, this special attorney argued that only the attorney for the corporation could speak in court on behalf of stockholders. According to his way of thinking, stockholders owning $27,000,000 par amount of stock had no right to come to court to speak for themselves, but were bound to permit the company's board of directors to speak for them in the receivership proceedings. He overlooked the fact, which board members acknowledged in the Commission investigation and which Mr. Hanauer there mentioned, that the board was practically out of office and had no more powers. He ignored the fact that stockholders had been deprived of the right to elect directors at a regular annual meeting. He did not mention the fact that most

of the board members neither owned nor directly represented any substantial amount of stock.

The Judge asked the special attorney's views on the claim of the independent committee that various board members had disqualified themselves from acting for independent stockholders; that these directors had affiliated themselves with the bankers' plans of reorganization and had thus made themselves partisans against the independent committee and against any other stockholders who deemed those plans inimical to the stockholders' interests. But this circumstance, said the man who claimed to be special attorney for the bankrupt corporation, "doesn't weigh a feather's weight . . . not a feather's weight." He had earlier argued that less than a majority of the board members were on stockholders' committees affiliated with the bankers. The implication was that a governing and controlling majority of the board could and would protect the stockholders. He made no mention of the four western directors who had not truly functioned even before the receivership, or of the New York Trust Company's vice-president who had been put in as a mere convenience and had never served on the board. Omitting these, the directors affiliated publicly with the bankers' side were a majority of the directorate which had functioned prior to the receivership. Nor did the special attorney for the company mention the fact that other directors, not publicly affiliated with the bankers' plans, were supporting those plans and had taken sides.

Whatever the source of the appointment of this special attorney and of the lawyer who had appeared as company attorney after Mr. Dynes's resignation, the board of directors did not have to pay them for their services. They were paid out of the corpus.

The ghost of the old company was made to walk in the Commission proceeding also. Here the lawyer who claimed to represent the corporation was Mr. Dynes, who had withdrawn as company attorney in the court proceedings when he was appointed receivers' attorney. He could not properly be attorney

for both, but in the Commission investigation he reassumed the character which he had felt obliged to give up in the court case. He did not make clear who had authorized him to speak for the company in the investigation or to use its name. He himself acknowledged that transactions subsequent to the appointment of the receivers were "matters subsequent to the ending of the corporation as an active entity."

The reason for this revival of the corporation may be found in the fact that no live "party" connected with the bankers wanted to subject himself to the orders of the Interstate Commerce Commission in this inquiry by becoming a party to the Commission's investigation. The receivers carefully avoided any formal appearance in the inquiry, although Mr. Condit, one of Mr. Shaw's partners, came perilously close to doing so, by asking a question of one of Mr. Dynes's witnesses. Mr. Condit on being asked by Commissioner Cox whether he wanted his appearance noted, beat a hasty retreat. Mr. Dynes himself, when his attorneyship for the receivers was pointedly brought up, said that "the receivers . . . have not appeared in this and have not authorized me to appear in this for them." Similarly, the bankers did not become parties to the Commission investigation, although their lawyers often were present at the inquiry, sometimes in considerable numbers. Nor did any of the directors or officers or committees or any other live person in the banker's entourage "note his appearance" in the Commission hearings. Becoming a "party" to a thoroughgoing investigation of St. Paul affairs might subject them, as Mr. Shaw felt he was subjected when he appeared only as a witness and not at all as a party, to "such annoyance as this."

Although these personages were not parties so far as the investigation was concerned, some of them had a substantial interest in what was and was not said in the hearings. For example, on one occasion during the inquiry Mr. Hanauer spent a busy Sunday on the telephone, communicating with one of the witnesses, Mr. Buckner of the New York Trust Company, having testimony fresh from the reporter's typewriter read to

him on the telephone, talking again with Mr. Buckner—all because Mr. Buckner had been asked questions about the need of having any bankers in reorganizations and had given answers indicating that they were not needed at all.

If there could be any escape from the dilemma of those who did not want to be parties, but wanted to be able to object to questions, some lawyer sympathetic with them would have to be present at the Commission's examinations, and that lawyer would have to represent some "party" which had made an "appearance" in the investigation. The solution attempted in the court proceeding to prevent opponents from becoming parties to the receivership would not be successful before the Commission, as the Commission was traditionally liberal in permitting participation by everyone who had a genuine interest in any of its proceedings. The next best thing to keeping out embarrassing security-holders would be to keep out embarrassing questions.

Whether or not Mr. Dynes or anyone else had this in mind, he was the lawyer who made objections when questions were addressed by the Commission's lawyers or by lawyers representing interests independent of the bankers and the old St. Paul régime. His objections, sometimes inopportune for lawyers trying to get the facts from reluctant witnesses, were made while the witness-chair was occupied by such witnesses as Mr. Hanauer, Mr. Byram, Mr. Shaw, Mr. Percy Rockefeller, his friend Mr. Pryor, Mr. Ryan, the water-power promoter and director, and Mr. McHugh, the banker director. At times Mr. Dynes was careful to state that he was not making his objection as attorney for the witness. Particularly when Mr. Percy Rockefeller and his friend Mr. Pryor were under examination, Mr. Dynes made his position as objector clear. "I do not," he said, "represent this witness. I only represent the corporation."

In this capacity he objected to attempts to learn all about the activities of Messrs. Rockefeller and Pryor in the Gary deal. He objected to questions about the propriety of stock purchases by Mr. Byram while holding office as receiver under court ap-

pointment. He objected to questions bearing on the propriety of actions by the bankers. He felt it was wrong for lawyers taking part in the Commission's investigation to inquire about the bankers' reorganization plans, or about Mr. Shaw's services after the receivership had begun, or about Mr. Byram's activities in connection with reorganization plans after he had become a court receiver.

The beginning of the court receivership was the dividing line, and what took place thereafter, Mr. Dynes frequently objected, had no part in the Commission's inquiry. Mr. William Church Osborn, a prominent corporation lawyer appearing in the case for independent security-holders, commented that "Mr. Dynes' idea that there is a watertight division between the conduct of this railroad before and after the receivership" would foreclose the Commission from study of the affairs of the railroad in all phases. Commissioner Cox overruled the effort to effect such an insulation of pertinent transactions from inquiry by the Commission. Mr. Dynes himself apparently failed to recall that in urging his dead-line he chose the date of "the ending of the corporation as an active entity," and that he was therefore making his objection on behalf of the corporation long after it had ceased to authorize anyone to speak for it. How he could do this, who could give him permission to do this, remained a mystery to the very end. Apparently the corporation's name was suspended in mid air, to be made into a client by a lawyer who had been retained by the directors at some time past when they were functioning and when the corporation was a substance and not a shadow.

Mr. Dynes had represented the board of directors when he went to court on March 18, just before he resigned and became attorney for the receivers. This last-mentioned capacity of his, among the variegated roles assumed by him or conferred upon him by someone during the period of reorganization, may have crept into his consciousness even when he participated in the Commission's hearings. For while Mr. Byram, president of the corporation and receiver of the property, was under examination, Mr. Dynes attempted to prevent questions on various matters arising during the receivership. The ground of his objection was that the witness was an official of the court, subject to the orders of the Judge.

Opinions may differ with respect to whether or not Mr. Dynes's role as receivers' attorney and court official motivated his efforts to secure immunity for Mr. Byram by drawing a sacred judicial circle about him. What is clear is that Mr. Dynes could not have been thinking of his duty to the court and to the receivership estate when he interrupted the Commission's examination of Mr. Percy Rockefeller in such fashion that the Commission's attorney charged him with coaching the witness.

Any coaching of the witness or lessening of the Commission's ability to get the facts about the Gary deal from Mr. Rockefeller was of course a disservice to the receivers. Theirs was the duty to secure reparation for any wrongs done to the St. Paul company in the past. Their attorneys, one of whom was Mr. Dynes, were the ones to assist the receivers in discharging that duty. If he felt that as attorney for the board of directors or for the insolvent corporation he had to interrupt the Commission's examination of Mr. Rockefeller, it would seem that his clientele comprised opposing interests, far more than when his appointment as receivers' lawyer made him decide that he must immediately resign his post as company lawyer in the court proceedings. For the Commission's inquiry was developing the facts on which the receivership estate might have brought a lawsuit for the benefit of the St. Paul security-holders against persons connected with the Gary deal. And anything calculated or likely to restrict the amount of information which the Commission could secure on the Gary purchase would be likely to deprive the receivers and their lawyers of facts they would need in bringing such a lawsuit for the benefit of their wards, the security-holders for whom the receivership was supposed to be conducted.

The various capacities in which Mr. Dynes functioned during the receivership added one more instance of the quick-change artistry which enlivened the scene—a spectator would have to

look sharply to know whether a lawyer was appearing at a particular moment for the friendly creditor, for the willing debtor, for the official receivers, or for the bankers' representatives. The uninitiated might have wondered who would pay these lawyers. But not the lawyers themselves. For this purpose, it made little difference that their nominal client was a creditor who expected to get a lawyer free of charge or a penniless corporation. And so it happened that during the many months in which Commission hearings were conducted and Mr. Dynes appeared as attorney for the insolvent corporation, insisting that he had no authority to represent the receivers, they were paying him a full-time salary, out of the assets in their possession. At the end of the receivership he was awarded, in addition, a bonus of an entire year's pay, also out of the security-holders' property. For the lawyers there was always the corpus.