COMPOSITE EXHIBIT B
CIRCUIT COURT CASES

Alexander v. Compton (In re Bonham), 229 F.3d 750 (9th Cir. 2000).

Westlaw

229 F.3d 750, 00 Cal. Daily Op. Serv. 8193, 2000 Daily Journal D.A.R. 10,895
(Cite as: 229 F.3d 750)

United States Court of Appeals,
Ninth Circuit.
In re Raejean BONHAM, aka Jean Bonham, aka Jeannie Bonham, dba World Plus, Inc., an Alaska corporation and Atlantic Pacific Funding Corporation, a Nevada corporation, Debtors.
Thomas Alexander; Gay Alexander; Alexander Rentals; Debbie Bailey; Wayne Bailey; Sondra Baker; Harry Baker; Lisa Baker; Lloyd Beadle; James Bennett; Maria Bennett; Thomas Boyd; Sheila Boyd; Leslie Boyd; Jeremy Boyd; Jill Cameron; Raymond Cameron; Joseph Campbell; Dennis Cary; Marvel Cary; Gene McClanahan; Farrell Christensen; Brent Cook; Jolanda Cook; Heather Cook; Melanie Cook; Jim Davis; Roxie Davis; Roger Delaney; Dorothy Delaney; Mary Beth Diethelm; Nathan Diethelm; Robert Dunn; Nancy Dutton; Linette Finstad; Richard Kedrowski; Mary Flickinger; Allen Fuss; Rayette Fuss; Ignatius Fuss; Julia Fuss; Tom Fuss; Barbara Fuss; Velesta Fusco; Pauline Fusco; Teo Fusco; Jacqueline Goldrick; Victor Gunn; Mary Gunn; Cynthia Hachez; Mike Hachez; Gary Halmstad; Rayna Hamm; John R. Hiltenbrand, Jr.; George R. Horner; Joann Horner; George L. Horner; Judith Horner; Horner Trust; Russ Johnson; Becky Johnson; Robert Karlen; Karen Karlen; Paul Keller; Carla Keller; Lee Kenaston, Gerald Kenaston; Janene Kenaston; Karen Kenaston; Don Kratzer, Janice Larson, Greta Lindley; Kenneth Lindley, Lynn Marvin; Ed Maynard; Maureen Maynard; Heidi Morton; Larry Nauta; Sherry Nauta; Leonard Nelson; Jeanette Nelson; Elmer Ostbloom; Margaret Ostbloom; William Pascoe; Ruth (Sherwood) Pugh; Dee Richie; Elizabeth Richie; Paul Ritchie; Ben Ritchie; Bradley Ritchie; Bartholomew Ritchie; Burton Ritchie; Rachael Ritchie; Rebecca Ritchie; Roxanne Ritchie; Paul Robinson; Harry Sinz; Vicki Vickery; Sally Ross; Mary Scott; James Sisk; Wayne Taylor; John Thornton; Lindsey Thornton; Carl Tompkins; Alane Tompkins; Verlin Tompkins; Linda Tompkins; Scott Tompkins; Catherine Tompkins; Charles Travis; Clifford Travis; Barbara Travis; Everett Travis; Tim Wallis; Mary Wallis; Ryan Walrath; Carol Walrath; Craig Zoet; Robert Zoet, Appellants,
v.
Larry D. Compton, Trustee, Appellee.
In re Raejean Bonham, aka Jean Bonham, aka Jeannie Bonham, dba World Plus, Inc., an Alaska corporation and Atlantic Pacific Funding Corporation, a Nevada corporation, Debtors.
Monika Brown; James Lentine; Jack C. Mellor; Morna W. Mellor; Jonathan Widdis, Plaintiffs-Appellants,
v.
Larry D. Compton, Trustee, Appellee.
In re Raejean Bonham, aka Jean Bonham, aka Jeannie Bonham, dba World Plus, Inc., an Alaska corporation and Atlantic Pacific Funding Corporation, a Nevada corporation, Debtors.
Randy Hansen; Day Essley; Claudia Essley; Tim McKay; Lisa McKay; Deanna Sanderson, aka Dee Thornell; Joseph Taylor, Sr., deceased; Maria E. Taylor; Joseph Taylor, Jr.; Patriot Management Corporation; and James Robert Walker, Plaintiffs-Appellants,
v.
Larry D. Compton, Trustee, Appellee.
In re Raejean Bonham, aka Jean Bonham, aka Jeannie Bonham, dba World Plus, Inc., an Alaska corporation and atlantic pacific funding corp., a Nevada corporation, Debtors.
Richard Alford; Carol Alford; Edward Ambrozevitch; Kathy Ambrozevitch; Charles Ashton; Bonnie Benham; Larry Benham; Joel Boggs; Rita Boggs; Artan Buckmeier, aka Buckmeier Enterprises; Roxanne Buckmeier aka Roxanne Siebeis; Florian Buckmeier; Victoria Buckmeier, Paul Carter; Steevyn Cysewski; Alfred Deramus; Deborah Desmond; Jim Desmond; Jon Doty; Homer Doty; Carolyn Duncan; James Dunlap; Pat Fenderson; Adele Fenderson; Ronald Franklin; Shirley Franklin; Esther Frederickson; Lawrence Gilbertson; David Glover; Jamie Glover; Samuel Halbert; Rebecca Halbert; Alex Haman; Elizabeth Haman; Janet Haman; J & A Haman Enterprises; George Hotrum; Sharon Hotrum; Tara Hotrum; George Hotrum; Eula Ingraham; Lois Krize dba Marketing Plus dba Three K Company; Margaret Krize; Rosemary Krize; Eric Larson; Nancy Larson; Richard Lindeman; Ellen Linsley; James Longwith; Richard Lynch; Zola Lynch; Donald Oines; Ann Oines; Salcha Marine, Inc.; Margo Savell; Richard Savell; Henrietta Selisker; Frank Selisker; Vicke Spear-Shipley; Clark Springer; Barbara Springer; Gerard Uphues aka Gary Uphues; Dona Uphues; Estate of Rosemary Waldron; Gerry

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Wyse, Plaintiffs-Appellants,
v.
Larry D. Compton, Trustee, Appellee.
In re Raejean Bonham, aka Jean Bonham, aka Jeannie Bonham, dba World Plus; World Plus, Inc., an Alaska corporation and Atlantic Pacific Funding Corp., a Nevada corporation, Debtors.
Richard Clausen; James L. Crawford; Stephen Cronkhite; Dale Cronkhite; Ray Guffey; Gloria Guffey; James Shook; Julie Shook; Evie S. Whitmire; Charles P. Whitmire, Appellants,
v.
Larry D. Compton, Trustee, Appellee.
In re Raejean Bonham, aka Jean Bonham, aka Jeannie Bonham, dba World Plus; World Plus, Inc., an Alaska corporation; and Atlantic Pacific Funding Corp., a Nevada corporation, Debtors.
Richard Ackiss; Patricia Babcock; Donald W. Barry; Joseph Bell; Mary Bell; Sandra J. Benson, Eddie L. Benson; Deke Burnett; Norah West; Bett York; Carl Cady; Cathy Cady; Lyell Chittenden; A.B. Clifford, Jr.; Eila Clifford; David Curry; Donna Curry; Curry Games, Inc.; Bernard Darling; Arleen Darling; David A. Dash; Michael P. Dykema; Shelly A. Dykema; Richard Dykema; Gisela Dykema; Brian R. Fox; Fred B. Fox; Alan R. Gering; Carol S. Gering; Robert E. Giinther; Marta L. Giinther; G.H. (Pete) Gunn; Lorretta Gunn; Peggy Ann Thranum; Carol Novaha; Gene Hansen; Mebble Hansen; Retta M. Jones; Gene Hansen; Jerome Krier; Totem Services, Inc., Ronald J. Krishnek; John K. Lohrke; Rodney J. Marcantel; Vincenzo Mazzier; Maria D. Mazzier; Cheryl Mazzier; Marutine McManus; Beverly Johnson; Doug E. Campbell; Dean Owen; Janet Owen; William H. Parrett; Ann E. Dehner; Robert L. Phillips; Mary E. Phillips; Margaret Russell; Darrell L. Russell; Thomas Schmidt; Craig A. Schumacher; Debra Singel; Dan Snodgress; Darlene Snodgress; Robert Taylor; Betty Taylor; L. Michael Thomas; Frances Thomas; Deborah F. Villas; Frances S.L. Williamson; Pamela Odom; Linda L. Winters, Appellants,
v.
Larry D. Compton, Trustee, Appellee.
In re Raejean Bonham, aka Jean Bonham, aka Jeannie Bonham, dba World Plus; World Plus, Inc., an Alaska corporation; and Atlantic Pacific Funding Corp., a Nevada corporation, Debtors.
Terry Anderson; S. Gordon Borjesson; Arlys Borjesson; Richard Bullion; Phyllis Bullion; Forest Button; John L. Dashiell; Jackie L. Dashiell; Don Davis; Darlene Davis; James Davis; Paula Davis; Rosa Davis; James Davis; Paul E. Davis; Thora E. Davis; Tay T. Epperson; Cecelia A. Esparza; Alan Fidelo; Darlene Fidelo; Ken Goldman; Sylvia Goldman; Joyce Goldman; John Hargesheimer; Mark K. Harris; Rebecca L. Eames; John Randy Hart; Rebecca Batt; Sherman Hart; Martin S. Jackson; Scott A. Johannes; Karis D. Johannes; Mark Johannes; Donna Kreiensieck; Larry L. Lawton; John Leclair; Niki Leclair; Terence Lord; Joan Lord; John Reilly Michael; Martin J. Patterson; Dianne H. Patterson; Richard Tay; Anthony Ray; Donald Roosa; Patricia Roosa; Ken Roosa; Helen Roosa; Betty Kuhl; Hermann M. Ruess; Howard M. Saklad; Floyd Shilanski; Rosa Shilanski; Patricia J. Silzel; Tonya Torres; Anna Widdis; Stephen Widmer; Jim Wilkins; Gail Wilkins; Harry Wonders; Alan S. Zangen; Kathy A. Zangen; Estelle Zangen, Appellants,
v.
Larry D. Compton, Trustee, Appellee.
In re Raejean Bonham, aka Jean Bonham, aka Jeannie Bonham, dba World Plus; World Plus, Inc., an Alaska corporation; and Atlantic Pacific Funding Corp., a Nevada corporation, Debtors.
David G. Betschart; Susan Betschart; Betschart Electric Co., Inc.; Betschart Electric Co., Inc. Money Purchase Pension Plan; Christopher J. Farwell; Peggy A. Farwell; Craig Forster; Victoria Forster; Fredric L. Guenther; Harriette Guenther; Estate of Lloyd W. Guenther; Donald G. Arnold; James V. Grimes; Julia P. Grimes; Gregory L. Kluh; G.L. Kluh & Sons Jewelers, Inc. Profit Sharing Plan; G.L. Kluh & Sons, Inc.; Kathleen Kluh; Dean Lamb; Mary Ellen McKain; John S. Murray; Rosemary Murray; Peter Murray; Jack J. Schoepfer; Wendy Schoepfer; Charles L. Scott; Mariah C.M. Scott; Charles A. Scott, Appellants,
v.
Larry D. Compton, Trustee, Appellee.
Brian Bemis; Loretta Bemis; Robert Bemis; Kris Bemis; Joseph Bielski; Patricia Bielski; Avan Brees; Alaska Plus; Beverly Kramme; Christian Blankenship; Marvin Brees; Darlene Brown; Robert Campbell; Joan F. Celusnik; Wayne L. Clark; Virginia L. Clark; Barbara Davenport; Michael Ford; Grant D. Davenport; Frank Dearmin; Patricia Dearmin; Tim Dow; Alice Ellingson; Harold Ellingson; Gregory Ely; Theresa Ely; Diana K. Evans Aka Diana Killinger; Pete Gardner; W. Martin Hammer; Cynthia Hammer; David Harshmam; Joe Harshman; John Herman; Robert Herman; Kaye Herman; Chuck Johnson; Margaret Johnson; Ray Kimberlin dba Cummins Building, aka Jeanette Kimberlin; Far North Utilities, Inc.; Transartic, Inc.; Craig Kinds,

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Kyle Kinda; Sharon M. Menski; John M. Manthey; William D. Miller; Doris R. Miller; Sandy Nelson; Shanna Nelson; Joseph Nyquist; Neil Nyquist; Jack O'brien; Cherryl Pearson; Wilbert Pearson; Fran Gutman; Willard Gutman; William Pfisterer; Linda Pfisterer; Carl Pfisterer; Genevieve Pfisterer; Amanda Pfisterer; Westre Pfisterer; Glenn Pfisterer; Donald Presler; Kristin Presler; Peggy L. Pugh; Randy Reynolds; Brenda Lacy; Thomas Richardson; John Rosie; Tyanne Rosie; Robert Rummer; Karen Rummer; Jeff Sanderson; Dawn Sanderson; Gary Sanderson; Kristine Sanderson; Chuck Sanderson; Delbert Sanderson; Bernadette Sanderson; Joe Sanderson; Linda Sanderson; Tom Scarborough; Judy Scarborough; Daniel Schacher; Julie Schacher; Larry Schafer; Velma Schafer; Adelle Smith; Christopher Smith; Jonathon Smith; Jana Smith; Elizabeth Smith; Joseph C. Stam; Diane C. Stam; Amanda I. Stam; Rick Storm; Wes Uhlman; Carolyn Vander-Kooy; Barry Vander-Kooy; Connie Villa; Frederick Villa; Robert Weaver; Sandy Weaver; Richard D. Webb; Bill Williams; Jeff L. Wilson; Sandy Wylie-Echeverria; Tina Wylie-Echeverria, Appellants,

v.

Larry D. Compton, Trustee, Appellee.

In re Raejean Bonham, aka Jean Bonham, aka Jeannie Bonham, dba World Plus; World Plus, Inc., an Alaska corporation and Atlantic Pacific Funding Corp., a Nevada corporation, Debtors.

Terry Franklin; Lynne G. Franklin; Shirlyn, Inc., Appellants,

v.

Larry D. Compton, Trustee, Appellee.

Nos. 98-36081, 98-36083, 98-36086, 98-36089, 98-36091, 98-36093, 98-36108, 98-36109, 98-36205 and 99-35046.

Argued and Submitted Aug. 2, 2000
Filed Oct. 4, 2000

Chapter 7 trustee moved to substantively consolidate debtor's estate with the nondebtor estates of her two closely held corporations. The United States Bankruptcy Court for the District of Alaska, Herbert A. Ross, J., 226 B.R. 56, granted motion and ordered nunc pro tunc substantive consolidation. Appeal was taken by investors who allegedly received avoidable fraudulent transfers in connection with debtor's Ponzi investment scheme that corporations had been used to further. The District Court, James K. Singleton, Jr., Chief Judge, concluded that the substantive consolidation order was not an appealable final order, dismissed the appeal, and remanded for further proceedings. Investors appealed. Addressing several issues of apparent first impression within the circuit, the Court of Appeals, Thomas, Circuit Judge, held that: (1) a bankruptcy court's order of substantive consolidation is final and appealable; (2) district court's order, erroneously dismissing the appeal for lack of finality, was final and appealable; (3) bankruptcy courts have the power to substantively consolidate entities, pursuant to their general equity powers; (4) bankruptcy court did not err in ordering substantive consolidation of debtor's estate and the estates of her closely held corporations; (5) in ordering substantive consolidation, bankruptcy court did not err in also preserving trustee's avoidance powers; and (6) bankruptcy court did not err in ordering nunc pro tunc substantive consolidation, as of the filing date of the initial, involuntary Chapter 7 petition.

Reversed and remanded with instructions.

West Headnotes

[1] Antitrust and Trade Regulation 29T 231

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(C) Particular Subjects and Regulations
29Tk231 k. Pyramid, Chain, or Referral Sale Plans. Most Cited Cases
(Formerly 92Hk12 Consumer Protection)
“Ponzi scheme” is a phony investment plan in which monies paid by later investors are used to pay artificially high returns to the initial investors, with the goal of attracting more investors.

[2] Bankruptcy 51 2641

51 Bankruptcy
51V The Estate
51V(F) Fraudulent Transfers
51k2641 k. Fraudulent Conveyances in General. Most Cited Cases

Bankruptcy 51 2704

51 Bankruptcy
51V The Estate

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51V(H) Avoidance Rights
51V(H)1 In General
51k2704 k. Trustee as Representative of Debtor or Creditors. Most Cited Cases
Bankruptcy trustee has power to avoid fraudulent transfers under the Bankruptcy Code and pursuant to state law. Bankr.Code, 11 U.S.C.A. §§ 544(b), 548.

[3] Bankruptcy 51 3774.1

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3774 Notice of Appeal; Time
51k3774.1 k. In General. Most Cited Cases
Appeals were timely, despite having been filed 34 days after entry of district court's order of dismissal and remand to the bankruptcy court for further proceedings, where district court did not enter a separate judgment after dismissing appeal of bankruptcy court's order of substantive consolidation for lack of finality, and so time for filing notice of appeal never began to run. F.R.A.P.Rule 4(a), 28 U.S.C.A.

[4] Bankruptcy 51 3773

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3773 k. Taking and Perfecting Appeal; Time; Bond. Most Cited Cases
Time for appeal does not start running, even when a court has given sufficient notice that it has dismissed a case, as long as the separate-document rule has not been complied with. F.R.A.P.Rule 4(a)(6), 28 U.S.C.A.

[5] Bankruptcy 51 3782

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3782 k. Conclusions of Law; De Novo Review. Most Cited Cases
Court of Appeals reviews de novo the district court's ruling that a bankruptcy court's decision is not an appealable, final order.

[6] Bankruptcy 51 3767

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3766 Decisions Reviewable
51k3767 k. Finality. Most Cited Cases
Appellate jurisdiction exists when the bankruptcy court order and the decision of the district court acting in its bankruptcy appellate capacity are both final orders. 28 U.S.C.A. § 158(d).

[7] Bankruptcy 51 3767

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3766 Decisions Reviewable
51k3767 k. Finality. Most Cited Cases
"Final decision" ordinarily is one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. 28 U.S.C.A. § 158(d).

[8] Bankruptcy 51 3767

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3766 Decisions Reviewable
51k3767 k. Finality. Most Cited Cases
Order may be final and appealable even when the time for filing an appeal has not begun to run. 28 U.S.C.A. § 158(d).

[9] Bankruptcy 51 2164.1

51 Bankruptcy
51II Courts; Proceedings in General
51II(B) Actions and Proceedings in General
51k2164 Judgment or Order
51k2164.1 k. In General. Most Cited Cases

Bankruptcy 51 3767

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3766 Decisions Reviewable
51k3767 k. Finality. Most Cited Cases
Although rule requiring district courts to enter judg-

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ment on a separate document must be "mechanically applied" in order to avoid confusion as to when the time for appeal has begun to run, district court's failure to comply with the separate-document requirement has no bearing on the question of whether the court's judgment or order is final and appealable and does not render an appeal premature. 28 U.S.C.A. § 158(d); F.R.A.P.Rule 4(a), 28 U.S.C.A

[10] Bankruptcy 51 3767

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3766 Decisions Reviewable
51k3767 k. Finality. Most Cited Cases

Ninth Circuit has adopted a "pragmatic approach" to finality in bankruptcy because certain proceedings in a bankruptcy case are so distinctive and conclusive either to the rights of individual parties or the ultimate outcome of the case that final decisions as to them should be appealable as of right. 28 U.S.C.A. § 158(d).

[11] Bankruptcy 51 3767

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3766 Decisions Reviewable
51k3767 k. Finality. Most Cited Cases

Ninth Circuit's pragmatic approach to finality in bankruptcy emphasizes the need for immediate review, rather than whether the order is technically interlocutory. 28 U.S.C.A. § 158(d).

[12] Bankruptcy 51 3767

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3766 Decisions Reviewable
51k3767 k. Finality. Most Cited Cases

Under the Ninth Circuit's pragmatic approach to finality in bankruptcy, a bankruptcy court order is considered to be "final and appealable" where it (1) resolves and seriously affects substantive rights and (2) finally determines the discrete issue to which it is addressed. 28 U.S.C.A. § 158(a, d).

[13] Bankruptcy 51 3767

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3766 Decisions Reviewable
51k3767 k. Finality. Most Cited Cases

Although, in the Ninth Circuit, the finality rule is given additional flexibility in the bankruptcy proceedings context, traditional finality concerns nonetheless dictate that Court of Appeals avoids having a case make two complete trips through the appellate process. 28 U.S.C.A. § 158(d).

[14] Bankruptcy 51 3767

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3766 Decisions Reviewable
51k3767 k. Finality. Most Cited Cases

Bankruptcy courts' orders of substantive consolidation are final and appealable; such orders seriously affect the substantive rights of the involved parties, and are of the sort that can cause irreparable harm if the losing party must wait until the bankruptcy court proceedings terminate before appealing. 28 U.S.C.A. § 158(a).

[15] Bankruptcy 51 3767

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3766 Decisions Reviewable
51k3767 k. Finality. Most Cited Cases

Although a district court renders a final order when it affirms or reverses a bankruptcy court's final order, a district court's order is ordinarily not final when the district court remands for further factual findings related to a central issue raised on appeal. 28 U.S.C.A. § 158(d).

[16] Bankruptcy 51 3767

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3766 Decisions Reviewable
51k3767 k. Finality. Most Cited Cases

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Balancing tests for finality set forth in the Ninth Circuit's *Vylene* and *Bonner Mall* decisions did not apply where district court did not reverse and remand for further factual findings but, instead, dismissed appeal from bankruptcy court's order for lack of finality and remanded for further proceedings. 28 U.S.C.A. § 158(d).

[17] Bankruptcy 51 3767

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3766 Decisions Reviewable
51k3767 k. Finality. Most Cited Cases
District court's order, which erroneously dismissed appeal from bankruptcy court's substantive consolidation order for lack of finality and remanded for further proceedings, was final and appealable. 28 U.S.C.A. § 158(d).

[18] Bankruptcy 51 3779

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3779 k. Scope of Review in General. Most Cited Cases
Court of Appeals reviews bankruptcy court's decision independently of district court's decision.

[19] Bankruptcy 51 3782

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3782 k. Conclusions of Law; De Novo Review. Most Cited Cases

Bankruptcy 51 3786

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3785 Findings of Fact
51k3786 k. Clear Error. Most Cited Cases
Court of Appeals reviews bankruptcy court's conclusions of law de novo and its findings of fact for clear error.

[20] Bankruptcy 51 3784

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3784 k. Discretion. Most Cited Cases
Bankruptcy court's determination of whether to issue an order nunc pro tunc is reviewed for abuse of discretion or erroneous application of the law.

[21] Bankruptcy 51 3784

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3784 k. Discretion. Most Cited Cases
Court of Appeals would not reverse the nunc pro tunc aspect of a bankruptcy court's order of substantive consolidation unless it had a definite and firm conviction that the bankruptcy court committed a clear error of judgment in the conclusion it reached.

[22] Bankruptcy 51 2125

51 Bankruptcy
51II Courts; Proceedings in General
51II(A) In General
51k2124 Power and Authority
51k2125 k. Equitable Powers and Principles. Most Cited Cases
For many purposes, bankruptcy courts are essentially courts of equity, and their proceedings inherently proceedings in equity.

[23] Bankruptcy 51 2084.1

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.1 k. In General. Most Cited Cases

Bankruptcy 51 2125

51 Bankruptcy
51II Courts; Proceedings in General

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51II(A) In General
51k2124 Power and Authority
51k2125 k. Equitable Powers and Principles. Most Cited Cases
Although authority to substantively consolidate was not expressly codified when the Bankruptcy Code was enacted, bankruptcy court's power of substantive consolidation derives from court's general equity powers, as expressed in section of the Code authorizing courts to issue any order necessary or appropriate to carry out the provisions of Title 11. Bankr.Code, 11 U.S.C.A. § 105(a).

[24] Bankruptcy 51 2125

51 Bankruptcy
51II Courts; Proceedings in General
51II(A) In General
51k2124 Power and Authority
51k2125 k. Equitable Powers and Principles. Most Cited Cases

Bankruptcy 51 2967.1

51 Bankruptcy
51VII Claims
51VII(F) Priorities
51k2967 Subordination
51k2967.1 k. In General. Most Cited Cases
Power of the bankruptcy court to subordinate claims or adjudicate equities arising out of the relationship between the several creditors is complete.

[25] Bankruptcy 51 3442.1

51 Bankruptcy
51XI Liquidation, Distribution, and Closing
51k3442 Distribution
51k3442.1 k. In General. Most Cited Cases
Theme of the Bankruptcy Act is equality of distribution.

[26] Bankruptcy 51 2084.1

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.1 k. In General. Most Cited Cases
Orders of "substantive consolidation" combine the assets and liabilities of separate and distinct, but related, legal entities into a single pool and treat them as though they belong to a single entity.

[27] Bankruptcy 51 2084.1

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.1 k. In General. Most Cited Cases
Substantive consolidation enables a bankruptcy court to disregard separate corporate entities, to pierce their corporate veils in the usual metaphor, in order to reach assets for the satisfaction of debts of a related corporation.

[28] Bankruptcy 51 2084.1

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.1 k. In General. Most Cited Cases
Following substantive consolidation, the consolidated assets create a single fund from which all claims against the consolidated debtors are satisfied, duplicate and inter-company claims are extinguished, and the creditors of the consolidated entities are combined for purposes of voting on reorganization plans.

[29] Bankruptcy 51 2084.1

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.1 k. In General. Most Cited Cases
Without the check of substantive consolidation, debtors could insulate money through transfers among inter-company shell corporations with impunity.

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[30] Bankruptcy 51 2084.1

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.1 k. In General. Most Cited Cases
Primary purpose of substantive consolidation is to ensure the equitable treatment of all creditors.

[31] Bankruptcy 51 2156

51 Bankruptcy
51II Courts; Proceedings in General
51II(B) Actions and Proceedings in General
51k2156 k. Nature and Form; Adversary Proceedings. Most Cited Cases
Bankruptcy court may order substantive consolidation as a contested matter upon motion by the involved parties, or via an adversary proceeding or other procedural device, as long as there is notice and an opportunity to be heard.

[32] Bankruptcy 51 2084.5

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.5 k. Grounds and Objections; Factors Considered. Most Cited Cases
In ordering substantive consolidation, bankruptcy courts must (1) consider whether there is a disregard of corporate formalities and commingling of assets by various entities, and (2) balance the benefits that substantive consolidation would bring against the harms that it would cause.

[33] Bankruptcy 51 2084.5

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.5 k. Grounds and Objections; Factors Considered. Most Cited Cases
No uniform guideline for determining when to order substantive consolidation has emerged; rather, only through a searching review of the record, on a case-by-case basis, can a court ensure that substantive consolidation effects its sole aim: fairness to all creditors.

[34] Bankruptcy 51 2084.5

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.5 k. Grounds and Objections; Factors Considered. Most Cited Cases

Bankruptcy 51 2084.15

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.15 k. Proceedings; Evidence. Most Cited Cases
Under the D.C. Circuit's *Auto-Train* test for determining whether substantive consolidation is proper, a proponent of substantive consolidation must first show that (1) there is a substantial identity between the entities to be consolidated, and (2) consolidation is necessary to avoid some harm or to realize some benefit.

[35] Bankruptcy 51 2084.5

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.5 k. Grounds and Objections; Factors Considered. Most Cited Cases
Factors that court should consider in determining whether a proponent of substantive consolidation has established a prima facie case for substantive consolidation under the *Auto-Train* test include the following: (1) presence or absence of consolidated financial statements, (2) unity of interests and owner-

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ship between various corporate entities, (3) existence of parent and intercorporate guarantees on loans, (4) degree of difficulty in segregating and ascertaining individual assets and liabilities, (5) existence of transfers of assets without formal observance of corporate formalities, (6) commingling of assets and business functions, and (7) profitability of consolidation at a single physical location.

[36] Bankruptcy 51 2084.5

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.5 k. Grounds and Objections; Factors Considered. Most Cited Cases

Bankruptcy 51 2084.15

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.15 k. Proceedings; Evidence. Most Cited Cases
When a prima facie showing for substantive consolidation under the *Auto-Train* test is made, presumption arises that creditors have not relied solely on the credit of one of the entities involved, and burden then shifts to objecting creditor to show that (1) it has relied on the separate credit of one of the entities to be consolidated, and (2) it will be prejudiced by substantive consolidation.

[37] Bankruptcy 51 2084.5

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.5 k. Grounds and Objections; Factors Considered. Most Cited Cases
Under the *Auto-Train* test for determining whether substantive consolidation is proper, if, after the proponent establishes a prima facie case for substantive consolidation, the objecting creditor makes its required showing, court may order consolidation only if it determines that the demonstrated benefits of consolidation "heavily" outweigh the harm.

[38] Bankruptcy 51 2084.5

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.5 k. Grounds and Objections; Factors Considered. Most Cited Cases
Each element of the *Auto-Train* test for determining whether substantive consolidation is proper must be satisfied to properly order substantive consolidation.

[39] Bankruptcy 51 2084.5

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.5 k. Grounds and Objections; Factors Considered. Most Cited Cases
Eighth Circuit's *Giller* test for determining whether substantive consolidation is proper examines (1) necessity of consolidation due to the interrelationship among debtors, (2) whether benefits of consolidation outweigh harm to creditors, and (3) prejudice resulting from not consolidating debtors.

[40] Bankruptcy 51 2084.5

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.5 k. Grounds and Objections; Factors Considered. Most Cited Cases
Second Circuit's *Augie/Restivo* test for determining whether substantive consolidation is proper requires consideration of two factors, the presence of either of which is sufficient basis to order substantive consolidation: (1) whether creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit, or (2) whether the affairs of the debtor are so entangled that consolida-

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tion will benefit all creditors.

[41] Bankruptcy 51 2084.5

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.5 k. Grounds and Objections; Factors Considered. Most Cited Cases
First factor of the *Augie/Restivo* test for determining whether substantive consolidation is proper, reliance on the separate credit of the entity, is based on the consideration that lenders structure their loans according to their expectations regarding the borrower and do not anticipate either having the assets of a more sound company available in the case of insolvency or having the creditors of a less sound debtor compete for the borrower's assets.

[42] Bankruptcy 51 2084.5

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.5 k. Grounds and Objections; Factors Considered. Most Cited Cases
Consolidation under the second factor of the *Augie/Restivo* test for determining whether substantive consolidation is proper, entanglement of the debtor's affairs, is justified only where the time and expense necessary even to attempt to unscramble them is so substantial as to threaten the realization of any net assets for all the creditors, or where no accurate identification and allocation of assets is possible.

[43] Bankruptcy 51 2084.5

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.5 k. Grounds and Objections; Factors Considered. Most Cited Cases
Second Circuit's two-part *Augie/Restivo* test, which considers (1) whether creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit, or (2) whether the affairs of the debtor are so entangled that consolidation will benefit all creditors, is appropriate to use in determining whether substantive consolidation is proper.

[44] Bankruptcy 51 2084.10

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.10 k. Particular Cases. Most Cited Cases
Substantive consolidation of Chapter 7 debtor's estate with the nondebtor estates of her closely held corporations was proper under the *Augie/Restivo* test; corporations, which had been used to further debtor's Ponzi scheme, were but instrumentalities of debtor with no separate existence of their own, debtor commingled her personal assets with those of corporations, disentangling entities' affairs would be needlessly expensive and possibly futile given number of Ponzi scheme investors and debtor's lack of cooperation, investors could not have believed that they were dealing with separate entities, despite their affidavits to the contrary, consolidation would permit trustee to pursue avoidance actions, thereby benefitting all creditors, and only alleged “harm” was that fraudulent transfers of money to investors would be recovered, estates would be equitably administered, and assets would be equitably distributed.

[45] Bankruptcy 51 2084.5

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.5 k. Grounds and Objections; Factors Considered. Most Cited Cases
Substantive consolidation is premised on a sole aim, fairness to all creditors, and not on any formalistic cost-benefit analysis.

[46] Bankruptcy 51 2084.5

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51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.5 k. Grounds and Objections; Factors Considered. Most Cited Cases
"Harm" usually measured in determining whether substantive consolidation is proper is the harm to the entity which is being substantively consolidated.

[47] Bankruptcy 51 2084.1

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.1 k. In General. Most Cited Cases
Resort to substantive consolidation should not be Pavlovian, but should be used sparingly, and in keeping with the equitable nature of substantive consolidation.

[48] Bankruptcy 51 2084.10

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.10 k. Particular Cases. Most Cited Cases

Bankruptcy 51 2704

51 Bankruptcy
51V The Estate
51V(H) Avoidance Rights
51V(H)1 In General
51k2704 k. Trustee as Representative of Debtor or Creditors. Most Cited Cases
In ordering the substantive consolidation of Chapter 7 debtor's estate with the nondebtor estates of her two closely held corporations, bankruptcy court acted properly in expressly preserving trustee's avoidance powers; eliminating trustee's avoidance power after consolidation would have eliminated the very reason for ordering consolidation, to recover funds transferred as part of debtor's Ponzi scheme. Bankr.Code, 11 U.S.C.A. §§ 544(b), 548.

[49] Bankruptcy 51 2084.15

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.15 k. Proceedings; Evidence. Most Cited Cases

Bankruptcy 51 2704

51 Bankruptcy
51V The Estate
51V(H) Avoidance Rights
51V(H)1 In General
51k2704 k. Trustee as Representative of Debtor or Creditors. Most Cited Cases
Absent express preservation of the trustee's avoidance power, an order of substantive consolidation would ordinarily eliminate that power.

[50] Bankruptcy 51 2084.15

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.15 k. Proceedings; Evidence. Most Cited Cases
Bankruptcy court has the power, in appropriate circumstances, to order less than complete substantive consolidation, or to place conditions on the substantive consolidation, including the preservation of avoidance claims by the formerly separate estates.

[51] Bankruptcy 51 2084.1

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.1 k. In General. Most Cited Cases
Substantive consolidation nunc pro tunc is proper

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under the appropriate circumstances.

[52] Bankruptcy 51 2084.1

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.1 k. In General. Most Cited Cases
It is within the discretion of the bankruptcy court to determine, in light of the equitable nature of substantive consolidation, whether nunc pro tunc substantive consolidation should be ordered.

[53] Bankruptcy 51 2084.1

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.1 k. In General. Most Cited Cases
Cautionary principles which apply to orders of substantive consolidation must be considered with particular care before a court orders nunc pro tunc consolidation: the power should be sparingly used and must be tailored to meet the needs of each particular case.

[54] Bankruptcy 51 2084.10

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.10 k. Particular Cases. Most Cited Cases

Bankruptcy 51 2722

51 Bankruptcy
51V The Estate
51V(H) Avoidance Rights
51V(H)2 Proceedings
51k2722 k. Time Limitations; Computation. Most Cited Cases
Nunc pro tunc substantive consolidation of Chapter 7 debtor's estate with the nondebtor estates of her two closely held corporations was properly ordered; debtor commingled her personal assets with those of the corporations and failed to maintain any corporate distinction between those entities to the extent that there was little to distinguish debtor and either of the corporations, reason for ordering substantive consolidation was to recover funds transferred as part of debtor's Ponzi scheme and, as such, the filing date of the original involuntary bankruptcy petition was the controlling date from which to measure the limitations period for the trustee's avoidance actions.
***758** Ronald W. Goss, Seattle, Washington, and Gerald K. Smith, Phoenix, Arizona, for appellants Richard K. Alford et al.

Grant E. Courtney, Seattle, Washington, for appellants David G. Betschart et al.

Rebecca S. Copeland, Anchorage, Alaska, for appellants Terry Anderson et al.

Cabot Christianson and Gary Spraker, Anchorage, Alaska, for appellee Larry D. Compton.

Appeal from the United States District Court for the District of Alaska; James K. Singleton, District Judge, Presiding. D.C. No. CV-98-00167-JKS.

Before: D. W. NELSON, REINHARDT and THOMAS, Circuit Judges.

THOMAS, Circuit Judge:

We must decide whether a bankruptcy court may order substantive consolidation of two non-debtor corporations, World Plus, Inc. and Atlantic Pacific Funding Corporation, with the bankruptcy estate of Chapter 7 debtor Raejean Bonham *nunc pro tunc* as of the filing date of the involuntary Chapter 7 petition. We have jurisdiction pursuant to 28 U.S.C. § 158(d), and we reverse the decision of the district court and remand with instructions to affirm the bankruptcy court's order of *nunc pro tunc* substantive consolidation.

***759** I

[1] This appeal arises out of a failed Ponzi scheme[FN1]

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operated by debtor Raejean Bonham originally through a proprietorship known as "World Plus," which she eventually incorporated as World Plus, Inc. ("WPI"), and beginning in 1992, under the name of Atlantic Pacific Funding Corp. ("APFC"), a Nevada corporation. *See In re Bonham*, 226 B.R. 56, 61-63 (Bankr.D.Alaska 1998). The stated purpose of both WPI and APFC was to purchase frequent flier miles available from various airlines or third parties at a discount and use them to acquire airline tickets, which were then to be sold to the public at a substantial profit. *See id.*

> FN1. "The term 'Ponzi scheme' is derived from Charles Ponzi, a famous Boston swindler. With a capital of $150, Ponzi began to borrow money on his own promissory notes at a 50% rate of interest payable in 90 days. Ponzi collected nearly $10 million in 8 months beginning in 1919, using the funds of new investors to pay off those whose notes had come due." *United States v. Masten*, 170 F.3d 790, 797 n. 9 (7th Cir.1999) (quotations and citations omitted). Generically, a Ponzi scheme is a phony investment plan in which monies paid by later investors are used to pay artificially high returns to the initial investors, with the goal of attracting more investors.

Bonham was the sole shareholder and director of both WPI and APFC. *See id.* On September 18, 1995, the state of Alaska involuntarily dissolved WPI. APFC was never registered to do business in Alaska, had no employees and appears to have only engaged in activities related to the Ponzi scheme. APFC was not a viable Nevada corporation after October 1, 1995. *See id.* at 62-63.

Beginning in 1989, Bonham began issuing as an individual, as WPI, and later as APFC, short-term investment contracts with promised returns of 20% to 50% over periods ranging from 10 days to 8 months. *See id.* For investment contracts issued after 1992, investors indiscriminately received contracts from both WPI and APFC regardless of the entity to which investors made investment payments. *See id.* at 67. The airline ticket sales business, however, did not generate sufficient revenue to cover the debt service on the investment contracts. To service these debts, Bonham transferred investment income from one investor directly to another investor, and between WPI and APFC, in satisfaction of prior investment contracts. *See id.* at 69. Moreover, Bonham used proceeds from WPI and APFC towards her personal finances. *See id.* at 72.

On December 19, 1995, a group of WPI and APFC investors commenced an involuntary Chapter 7 proceeding against Bonham to collect on unpaid investment contracts. *See id.* at 60. The bankruptcy court appointed Larry D. Compton as the interim Chapter 7 trustee. Initially, Bonham contested the involuntary Chapter 7 petition; however, she subsequently agreed to the petition and filed a voluntary Chapter 11 petition. *See id.* On January 8, 1996, the bankruptcy court converted the bankruptcy case to Chapter 11 and appointed Compton as Chapter 11 trustee. *Id.* However, after Compton investigated Bonham's operations and concluded that he could not continue the business because it was the front for a Ponzi scheme, the bankruptcy court converted the case back to Chapter 7 and appointed Compton as Chapter 7 trustee. *Id.* Since the initiation of the bankruptcy case, approximately 1,111 proofs of claim have been filed against Bonham's debtor estate for over $53 million. *See id.*

[2] Because minimal net proceeds were expected from the liquidation of Bonham's personal assets and WPI and APFC had no material assets, Compton filed over 600 adversary proceedings against investors of Bonham, WPI or APFC to avoid fraudulent transfers. *Id.* These cases are administered through a lead adversary action referred to as the *Bonham Recovery Action* ("*BRA* "), Adv. Case No. F95-00897-168 HAR.[FN2] The investors, however, challenged***760** the trustee's standing to avoid transfers made by WPI and APFC because the Chapter 7 petition named only Bonham as the debtor and moved to dismiss the adversary proceedings for lack of standing.

> FN2. A bankruptcy trustee has power to avoid fraudulent transfers under the Bankruptcy Code and pursuant to state law. *See* 11 U.S.C. §§ 544(b), 548; *see also Wyle v. C.H. Rider & Family* (*In re United Energy Corp.*), 944 F.2d 589, 593 (9th Cir.1991). The "investors" who seek review of the order of substantive consolidation are characterized by the bankruptcy court as "Targets" of the avoidance actions, *i.e.*, creditors of

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> WPI, APFC and Bonham who were paid pre-petition, but are subject via the *BRA* to avoidance claims. *See In re Bonham*, 226 B.R. at 94.

In response, Compton filed a motion for substantive consolidation *nunc pro tunc* of Bonham's debtor estate with the non-debtor estates of WPI and APFC effective as of December 19, 1995, the date on which the involuntary bankruptcy proceeding was commenced against Bonham. In a lengthy order making extensive findings of fact and conclusions of law, the bankruptcy court ordered the *nunc pro tunc* substantive consolidation of WPI and APFC with Bonham's estate in order to assure that the overcompensated initial investors would share in the losses suffered by subsequent investors. *See id.* at 74-75, 102. In doing so, the bankruptcy court determined that (1) the motions process was an appropriate procedure for substantive consolidation as long as there was notice and an opportunity to be heard, and (2) Bonham had constructed a Ponzi scheme for which WPI and APFC were simply vehicles Bonham used to perpetuate the fraud. *See id.* at 94-95, 96, 101-02. In a separate order, the bankruptcy court enumerated the terms and conditions of its order of substantive consolidation, which specifically reserved to the trustee the power to exercise the avoidance rights of the consolidated entities under 11 U.S.C. §§ 544, 547 and 548.

The investors-in fourteen separate notices of appeal-appealed the substantive consolidation order to federal district court. In a brief order filed on September 30, 1998, the district court concluded that the bankruptcy court's order of substantive consolidation was not an appealable final order, dismissed the appeal for lack of finality and remanded for further proceedings. In doing so, the district court noted that the consolidation order (and the investors' objections) "are ... bound up in the underlying merits of the case." The court therefore concluded that "any attempt to sort out the rights and wrongs of the parties at this stage is premature" because "[i]t is impossible to decide the consolidation issue without addressing the underlying record."

[3][4] A majority of the investors appealed the district court order within 30 days of the issuance of the order dismissing the investors' appeals for lack of finality. However, four investors, represented by counsel Gary Sleeper and Mark P. Melchert, filed their notices of appeal on November 4, 1998, 34 days after the district court issued its order.[FN3]

> FN3. These appeals were timely despite having been filed 30 days after entry of the district court's order of dismissal and remand to the bankruptcy court for further proceedings. *See* Fed. R.App. P. 4(a). Because the district court did not enter a separate judgment after dismissing the investors' appeal of the bankruptcy court's order of substantive consolidation for lack of finality, the time for filing a notice of appeal never began to run. *McCalden v. Calif. Library Ass'n*, 955 F.2d 1214, 1218 (9th Cir.1990) ("the time for appeal does not start running until a judgment is ... set forth in a separate document and properly entered by the clerk of the court."). As set forth in *McCalden*, under Fed. R.App. P. 4(a)(6), the time for appeal does not start running even when a court has given sufficient notice that it has dismissed a case, as long as the separate-document rule has not been complied with. *See id.; see also Corrigan v. Bargala*, 140 F.3d 815, 818-19 (9th Cir.1998).

II

[5] A threshold jurisdictional issue is whether the bankruptcy court's order of substantive consolidation and the district ***761** court remand order for further proceedings are final and appealable orders pursuant to 28 U.S.C. § 158. We review *de novo* the district court's ruling that a bankruptcy court's decision is not an appealable, final order. *See Duckor Spradling & Metzger v. Baum Trust* (*In re P.R.T.C., Inc.*), 177 F.3d 774, 782 (9th Cir.1999).

[6][7][8][9] Under 28 U.S.C. § 158(d), appellate jurisdiction exists when the bankruptcy court order and the decision of the district court acting in its bankruptcy appellate capacity are both final orders.[FN4] *See Elliott v. Four Seasons Prop. (In re Frontier Prop.)*, 979 F.2d 1358, 1362 (9th Cir.1992) (citations omitted); *King v. Stanton (In re Stanton)*, 766 F.2d 1283, 1285 (9th Cir.1985); *Dominguez v. Miller (In re Dominguez)*, 51 F.3d 1502, 1506 (9th Cir.1995). Ordinarily, a final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[FN5] *In re Frontier*

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Prop., 979 F.2d at 1362 (citations omitted).

> FN4. Under 28 U.S.C. § 158(d), we have jurisdiction over "appeals from all final decisions, judgments, orders and decrees entered" under 28 U.S.C. § 158(a), which in turn gives the district court jurisdiction to hear appeals "from final judgments, orders, and decrees" of the bankruptcy court.
>
> FN5. An order may be final and appealable even when the time for filing an appeal has not begun to run. *See McCalden*, 955 F.2d at 1218. This circuit has held that the rule requiring district courts to enter judgment on a separate document must be "mechanically applied" in order to avoid confusion as to when the time for appeal has begun to run. *Id.* However, a district court's failure to comply with the separate-document requirement has no bearing on the question whether the court's judgment or order is final and appealable and does not render an appeal premature.

[10][11] We have adopted a "pragmatic approach" to finality in bankruptcy because "certain proceedings in a bankruptcy case are so distinctive and conclusive either to the rights of individual parties or the ultimate outcome of the case that final decisions as to them should be appealable as of right." *Id.* at 1363 (citations omitted). Our approach "emphasizes the need for immediate review, rather than whether the order is technically interlocutory ..." *Allen v. Old Nat'l Bank of Washington (In re Allen)*, 896 F.2d 416, 418 (9th Cir.1990) (citation omitted).

[12][13] Under our pragmatic approach, a bankruptcy court order is considered to be final and thus appealable "where it 1) resolves and seriously affects substantive rights and 2) finally determines the discrete issue to which it is addressed." *Law Offices of Nicholas A. Franke v. Tiffany* (*In re Lewis)*, 113 F.3d 1040, 1043 (9th Cir.1997); *see In re Allen*, 896 F.2d at 418-19 (citing *Mason v. Integrity Insurance Co. (In re Mason)*, 709 F.2d 1313, 1315 (9th Cir.1983)). "Although this finality rule is given additional flexibility in the bankruptcy proceedings context, traditional finality concerns nonetheless dictate that 'we avoid having a case make two complete trips through the appellate process.' " *In re Lewis*, 113 F.3d at 1043 (quoting *Vylene Enterprises, Inc. v. Naugles, Inc. (In re Vylene Enterprises, Inc.)*, 968 F.2d 887, 895 (9th Cir.1992)).

We have yet to directly address whether a bankruptcy court's order of substantive consolidation is final and appealable under § 158(a). However, other circuits have generally addressed interlocutory appeals of substantive consolidation orders without consideration of the jurisdictional question raised here. *See, e.g., First Nat'l Bank of El Dorado v. Giller (In re Giller)*, 962 F.2d 796, 797-98 (8th Cir.1992); *Eastgroup Properties v. Southern Motel Assoc., Ltd.*, 935 F.2d 245, 248 (11th Cir.1991); *Union Savings Bank v. Augie/Restivo Baking Co. Ltd. (In re Augie/Restivo Baking Co.)*, 860 F.2d 515, 516-17 (2d Cir.1988); *cf. Drabkin v. Midland-Ross Corp.* (*In re Auto-Train Corp., Inc.)*, 810 F.2d 270, 272-73 (D.C.Cir.1987).

***762** [14] Consistent with the approach of our sister circuits, and properly applying *Frontier Prop.*, we conclude that substantive consolidation orders are final and appealable under § 158(a). A substantive consolidation order seriously affects the substantive rights of the involved parties. The bankruptcy rules recognize as much:

> Consolidation, as distinguished from joint administration, is neither authorized nor prohibited by this rule since the propriety of consolidation depends on substantive considerations and affects the substantive rights of the creditors of the different estates.

Adv. Ctte. Note to Bankr.R. 1015. Numerous cases and commentators have similarly noted that substantive consolidation "is no mere instrument of procedural convenience ... but a measure vitally affecting substantive rights." *See, e.g., Flora Mir Candy Corp. v. R.S. Dickson & Co. (In re Flora Mir Candy Corp.)*, 432 F.2d 1060, 1062-63 (2d Cir.1970); *accord Reider v. Fed. Deposit Ins. Corp. (In re Reider)*, 31 F.3d 1102, 1107 (11th Cir.1994); *cf.* J. Stephen Gilbert, Substantive Consolidation in Bankruptcy: A Primer, 43 Vand. L.Rev. 207, 208 (1990); Hugh M. Ray and Nancy Clarkson, Bankruptcy Law Reform: A Need for Change? A Creditor's Perspective, 48 Consumer Fin. L.Q. Rep. 476, 480 (1994) (advocating that substantive consolidation orders should be appealable). Consolidation "almost invariably redistributes wealth

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among the creditors of the various entities" because the consolidated entities are likely to have different debt-to-asset ratios. *Eastgroup*, 935 F.2d at 248 (quoting *In re Auto-Train*, 810 F.2d at 276); *In re Augie/Restivo*, 860 F.2d at 519.

In the instant case, bankruptcy court "finally determine[d]" the "discrete issue" of whether WPI and APFC should be substantively consolidated with Bonham's estate, a decision that "resolve[d] and seriously affect[ed] substantive rights" of the parties.[FN6] The consolidation order is of the sort that "can cause irreparable harm if the losing party must wait until the bankruptcy court proceedings terminate before appealing." *In re Allen*, 896 F.2d at 418 (citations omitted). We therefore conclude that the district court erred by holding that the order was not final for the purposes of appellate review. *Cf. In re Lewis*, 113 F.3d at 1044 (finding a disgorgement for purposes of appeal). The bankruptcy court order was final and appealable.

FN6. The bankruptcy court after giving notice to the parties and conducting evidentiary hearings made extensive findings of fact and conclusions of law in ordering consolidation. *See In re Bonham*, 226 B.R. at 95-101; *cf. In re Giller*, 962 F.2d at 798; *In re Mason*, 709 F.2d at 1317 (order for relief final because procedure on order for relief petition has attributes of adversary proceedings). Among these findings, the bankruptcy court concluded that Bonham operated a Ponzi scheme; that Bonham had transferred investment income from one investor to another in satisfaction of prior investment contracts; that she had misused investment income for personal benefit; and that she had intermingled and confused the accounts of both WPI and APFC. *See In re Bonham*, 226 B.R. at 66, 69, 72-73, ¶¶ 2.6.1-4, 2.8.10-12, 2.11.1-5. The bankruptcy court further concluded that substantive consolidation was appropriate for three separate reasons: (1) the financial affairs of Bonham, WPI and APFC were "hopelessly entangled" resulting in significant harm to numerous claimants; (2) the claimants were enticed into investing in a fraudulent Ponzi scheme, and Bonham used investment funds to pay other investors and for personal benefit, and (3) Bonham, WPI and APFC should be treated as alter egos because insufficient funds were available to cover all of the creditors' claims. *See id.* at 96-97.

[15][16][17] The district court order was also final and appealable under § 158(d). Although a district court renders a final order when it affirms or reverses a bankruptcy court's final order, *see In re Vylene Enterprises*, 968 F.2d at 894, a district court's order is ordinarily not final "when the district court remands for further factual findings related to a central issue raised on appeal." *Bonner Mall Partnership v. U.S. Bancorp Mortgage Co. (In re Bonner Mall Partnership)*, 2 F.3d 899, 904 (9th Cir.1993); *see* ***763***Stanley v. Crossland, Crossland, Chambers, MacArthur & Lastreto (In re Lakeshore)*, 81 F.3d 103, 105 (9th Cir.1996). We have applied two related balancing tests in determining finality, both in conjunction and separately. *See Walthall v. U.S.*, 131 F.3d 1289, 1293 (9th Cir.1997) (citing *Vylene* test); *In re Lakeshore*, 81 F.3d at 106; *In re Bonner Mall*, 2 F.3d at 904 (citing *In re Stanton*, 766 F.2d at 1288 n. 8).

In contrast to the finality concerns raised in the usual case in which the district court reverses and remands the bankruptcy court order for further factual findings, the district court here declined to exercise jurisdiction after determining that the substantive consolidation order was non-final, and therefore, remanded this action for further proceedings. Thus, the sole question posed on appeal is whether the district court properly dismissed the investors' appeal for lack of finality. As such, the balancing tests set forth in *Vylene* and *Bonner Mall* do not apply. Because the district court erred in dismissing the investors' appeal for lack of finality, we may exercise jurisdiction over the appeal of the district court decision.

III

[18][19][20][21] The bankruptcy court did not err in substantively consolidating the estates, nor in doing so *nunc pro tunc*. We review the bankruptcy court's decision independently of the district court's decision. *See In re Lewis*, 113 F.3d at 1043. We review the bankruptcy court's conclusions of law *de novo* and its findings of fact for clear error. *See id.* A bankruptcy court's determination of whether to issue an order *nunc pro tunc* "is reviewed for abuse of discretion or

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erroneous application of the law." *See* Atkins v. Wain, Samuel & Co. (*In re Atkins*), 69 F.3d 970, 973 (9th Cir.1995). Thus, we will not reverse the *nunc pro tunc* aspect of the bankruptcy court's order of substantive consolidation unless we have a definite and firm conviction that the bankruptcy court committed a clear error of judgment in the conclusion it reached. *See id.*

A

[22][23] Contrary to the investors' argument, the bankruptcy court had the power to enter the substantive consolidation order.[FN7] "[F]or many purposes, courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity." *Pepper v. Litton*, 308 U.S. 295, 304, 60 S.Ct. 238, 84 L.Ed. 281 (1939) (internal quotations and citations omitted); *see also Local Loan Co. v. Hunt*, 292 U.S. 234, 240, 54 S.Ct. 695, 78 L.Ed. 1230 (1934); *Bardes v. First Nat'l Bank of Hawarden*, 178 U.S. 524, 535, 20 S.Ct. 1000, 44 L.Ed. 1175 (1900). The bankruptcy court's power of substantive consolidation has been considered part of the bankruptcy court's general equitable powers since the passage of the Bankruptcy Act of 1898. *See In re Reider*, 31 F.3d at 1105; *see also Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215, 219, 61 S.Ct. 904, 85 L.Ed. 1293 (1941).

> FN7. This court has previously discussed the doctrine, but never considered a direct challenge to the bankruptcy court's power to employ it. *See Gill v. Sierra Pacific Constr., Inc. (In re Parkway Calabasas*), 89 B.R. 832 (Bankr.C.D.Cal.1988), *aff'd*, 949 F.2d 1058 (9th Cir.1991); *cf. United States v. Alaska Nat'l Bank of the North* (*In re Walsh Construction, Inc.*), 669 F.2d 1325, 1330 (9th Cir.1982) (recognizing *in dicta* power to substantively consolidate entities, but noting that power to be "used sparingly"); *Anaconda Building Materials Co. v. Newland*, 336 F.2d 625 (9th Cir.1964).

Although substantive consolidation was not codified by the Bankruptcy Reform Acts of 1978 or 1994, *see* Pub.L. No. 95-598 (1978) and Pub.L. No. 103-394, § 104(a) (1994), as were related provisions allowing for procedural consolidation or joint administration, courts, as well as the bankruptcy rules, recognize its validity and have ordered substantive consolidation subsequent to the enactment of the Bankruptcy Code. *See, e.g., In re Reider*, 31 F.3d at 1107; *cf.* Adv. Ctte. Notes to Bankr.Rule 1015 (allowing for joint administration, but "[t]his rule does not deal with ***764** the consolidation of cases involving two or more separate debtors ... [which is] neither authorized nor prohibited by this rule ..."). At present, consistent with its historical roots, the power of substantive consolidation derives from the bankruptcy court's general equity powers as expressed in § 105 of the Bankruptcy Code.[FN8] *See In re Augie/Restivo*, 860 F.2d at 518 n. 1.

> FN8. Section 105(a) states: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a).

[24][25][26][27][28][29] The theory of substantive consolidation emanates from the core of bankruptcy jurisprudence. As Justice Douglas noted, "[t]he power of the bankruptcy court to subordinate claims or adjudicate equities arising out of the relationship between the several creditors is complete." *Sampsell*, 313 U.S. at 219, 61 S.Ct. 904. "[T]he theme of the Bankruptcy Act is equality of distribution." *Id.* Orders of substantive consolidation combine the assets and liabilities of separate and distinct-but related-legal entities into a single pool and treat them as though they belong to a single entity. *See Federal Deposit Insurance Corp. v. Colonial Realty Co.*, 966 F.2d 57, 58-59 (2d Cir.1992); *Eastgroup*, 935 F.2d at 248; Norton Bankruptcy Law and Practice 2d § 20:4 (1997). Substantive consolidation "enabl[es] a bankruptcy court to disregard separate corporate entities, to pierce their corporate veils in the usual metaphor, in order to reach assets for the satisfaction of debts of a related corporation." *James Talcott, Inc. v. Wharton* (*In re Continental Vending Machine Corp.*), 517 F.2d 997, 1000 (2d Cir.1975). The consolidated assets create a single fund from which all claims against the consolidated debtors are satisfied; duplicate and inter-company claims are extinguished; and, the creditors of the consolidated entities are combined for purposes of voting on reorganization plans. *See In re Augie/Restivo*, 860 F.2d at 518. Without the check of substantive consolidation, debtors could insulate money through transfers among inter-company shell corporations with impunity.

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[30] The primary purpose of substantive consolidation "is to ensure the equitable treatment of all creditors." *Id.* Absent any statutory guidelines and with an eye towards its equitable goals, courts have ratified substantive consolidation in a variety of circumstances. For example, the substantive consolidation of two estates was first tacitly approved by the Supreme Court in the context of a debtor who had abused corporate formalities and allegedly made fraudulent conveyances of the debtor shareholder's assets to the corporation. *See* *Sampsell*, 313 U.S. at 218-19, 61 S.Ct. 904. In a series of early substantive consolidation decisions, the Second Circuit noted several circumstances in which substantive consolidation is proper, including where the creditors of the consolidated entities treated the entities as a unit and the business affairs of the consolidated entities were hopelessly entangled. *See* *In re Augie/Restivo*, 860 F.2d at 518; *In re Flora Mir*, 432 F.2d at 1062-63; *In re Continental Vending*, 517 F.2d at 1000.

[31] More recently, in *Giller*, the Eighth Circuit considered the appeal by a creditor of several debtor corporations that were substantively consolidated because the sole and majority shareholder of the corporations had abused the debtors' corporate forms and had caused transfers that would give rise to fraudulent conveyance and preference causes of action. *See* 962 F.2d at 798-99. In *Auto-Train*, the D.C. Circuit considered an appeal of an order of substantive consolidation which had been urged by the trustee so that the trustee could attack a transfer of funds by a wholly-owned subsidiary of the debtor as a voidable preference. *See* 810 F.2d at 272-73. In doing so, the court stated that substantive consolidation is ordered "typically to avoid the expense or difficulty of sorting out the debtor's records to determine the separate assets and liabilities of ***765** each affiliated entity." *See* *id.* at 276.[FN9]

FN9. Courts have ordered substantive consolidation in numerous procedural contexts. For example, a bankruptcy court may order substantive consolidation as a contested matter upon motion by the involved parties, as was done in the instant appeal, or via an adversary proceeding or other procedural device, as long as there is notice and an opportunity to be heard. *See* *In re Reider*, 31 F.3d at 1108; *Colonial Realty*, 966 F.2d at 58; *In re Giller*, 962 F.2d at 798; *see also* *Munford, Inc. v. TOC Retail, Inc. (In re Munford, Inc.)*, 115 B.R. 390, 391 (Bankr.N.D.Ga.1990) (substantive consolidation pursued through adversary proceeding).

Courts have permitted the consolidation of non-debtor and debtor entities in furtherance of the equitable goals of substantive consolidation. *See, e.g.,* *In re Auto-Train*, 810 F.2d at 275; *In re Munford*, 115 B.R. at 395-96; *Walter E. Heller & Co. v. Langenkamp* (*In re Tureaud*), 59 B.R. 973, 974, 978 (N.D.Okla.1986). Moreover, bankruptcy courts have sanctioned the substantive consolidation of two or more entities *nunc pro tunc* in order to allow a trustee or creditors to attack fraudulent transfers or avoidable preferences made by the debtor or consolidated entities as of the date of filing of the initial bankruptcy petition. *See, e.g.,* *First National Bank of Barnesville v. Rafoth (In re Baker & Getty Financial Srvcs., Inc.)*, 974 F.2d 712, 720 (6th Cir.1992); *In re Auto-Train*, 810 F.2d at 275-77; *Kroh Brothers Development Co. v. Kroh Bros. Mgmt. Co. (In re Kroh Bros. Dev. Co.)*, 117 B.R. 499, 502 (W.D.Mo.1989).

Thus, even though substantive consolidation was not codified in the statutory overhaul of bankruptcy law in 1978, the equitable power undoubtedly survived enactment of the Bankruptcy Code. No case has held to the contrary.

B

[32][33] The bankruptcy court did not err in using its substantive consolidation power in this case. Two broad themes have emerged from substantive consolidation case law: in ordering substantive consolidation, courts must (1) consider whether there is a disregard of corporate formalities and commingling of assets by various entities; and (2) balance the benefits that substantive consolidation would bring against the harms that it would cause. *See* *In re Reider*, 31 F.3d at 1106; *In re Standard Brands Paint Co.*, 154 B.R. 563, 568 (Bankr.C.D.Cal.1993); *see also* *In re Augie/Restivo*, 860 F.2d at 518-19 (collecting cases). No uniform guideline for determining when to order substantive consolidation has emerged. Rather, "[o]nly through a searching review of the record, on a case-by-case basis, can a court ensure that substantive consolidation effects its sole aim: fairness to all creditors." *In re Auto-Train*, 810 F.2d

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at 276; *Colonial Realty*, 966 F.2d at 61.

[34][35][36][37][38][39] Two "similar but not identical" tests have been applied to assess whether substantive consolidation is proper, neither of which we have had occasion to apply or adopt. *See In re Reider*, 31 F.3d at 1107; *see also In re Augie/Restivo*, 860 F.2d at 518; *In re Auto-Train*, 810 F.2d at 276-77. In *Auto-Train*, the D.C. Circuit articulated a three-part burden-shifting test as part of "a searching inquiry to ensure that consolidation yields benefits offsetting the harm it inflicts to objecting parties." 810 F.2d at 276. Under this test, a proponent of substantive consolidation must first show that "(1) there is a substantial identity between the entities to be consolidated; and (2) consolidation is necessary to avoid some harm or to realize some benefit." [FN10] ***766** *Eastgroup*, 935 F.2d at 249 (adopting *Auto-Train* test). When this *prima facie* showing is made, "a presumption arises 'that creditors have not relied solely on the credit of one of the entities involved.' " *Id.* (quoting *Matter of G.V. Lewellyn & Co., Inc.*, 26 B.R. 246, 251-52 (Bankr.S.D.Iowa 1982)). The burden then shifts to an objecting creditor to show that "(1) it has relied on the separate credit of one of the entities to be consolidated; and (2) it will be prejudiced by substantive consolidation." *Id.* (citing *In re Auto-Train*, 810 F.2d at 276). Finally, if the objecting creditor makes the required showing, "the court may order consolidation only if it determines that the demonstrated benefits of consolidation 'heavily' outweigh the harm." *In re Auto-Train*, 810 F.2d at 276. Each element of the *Auto-Train* test must be satisfied to properly order substantive consolidation.[FN11]

> FN10. Courts have noted a non-determinative list of factors that a court should consider in determining whether a proponent of substantive consolidation has established a *prima facie* case for substantive consolidation. *See, e.g.*, *Eastgroup*, 935 F.2d at 249-50 (citing *In re Vecco Construction Indus.*, 4 B.R. 407, 410 (Bankr.E.D.Va.1980)). These factors include: (1) the presence or absence of consolidated financial statements; (2) the unity of interests and ownership between various corporate entities; (3) the existence of parent and intercorporate guarantees on loans; (4) the degree of difficulty in segregating and ascertaining individual assets and liabilities; (5) the existence of transfers of assets without formal observance of corporate formalities; (6) the commingling of assets and business functions; (7) the profitability of consolidation at a single physical location. *See In re Vecco Constr.*, 4 B.R. at 410. *See also Fish v. East*, 114 F.2d 177 (10th Cir.1940) (listing 10 factors relevant to substantive consolidation); *Pension Benefit Guar. Corp. v. Ouimet Corp.*, 711 F.2d 1085, 1093 (1st Cir.1983); *In re Luth*, 28 B.R. 564, 566-67 (Bankr.D.Idaho 1983).
>
> FN11. The Eighth Circuit in *Giller* has adopted a three-factor variant of the *Auto-Train* test: "1) the necessity of consolidation due to the interrelationship among the debtors; 2) whether the benefits of consolidation outweigh the harm to creditors; and 3) prejudice resulting from not consolidating the debtors." *See* 962 F.2d at 799 (citation omitted); *cf. Eastgroup*, 935 F.2d at 248-50.

[40][41][42] The Second Circuit has applied an independent test which requires the consideration of two factors: "(1) whether creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit; or (2) whether the affairs of the debtor are so entangled that consolidation will benefit all creditors." *In re Reider*, 31 F.3d at 1108 (citing *In re Augie/Restivo*, 860 F.2d at 518); *see also Colonial Realty*, 966 F.2d at 61. The presence of either factor is a sufficient basis to order substantive consolidation. *See id.* The first factor, reliance on the separate credit of the entity, is based on the consideration that lenders "structure their loans according to their expectations regarding th[e] borrower and do not anticipate either having the assets of a more sound company available in the case of insolvency or having the creditors of a less sound debtor compete for the borrower's assets." *In re Augie/Restivo*, 860 F.2d at 518-19. Consolidation under the second factor, entanglement of the debtor's affairs, is justified only where "the time and expense necessary even to attempt to unscramble them [is] so substantial as to threaten the realization of any net assets for all the creditors" or where no accurate identification and allocation of assets is possible. *Id.* at 519.

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[43] The Second Circuit's approach is more grounded in substantive consolidation and economic theory; it is also more easily applied. Thus, we adopt it and utilize it in our analysis of this case. In applying the Second Circuit's test, we must determine whether Bonham's creditors either dealt with WPI, APFC and Bonham as a single economic unit and did not rely on the separate credit of each of the consolidated entities; or, whether the operations of WPI and APFC were excessively entangled with Bonham's affairs to the extent that consolidation will benefit all creditors. *See In re Augie/Restivo*, 860 F.2d at 518.

[44] The application of the Second Circuit test makes clear that the bankruptcy court did not err in ordering substantive consolidation of WPI, APFC and Bonham's estate under either of these elements. The bankruptcy court's findings support its conclusion that Bonham, WPI and APFC "were but instrumentalities of the bankrupt with no separate existence of ***767** their own." *See Soviero v. Franklin Nat'l Bank of Long Island*, 328 F.2d 446, 448 (2d Cir.1964). The Second Circuit noted in *Soviero* that "there existed a unity of interest and ownership common to all corporations, and that to adhere to the separate corporate entities theory would result in an injustice to the bankrupt's creditors." *See id.* The same observation applies to the instant appeal. *See also In re Kroh Bros.*, 117 B.R. at 502 (*nunc pro tunc* consolidation proper to allow trustee standing to pursue transfers as a preference and avoidable transfer).

The record clearly shows, and the investors do not dispute the bankruptcy court's determination, that Bonham commingled her personal assets with those of WPI and APFC, that there was no clear demarcation between the affairs of Bonham, WPI and APFC, and that Bonham often commingled the assets and names of WPI and APFC. *See In re Bonham*, 226 B.R. at 60-71 & ¶ 2.8.7-2.8.8. In light of the multiplicity of investors and claims and the lack of cooperation on the part of Bonham, the bankruptcy court did not clearly err in determining that the exercise of disentangling the affairs of Bonham, WPI and APFC would be needlessly expensive and possibly futile. *See id.* at ¶ 2.8.12.

The bankruptcy court also did not err in according little weight to the investors' affidavits stating that they had relied on the separate credit of WPI and APFC in entering into investment contracts. On appeal, the investors again point to these affidavits and contend that the bankruptcy court "ignored" them. The burden rests on the investors to overcome the presumption that they did not rely on the separate credit of WPI or APFC. *See In re Auto-Train*, 810 F.2d at 276. The bankruptcy court examined each of these affidavits, observed that each was boilerplate and that the affiants provided no other evidence, such as financial statements, in support of their affidavits. *See id.* at 101 & ¶¶ 2.12.4-2.12.8. In light of the substantial evidence presented by Compton supporting his contention that Bonham commingled the assets of WPI and APFC and used their names interchangeably, the lack of any independent financial statements or corporate tax returns of WPI and APFC, and Bonham's testimony that she personally handled each investment, *see In re Bonham*, 226 B.R. at 73-75, it is clear that the bankruptcy court did not err in crediting little weight to these affidavits and determining that the creditors could not have believed that they were dealing with separate entities. *See In re Augie/Restivo*, 860 F.2d at 519.

[45][46] The investors contend that the bankruptcy court failed to properly weigh the benefits of substantive consolidation against the harm to the investors.[FN12] The "harm" usually measured is the harm to the entity which is being substantively consolidated. Here, the only "harm" is that third parties may have greater exposure to risk because they may lose a legal defense to what would otherwise be viable claims of fraudulent transfer. In short, the alleged "harm" is that fraudulent transfers of money will be recovered, the estates will be equitably administered and the assets equitably distributed. The bankruptcy court did not err in this aspect of its analysis.

> FN12. In part, they argue that the bankruptcy court failed to conduct an explicit cost-benefit analysis, but rather, relied "only on general notions of fairness." The investors cite to no authority that requires any sort of cost-benefit analysis. Rather, substantive consolidation is premised on a "sole aim: fairness to all creditors," and not on any formalistic cost-benefit analysis. *Cf. Colonial Realty*, 966 F.2d at 61.

[47] Of course, "[r]esort to consolidation ... should not be Pavlovian," *see In re Augie/Restivo*, 860 F.2d at 519, but as almost every other court has noted,

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should be used "sparingly," *In re Flora Mir*, 432 F.2d at 1062-63, and in keeping with the equitable nature of substantive consolidation. Nonetheless, the benefits of substantive consolidation in this appeal are clear. ***768** As the bankruptcy court recognized, *nunc pro tunc* consolidation will make it possible for Compton to pursue avoidance actions under §§ 544(b) and 548, benefitting the creditors of Bonham, WPI and APFC. *See In re Bonham*, 226 B.R. at 101 (citing *In re Kroh*, 117 B.R. at 502). Without consolidation, claimants who have received no payments from WPI and APFC will recover no funds invested in either of those entities. In short, substantive consolidation will allow a truly equitable distribution of assets by treating the corporate shells as a single economic unit.

Contrary to the investors' assertions, the instant appeal is distinguishable from our affirmance of a district court's refusal to order substantive consolidation in *Anaconda*. In *Anaconda*, creditors of the parent corporation-debtor sought to share in the assets of its subsidiaries to the same extent as the creditors would have been entitled to share in the assets of the parent corporation. *See* 336 F.2d at 626. The subsidiaries had been created to raise money for the parent corporation by selling bonds secured by mortgages on property sold by the parent corporation. The parent corporation subsequently misrepresented the value of some mortgages and issued some fictitious mortgages. *See id.*

Even though the parent corporation benefitted from its subsidiaries, we noted that consolidation would be improper based on several factors distinguishing *Anaconda* from the instant appeal: (1) the parent corporation and the subsidiaries were not operated as a single entity; (2) the subsidiaries were not operated as part of a scheme to perpetuate the fraud; and, (3) the objecting creditors of the parent corporation had relied solely upon the sole credit of the parent corporation and did not seek additional security from the subsidiaries. *See id.* at 627. Based on these findings, the district court had correctly held that the subsidiaries had existed as separate corporate entities and that the objecting creditors had not been prejudiced by the corporate relationship between the parent and subsidiaries. *See id.* at 627-28. In contrast, Bonham, WPI and APFC were not operated as separate entities, and the creditors of APFC and WPI-like Bonham's creditors-relied solely on Bonham, and not on the separate credit of the two corporations.

[48][49][50] Finally, the investors' contention that the bankruptcy court cannot order substantive consolidation for the sole purpose of preserving the trustee's avoidance power, where there are no assets to be pooled, is without merit. The primary motivation for ordering substantive consolidation in the instant appeal is to allow the trustee to pursue avoidance actions against "Target" creditors who have recouped, in part or in full, their investments with Bonham. With substantive consolidation *nunc pro tunc*, the trustee will be able to recover fraudulent transfers made by WPI and APFC within one year prior to the filing of the involuntary petition against Bonham and to redistribute the recovered assets equitably to all of Bonham's creditors. *See* 11 U.S.C. § 548(a)(1); *see also* 11 U.S.C. § 547(b) (trustee may avoid preferential transfer made to a debtor on or within ninety days before the date of the filing of the bankruptcy petition). Such a motivation is not without precedent and is proper in light of the equitable nature of substantive consolidation. *Cf. In re Giller*, 962 F.2d at 799; *In re Kroh Bros.*, 117 B.R. at 502.

Absent express preservation of the trustee's avoidance power, an order of substantive consolidation would ordinarily eliminate that power. For example, in *Parkway Calabasas*, the bankruptcy court held that the trustee's fraudulent conveyance cause of action in an adversary proceeding was rendered moot by the substantive consolidation of two bankruptcy cases where the bankruptcy court order failed to preserve the trustee's avoidance powers. *See* 89 B.R. at 834; *see also In re Giller*, 962 F.2d at 798-99 (recognizing that ordinarily substantive consolidation ***769** would eliminate justification for exercise of trustee's avoidance power).

However, "[t]he bankruptcy court has the power, in appropriate circumstances, to order less than complete substantive consolidation, or to place conditions on the substantive consolidation," including the preservation of avoidance claims by the formerly separate estates. *In re Parkway Calabasas*, 89 B.R. at 837; *see Moran v. Hong Kong & Shanghai Banking Corp.* (*In re Deltacorp, Inc.*), 179 B.R. 773, 777 (Bankr.S.D.N.Y.1995); *see also In re Giller*, 962 F.2d at 799; *In re Standard Brands*, 154 B.R. at 570. In *Giller*, for example, only one of the consolidated entities had any assets to be pooled upon substantive

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consolidation. The corporate debtors moved to substantively consolidate their case because Giller had abused corporate forms and caused them to make transfers potentially subject to fraudulent conveyance claims and because the sole administratively solvent debtor could fund litigation necessary to recover fraudulent transfers. The Eighth Circuit affirmed the bankruptcy court's preservation of the avoidance powers through substantive consolidation because that was the only means to fund the litigation necessary to permit a distribution to the unsecured creditors. *See In re Giller*, 962 F.2d at 797-98 ("only hope for paying the bulk of creditors was to use the assets of one solvent Debtor to pursue fraudulent conveyance and preference causes of action"). The court stated: "eliminating the trustee's avoidance power after consolidation would also eliminate the very reason for ordering consolidation in the first place, that is, to obtain the funds required to recover transferred assets." *Id.*

Similarly, in *Parkway Calabasas*, the bankruptcy court recognized that it could have imposed conditions or qualifications on the order of substantive consolidation that would have allowed the trustee to assert fraudulent conveyance claims in the adversary proceeding, but failed to do so. *See* 89 B.R. at 837-38; *see also In re Deltacorp*, 179 B.R. at 777; *In re Kroh*, 117 B.R. at 502 (*nunc pro tunc* consolidation proper to allow trustee standing to pursue transfers as a preference and avoidable transfer).

Here, the bankruptcy court expressly ordered the substantive consolidation of WPI and APFC with Bonham's estate to allow Compton to pursue avoidance actions against investors who received fraudulent transfers in connection with the Ponzi investment scheme. *See In re Bonham*, 226 B.R. at 94-95. As in *Giller*, eliminating Compton's avoidance power after consolidation would also eliminate the very reason for ordering consolidation-to recover funds transferred as part of the Ponzi scheme. The bankruptcy court therefore did not err in ordering substantive consolidation and in preserving the trustee's avoidance powers in doing so.

C

The bankruptcy court did not err in substantively consolidating WPI and APFC with Bonham's estate *nunc pro tunc*. Absent *nunc pro tunc* substantive consolidation, the trustee would be barred from seeking the avoidance of fraudulent conveyances made through WPI and APFC prior to one year before the date of the order of substantive consolidation.

We have yet to consider whether a bankruptcy court may order *nunc pro tunc* substantive consolidation. In *Parkway Calabasas*, for example, the trustee sought to preserve fraudulent conveyance causes of action through *nunc pro tunc* substantive consolidation, despite the fact that substantive consolidation was ordered to be prospective only. *See* 89 B.R. at 836. The bankruptcy court, however, did not reach the question of *nunc pro tunc* consolidation because the bankruptcy case had been filed within the period to allow the trustee's preference claims to go forward and because the order of "complete" substantive consolidation barred in whole the trustee's fraudulent conveyance claims. *See id.* at 840.

***770** Several courts, however, have held that substantive consolidation *nunc pro tunc* is proper under the appropriate circumstances. In *Auto-Train*, the bankruptcy court substantively consolidated a wholly-owned non-debtor subsidiary of a debtor corporation in a pending bankruptcy case. *See* 810 F.2d at 275. The trustee sought to rely on the filing date of the parent corporation's bankruptcy petition to attack a transfer made by the subsidiary to one of its creditors prior to the date of substantive consolidation. *See id.* The D.C. Circuit noted that before using its equitable *nunc pro tunc* powers to give a consolidation order retroactive effect, a bankruptcy court must undertake "an additional and slightly different balancing process" than the test employed to assess whether to substantively consolidate debtor entities. *Id.* at 276. According to *Auto-Train*, "a court should enter a consolidation order *nunc pro tunc* only when it is satisfied that the use of *nunc pro tunc* yields benefits greater than the harm it inflicts," an inquiry that virtually parallels that used by the D.C. Circuit in assessing whether to order substantive consolidation in the first place. *Id.* at 277. The court elaborated:

> Because the consolidation proceeding will already have established a substantial identity between the entities to be consolidated, this inquiry begins with the proponent of *nunc pro tunc* making a showing that *nunc pro tunc* is necessary to achieve some benefit or avoid some harm. Following this showing, a potential preference holder may challenge

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> the *nunc pro tunc* entry of the consolidation order by establishing that it relied on the separate credit of one of the entities to be consolidated and that it will be harmed by the shift in filing dates. If a potential preference holder meets this burden, the court must then determine whether the benefits of *nunc pro tunc* outweigh its detriments.

Id. The D.C. Circuit nonetheless applied this rule to reverse the *nunc pro tunc* feature of the bankruptcy court's order of substantive consolidation because the bankruptcy court had given "little or no weight" to the objecting creditor's reliance on the separate credit of the consolidated entity. *Id.; but see* *In re Kroh*, 117 B.R. at 502 (affirming *nunc pro tunc* substantive consolidation where *Auto-Train* showing made).

While we ratify *nunc pro tunc* consolidation, we decline to adopt *Auto-Train* 's approach to determining whether *nunc pro tunc* substantive consolidation should be ordered for many of the same reasons the Sixth Circuit declined to do so in *Baker*. In *Baker*, the Sixth Circuit allowed for the *nunc pro tunc* consolidation of two debtor estates. *See* 974 F.2d at 720. The court, however, noted that the *Auto-Train* test so closely paralleled the inquiry conducted under *Auto-Train* to order substantive consolidation that it would add "needless confusion to allow relitigation of this question in the guise of litigation over the filing date, particularly when the outcomes will almost always be the same." *Id.* at 721; *see also* *In re Kroh*, 117 B.R. at 502. Instead, the Sixth Circuit adopted the approach set forth in *Matter of Evans Temple Church of God in Christ & Community Ctr., Inc.*, 55 B.R. 976, 981-82 (Bankr.N.D.Ohio 1986).

In *Matter of Evans*, the bankruptcy court noted that implicit in any order of substantive consolidation is the determination "that the assets and liabilities of one debtor are substantially the same assets and liabilities of the second debtor." 55 B.R. at 982. The court went on to explain:

> If the reasons for substantively consolidating two cases filed under the Code is to protect the unsecured creditors of both debtors where the assets and liabilities of the debtors are so intermingled as to make them substantially the same, and if the purpose of the preference provisions is to assure equality of distribution among all creditors, then it logically follows that where two cases are substantively consolidated upon a determination by the Court that the assets ***771** and liabilities of each debtor are not clearly separable, the preference provisions require us to treat the creditors of both debtors in substantially the same manner. In order for us to do so, we must assign a like filing date to both Debtors for purposes of the preference provisions.

Id. The *Baker* court similarly concluded that "[t]he order of consolidation rests on the foundation that the assets of all of the consolidated parties are substantially the same," and that the earliest filing date is the controlling date. *In re Baker*, 974 F.2d at 721; *but see* *In re Tureaud*, 59 B.R. at 977-78 (ordering substantive consolidation as of date of filing of application for substantive consolidation, and not date of filing of bankruptcy petition).

[51][52][53] We agree with the Sixth Circuit and adopt a similar rationale. *See* *In re Baker*, 974 F.2d at 720. Our abecedarian prerequisite to ordering substantive consolidation is that the two factors set forth in *Augie/Restivo* must be satisfied. That assessment requires that either (1) the creditors dealt with the consolidated entities as if they were the same, or (2) the affairs of the consolidated entities are so entangled that it would not be feasible to identify and allocate all of their assets and liabilities. In either case, the bankruptcy court must in essence determine that the assets of all of the consolidated parties are substantially the same. Moreover, the effect of substantive consolidation is to pool both the assets and liabilities of the consolidated entities and to treat them as the same in satisfying the claims of the creditors. As such, we see no principled need to apply the layered analysis set forth in *Auto-Train.* Rather, we leave it to the discretion of the bankruptcy court to determine in light of the equitable nature of substantive consolidation whether *nunc pro tunc* consolidation should be ordered. However, the cautionary principles which apply to orders of substantive consolidation must be considered with particular care before a court orders *nunc pro tunc* consolidation: the power should be sparingly used and must be tailored to meet the needs of each particular case.

[54] Applying this approach, it is clear that the bankruptcy court did not err in ordering substantive consolidation *nunc pro tunc.* Bonham commingled her personal assets with those of WPI and APFC, and

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failed to maintain any corporate distinction between those entities to the extent that there was little to distinguish Bonham, WPI and APFC. As such, the filing date of the original involuntary bankruptcy petition is the controlling date from which to measure the limitations period for the trustee's avoidance actions. In light of the foregoing, the bankruptcy court did not err in substantively consolidating WPI and APFC with Bonham's estate *nunc pro tunc*.

IV

We reverse the decision of the district court and remand with instructions to affirm the order of the bankruptcy court substantively consolidating Bonham's estate with WPI and APFC *nunc pro tunc*.

REVERSED AND REMANDED WITH INSTRUCTIONS.

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935 F.2d 245, 25 Collier Bankr.Cas.2d 158, 21 Bankr.Ct.Dec. 1423, Bankr. L. Rep. P 74,055
(Cite as: 935 F.2d 245)

United States Court of Appeals,
Eleventh Circuit.
EASTGROUP PROPERTIES, Al Olshan, Morris Macy, Plaintiffs-Appellants,
v.
SOUTHERN MOTEL ASSOC., LTD., George E. Mills, Jr., Trustee for Southern Motel Associates, Ltd. and Trustee for Gainesville P-H Properties, Inc., Gainesville P-H Properties, Inc., Defendants-Appellees.
No. 90-3701.

July 11, 1991.

Chapter 7 trustee for the two debtors moved to consolidate substantively two bankruptcy cases. The Bankruptcy Court granted consolidation. Objecting creditors appealed. The United States District Court for the Middle District of Florida Nos. 89-947 to 950-CIV-ORL-19, Patricia C. Fawsett, J., affirmed. Creditors appealed. The Court of Appeals, Edmondson, Circuit Judge, held that: (1) trustee presented sufficient evidence on common identity of debtor entities and on harm to be avoided or benefit to be realized from consolidation to establish prima facie case for consolidation, and (2) objecting creditors failed to prove that they relied on separate credit of one debtor entity in deciding to deal with it so as to constitute defense to consolidation.

Affirmed.

West Headnotes

[1] Bankruptcy 51 2084.1

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.1 k. In General. Most Cited Cases
(Formerly 51k2084)
Although not specifically authorized by Bankruptcy Code, bankruptcy courts have power to order substantive consolidation by virtue of their general equitable powers.

[2] Bankruptcy 51 2084.1

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.1 k. In General. Most Cited Cases
(Formerly 51k2084)
Purpose of substantive consolidation is to insure equitable treatment of all creditors; substantive consolidation involves pooling of assets and liabilities of two or more related entities; liabilities of entities involved are then satisfied from common pool of assets created by consolidation.

[3] Bankruptcy 51 2085

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2085 k. Reorganization Cases. Most Cited Cases
In Chapter 11 consolidation case, creditors of consolidated entities are combined for purpose of voting on reorganization plans. Bankr.Code, 11 U.S.C.A. § 1101 et seq.

[4] Bankruptcy 51 2084.1

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.1 k. In General. Most Cited Cases
(Formerly 51k2084)
Substantive consolidation in bankruptcy eliminates intercorporate liabilities of consolidated entities.

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935 F.2d 245, 25 Collier Bankr.Cas.2d 158, 21 Bankr.Ct.Dec. 1423, Bankr. L. Rep. P 74,055
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[5] Bankruptcy 51 2084.5

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.5 k. Grounds and Objections; Factors Considered. Most Cited Cases

Bankruptcy 51 2084.15

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.15 k. Proceedings; Evidence. Most Cited Cases
Proponent of substantive consolidation in bankruptcy must show that: there is substantial identity between entities to be consolidated, and consolidation is necessary to avoid some harm or realize some benefits; when showing is made, presumption arises that creditors have not relied solely on credit of one of the entities involved.

[6] Bankruptcy 51 2084.15

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.15 k. Proceedings; Evidence. Most Cited Cases
Once proponent of substantive consolidation in bankruptcy has made prima facie case for consolidation, burden shifts to objecting creditor to show that: it has relied on separate credit of one of entities to be consolidated; and it will be prejudiced by substantive consolidation.

[7] Bankruptcy 51 2084.5

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.5 k. Grounds and Objections; Factors Considered. Most Cited Cases
If objecting creditor shows that it has relied on separate credit of one of entities to be consolidated and it will be prejudiced by substantive consolidation, bankruptcy court may order consolidation only if it determines that demonstrated benefits of consolidation heavily outweigh harm.

[8] Bankruptcy 51 2084.5

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.5 k. Grounds and Objections; Factors Considered. Most Cited Cases
Even if objecting creditor establishes reliance in fact on separate credit of one of entities to be consolidated in bankruptcy, it may be estopped from asserting defense to consolidation, where reasonable creditor in similar situation would not have relied on separate credit of one of entities to be consolidated, i.e., where such claim would be unreasonable in light of all the facts.

[9] Bankruptcy 51 3787

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3785 Findings of Fact
51k3787 k. Particular Cases and Issues. Most Cited Cases
Bankruptcy court's finding that absent substantive consolidation, majority of creditors of one entity would receive only small part of their claims, while equity interest holders of related entity would receive substantial distribution was not clearly erroneous.

[10] Bankruptcy 51 2084.15

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.15 k. Proceedings; Evidence. Most Cited Cases

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Evidence that one entity paid unsecured debts of other, that creditors relied on combined credit of both entities in dealing with one entity, and that larger portion of each of administrative and priority creditors' claims would be paid was sufficient to establish that substantive consolidation in bankruptcy was necessary to avoid some harm or realize some benefit.

[11] Bankruptcy 51 2084.15

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of Cases
51k2084.15 k. Proceedings; Evidence. Most Cited Cases
Objectors to substantive consolidation in bankruptcy failed to show that they relied on separate credit of debtor entity in deciding to deal with it so as to establish defense to substantive consolidation merely because entities held themselves out to public and to their creditors as separate corporations and because creditor/objector pursued court fight over identity of tenant in lease contracts as between the debtor entities.

***246** Samuel J. Zusmann, Jr., Maguire, jVoorhis & Wells, P.A., Richard Blackstone Webber, II, Orlando, Fla., for Eastgroup Properties.

Kelton M. Farris, Orlando Fla., for Al Olshan and Morris Macy.

Robert L. Young Carlton, Fields, Ward, Emmanuel Smith & Cutler, P.A., Orlando, Fla., for plaintiffs-appellants.

Peter N. Hill Wolff, Hill & Meininger, P.A., Orlando, Fla., for George E. Mills, Jr.

Appeal from the United States District Court for the Middle District of Florida.

Before KRAVITCH and EDMONDSON, Circuit Judges, and GODBOLD, Senior Circuit Judge.

EDMONDSON, Circuit Judge:

Appellants, Eastgroup Properties, Al Olshan, and Morris Macy, all of whom are creditors of Southern Motel Association, challenge the district court's decision to affirm the order of the bankruptcy court to consolidate substantively the bankruptcy estates of two related entities, Gainesville P-H Properties ("GPH") and Southern Motel Association ("SMA"). Appellants contend that both the bankruptcy court and the district court erred in finding (1) a sufficient factual basis for consolidation and (2) a legal basis for consolidation. Because we conclude that the bankruptcy trustee made a prima facie case for consolidation and that appellants provided no substantial evidence of their reliance on the separate credit of SMA, we affirm the order of substantive consolidation.

I. BACKGROUND

Appellee George E. Mills is the Chapter 7 bankruptcy trustee for the bankruptcy estates of SMA and GPH. SMA is a limited partnership that was formed for the purpose of acquiring and holding fee simple title to, and leasehold interests in, motel properties. GPH is a corporation whose sole business is the operation of the motel businesses owned or leased by SMA. [FN1] Appellant Eastgroup Properties ("Eastgroup") leased five properties to SMA, which were subleased to GPH.[FN2] Appellants***247** Olshan and Macy-apparently in the capacity of trustees-sold certain properties to SMA which were secured by an inferior purchase money mortgage note; they held mortgages on the motel properties purchased or leased by SMA and leased or subleased to GPH.[FN3]

FN1. For a short time, GPH operated a motel for an unrelated entity.

FN2. It seems that GPH's predecessor corporations may have originally leased the properties from Eastgroup and that, later, GPH assigned its interests as lessee in the leases to SMA. *See In re Gainesville P-H Properties, Inc.*, 87 B.R. 709, 710, 711 (Bankr.M.D.Fla.1988); *In re Southern Motel Assocs., Ltd.*, 81 B.R. 112, 113 (Bankr.M.D.Fla.1987).

Eastgroup's claim against SMA is for prepetition rent and postpetition rent (during both the Chapter 11 and the Chapter 7 cases).

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> FN3. After liquidation of the properties securing the mortgage-and partial payment of SMA's obligation to them-Olshan and Macy have an unsecured claim of approximately $8,000,000 against SMA.

SMA and GPH filed for Chapter 11 bankruptcy in 1987. In 1989, both bankruptcy cases were converted to Chapter 7 bankruptcy cases; and Mills was appointed the trustee in both cases. Mills moved to consolidate substantively the two bankruptcy cases.[FN4] This motion was granted after the bankruptcy court conducted a hearing; the trustee presented evidence for substantive consolidation, but none of the appellants presented independent evidence. The district court affirmed the bankruptcy court's order to consolidate substantively the two bankruptcy estates.

> FN4. At the time that Mills moved for substantive consolidation, SMA had $861,205 available to satisfy claims against it and GPH had $283,917.34 available to satisfy its creditors. The majority of the claims filed in the two bankruptcy cases were filed against GPH, the operator of the motel properties. Administrative-that is, post-petition-claims filed against SMA included $800,000 in Chapter 11 claims and $600,000 in Chapter 7 claims. Chapter 11 administrative claims filed against GPH total approximately $1,000,000; no evidence was presented on the amount of Chapter 7 administrative claims filed against GPH. The IRS and the State of Florida have priority claims of approximately $700,000 against GPH.

SMA and GPH are commonly owned. The limited partners of SMA are Kilimanjaro Holdings, Inc.; Tharani, Inc.; and Ringgold Investments, Inc.[FN5] GPH is wholly owned by Florten Corporation, which in turn is wholly owned by 11 Stars Realty, Inc. Kilimanjaro Holdings, Tharani, and Ringgold Investments own 11 Stars Realty. In addition to being owned by the same entities (Kilimanjaro Holdings, Tharani, and Ringgold Investments), both SMA and GPH have common officers. Georgia King, the secretary/treasurer and comptroller of GPH, was also the secretary of SMA's general partner; she served as comptroller, office manager, and secretary for both SMA and GPH.[FN6]

> FN5. SMA's general partner is 11 Stars Realty, Inc. *See In re Gainesville P-H Properties, Inc.*, 87 B.R. at 710; *In re Southern Motel Assocs., Ltd.*, 81 B.R. at 113.

> FN6. In addition, we note that Amir Khimani is the principal and chief executive officer of both GPH and SMA. *See In re Gainesville P-H Properties*, 87 B.R. at 710; *In re Southern Motel Assocs.*, 81 B.R. at 113.

SMA and GPH had entered into written lease agreements about the management and operation of eleven motel properties, including the five properties SMA had leased from Eastgroup. GPH's lease obligations to SMA were designed to cover SMA's mortgage and lease obligations on the properties.[FN7] At the hearing, King testified that funds flowed between GPH and SMA and that it was likely that GPH undertook payment of some of SMA's unsecured obligations, although she could not recall any specific instance.[FN8] At some point-apparently near the end of the Chapter 11 cases-GPH defaulted on its contractual obligations to SMA, falling three and, in some cases, four months in arrears.

> FN7. We note that SMA's rental obligations consisted of fixed rental payments and percentage rental payments on each property (based on occupancy). *See In re Gainesville P-H Properties*, 87 B.R. at 710; *In re Southern Motel Assocs.*, 81 B.R. at 114.

> FN8. King also testified that each of the entities had claims against the other.

SMA and GPH operated out of a central office in Orlando, Florida. Five or six GPH employees worked in this office. While the majority of their time was spent performing services for GPH, the entity which paid their salaries, these employees also performed services for SMA. No effort was ***248** made to account for the time these individuals performed services for SMA, and SMA never made salary or wage payments to them. In addition, no effort was made to allocate overhead between the two entities. Despite this sharing of office and personnel, King testified at the hearing that GPH and SMA each held itself out to the public and to its creditors as a separate corporation. There is evidence, however, that GPH repre-

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sented-to at least one of the companies with which it did business, Specialty Roofing and Waterproofing, Inc.-that it owned the property where the creditor was to perform certain work, when, in fact, SMA owned the particular property.

II. DISCUSSION

Appellants contend that the bankruptcy court erred in weighing the equities when it ordered substantive consolidation. They argue that its apparent rationale for consolidation-that, absent consolidation, SMA's equity holders might receive a distribution after all claims were paid, while GPH's unsecured creditors (who might receive a distribution if the estates were consolidated) would not receive anything-is disproved by the mathematics of the cases: that, regardless of consolidation, GPH's unsecured creditors will receive no distribution and SMA's equity holders will receive nothing. Appellants also argue that the bankruptcy court gave inadequate weight to the fact that consolidation would prejudice them because their unsecured claims would not be paid if the estates are consolidated. The trustee, on the other hand, contends that the bankruptcy court properly found that he had established a prima facie case for consolidation and that, because the appellants failed to present evidence that they had relied on SMA's separate credit, the bankruptcy court's order of substantive consolidation, which was affirmed by the district court, should be affirmed by this court.

A. The Legal Framework for Substantive Consolidation

[1][2][3][4] While not specifically authorized by the bankruptcy code, bankruptcy courts have the power to order substantive consolidation by virtue of their general equitable powers. *See, e.g.*, *Union Savings Bank v. Augie/Restivo Baking Co. (In re Augie/Restivo Baking Co.)*, 860 F.2d 515, 518 & n. 1 (2d Cir.1988); *Drabkin v. Midland-Ross Corp. (In re Auto-train Corp.)*, 810 F.2d 270, 276 (D.C.Cir.1987).[FN9] The purpose of substantive consolidation is "to insure the equitable treatment of all creditors." *In re Murray Indus.*, 119 B.R. 820, 830 (Bankr.M.D.Fla.1990). It involves the pooling of the assets and liabilities of two or more related entities; the liabilities of the entities involved are then satisfied from the common pool of assets created by consolidation. *See In re Augie/Restivo Baking Co.*, 860 F.2d at 518; *Holywell Corp. v. Bank of New York*, 59 B.R. 340, 347 (S.D.Fla.1986). In a Chapter 11 consolidation case, the creditors of the consolidated entities are combined for the purpose of voting on reorganization plans. *In re Augie/Restivo Baking Co.*, 860 F.2d at 518. In addition, substantive consolidation eliminates the inter-corporate liabilities of the consolidated entities. *Id; see also Holywell Corp.*, 59 B.R. at 347.

> FN9. The Second Circuit has likened the bankruptcy court's power to consolidate substantively to the ability to pierce the corporate veil of separate corporations to reach assets for the satisfaction of a related corporation's debt. *See James Talcott, Inc. v. Warton* (*In re Continental Vending Machine Corp.*), 517 F.2d 997, 1000 (2d Cir.1975).

Because the entities to be consolidated are likely to have different debt-to-asset ratios, consolidation "almost invariably redistributes wealth among the creditors of the various entities." *In re Auto-train*, 810 F.2d at 276. Thus, courts have stated that substantive consolidation should be "used sparingly." *See In re Continental Vending Machine Corp.*, 517 F.2d at 1001 (quoting *Chemical Bank New York Trust Co. v. Kheel*, 369 F.2d 845, 847 (2d Cir.1966)). There is, however, a "modern" or "liberal" trend [FN10] toward allowing substantive consolidation, which

> FN10. *See In re Murray Indus.*, 119 B.R. at 828; *In re Vecco Construction Indus.*, 4 B.R. 407, 409 (Bankr.E.D.Va.1980).

> ***249** has its genesis in the increased judicial recognition of the widespread use of interrelated corporate structures by subsidiary corporations operating under a parent entity's corporate umbrella for tax and business purposes.
> *In re Murray Indus.*, 119 B.R. at 828-29.

We have never addressed the issue of the standard which bankruptcy courts in this circuit should employ in making a determination of whether substantive consolidation is warranted. It is agreed that the basic criterion by which to evaluate a proposed substantive consolidation is whether "the economic prejudice of continued debtor separateness" outweighs "the economic prejudice of consolidation." *See In re Snider Bros., Inc.*, 18 B.R. 230, 234 (Bankr.D.Mass.1982).

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In other words, a court must "conduct a searching inquiry to ensure that consolidation yields benefits offsetting the harm it inflicts on objecting parties." *In re Auto-train*, 810 F.2d at 276.

[5][6][7][8] The D.C. Circuit has elaborated a standard, which we adopt today, by which to determine whether to grant a motion for substantive consolidation. Under this standard, the proponent of substantive consolidation must show that (1) there is substantial identity between the entities to be consolidated; and (2) consolidation is necessary to avoid some harm or to realize some benefit. *Id; see also In re Murray Indus.*, 119 B.R. at 829; *Matter of Lewellyn*, 26 B.R. 246, 251 (Bankr.S.D.Iowa 1982); *In re Snider Bros.*, 18 B.R. at 238. When this showing is made, a presumption arises "that creditors have not relied solely on the credit of one of the entities involved." *Matter of Lewellyn*, 26 B.R. at 251-52. Once the proponent has made this prima facie case for consolidation, the burden shifts to an objecting creditor to show that (1) it has relied on the separate credit of one of the entities to be consolidated; and (2) it will be prejudiced by substantive consolidation. *See In re Auto-train*, 810 F.2d at 276 ("a creditor may object on the grounds that it relied on the separate credit of one of the entities and that it will be prejudiced by the consolidation"); *see also Matter of Lewellyn*, 26 B.R. at 252 ("once the proponent of consolidation makes out a *prima facie* case the burden shifts to the objector to show there was sole reliance on the credit of one entity"); *In re Snider Bros.*, 18 B.R. at 238 (that objecting creditor "has looked solely to the credit of its debtor" and "is certain to suffer more than minimal harm as a result of consolidation" constitutes defense to substantive consolidation).[FN11] Finally, if an objecting creditor has made this showing, "the court may order consolidation only if it determines that the demonstrated benefits of consolidation 'heavily' outweigh the harm." *In re Auto-train*, 810 F.2d at 276.

FN11. Even if an objecting creditor establishes reliance in fact, it may be estopped from asserting this defense to consolidation where a reasonable creditor in a similar situation would not have relied on the separate credit of one of the entities to be consolidated-that is, "where such a claim would be unreasonable in light of all the facts." *See In re Snider Bros.*, 18 B.R. at 237, 235, 238 (estoppel applies where creditors "knew or should have known of the close association between affiliate and bankrupt," or where creditors "could be deemed to have dealt with the debtors with full knowledge of their 'consolidated operation' ").

In making his prima facie case for consolidation, the proponent of consolidation may want to frame his argument using the seven factors outlined in *In re Vecco Construction Industries, Inc.*[FN12]:

FN12. *See In re Vecco Construction Indus.*, 4 B.R. at 410.

(1) The presence or absence of consolidated financial statements.

(2) The unity of interests and ownership between various corporate entities.

(3) The existence of parent and intercorporate guarantees on loans.

(4) The degree of difficulty in segregating and ascertaining individual assets and liabilities.

(5) The existence of transfers of assets without formal observance of corporate formalities.

(6) The commingling of assets and business functions.

(7) The profitability of consolidation at a single physical location.

***250** *See In re Murray Indus.*, 119 B.R. at 830; *Holywell Corp.*, 59 B.R. at 347.[FN13] Additional factors that could be presented in some cases include (1) the parent owning the majority of the subsidiary's stock; (2) the entities having common officers or directors; (3) the subsidiary being grossly undercapitalized; (4) the subsidiary transacting business solely with the parent; and (5) both entities disregarding the legal requirements of the subsidiary as a separate organization. *Pension Benefit Guar. Corp. v. Ouimet Corp.*, 711 F.2d 1085, 1093 (1st Cir.1983). We stress, however, that we mention the specific factors set out in *Vecco, Ouimet*, and elsewhere only as examples of information that may be

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useful to courts charged with deciding whether there is a substantial identity between the entities to be consolidated and whether consolidation is necessary to avoid some harm or to realize some benefit.[FN14] No single factor is likely to be determinative in the court's inquiry.

FN13. Other cases in which the seven-factor inquiry was used include *In re Mortgage Investment Co.*, 111 B.R. 604, 610 (Bankr.W.D.Tex.1990), and *In re Donut Queen*, 41 B.R. 706, 709 (Bankr.E.D.N.Y.1984).

FN14. We decline to say in the abstract whether any particular factor shows one element or another in the proponent's prima facie case: because of the fact-specific nature of cases on substantive consolidation, a factor may support either element of the prima facie case or both elements-depending on the facts of the particular case.

B. Substantive Consolidation in This Case

[9] The bankruptcy court in this case found the existence of a number of factors, from which it concluded that substantive consolidation was warranted:

(1) Ownership is common.

(2) Both entities used the same employees and the same physical facilities. Employees were paid only by one entity, although they performed services for both.

(3) Funds were transferred from one entity to another.

(4) One entity paid unsecured debts of the other.

(5) Although the relationship between the two entities was set forth in written lease agreements, substantial defaults in performance of those agreements had no effect on the existing and continuing interrelationships.

(6) Confusion exists among creditors regarding the question of which entity owns which assets.

(7) It appears that, absent substantive consolidation, the majority of the creditors will receive only a small portion of their claims, while the equity interest holders may receive a substantial distribution.

In re Gainesville P-H Properties, Inc., 106 B.R. 304, 306 (Bankr.M.D.Fla.1989). While appellants contest the significance of many of these findings with respect to substantive consolidation because of the particular facts of this case, they challenge as clearly erroneous only the last factor. They point out that, based on the total amount of administrative and priority claims filed in both cases (which, under the relevant provisions of the bankruptcy code, must be paid before unsecured creditors receive a distribution), there is no chance that the unsecured creditors will receive a distribution even if the bankruptcy estates are consolidated. But the bankruptcy court did not limit this finding to *unsecured* creditors; given the claim-to-asset ratio in the GPH case and the testimony at the hearing on the motion for consolidation,[FN15] it seems likely that many of GPH's creditors with administrative claims will receive only a small portion of their administrative claims. Appellants also contend that, even without consolidation, there is no chance that SMA's equity holders will receive a distribution because there is a total of approximately $12,000,000 in administrative and unsecured claims which have been filed that would have to be satisfied before ***251** SMA's equity holders would receive a distribution. Put differently, the $12,000,000 in claims would have to be reduced to a sum less than $861,205 before a distribution to equity holders would be possible. Still, at the hearing, the bankruptcy trustee testified that, in the SMA case, “the possibility exists that some money would be available to return to the Debtor equity holders possibly, depending upon objection to claims etcetera and whether those claims are allowed”; that is, the amount of claims in the SMA case may be decreased because of challenges to the claims. Thus, at this point, it is impossible to say that the bankruptcy court's findings were clearly erroneous.

FN15. The bankruptcy trustee testified that, absent consolidation, there were no funds available in the GPH cases to pay general unsecured creditors and that it was possible that not all administrative claims in the GPH case would be paid in full. In contrast, he

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testified that it was possible that some of the general unsecured creditors in the SMA case could be paid.

[10] We still have to determine whether the bankruptcy court and the district court correctly ordered substantive consolidation. We have to determine whether "consolidation yields benefits offsetting the harms it inflicts on objecting parties," *In re Auto-train*, 810 F.2d at 276, using the *Auto-train* analysis.

We believe that the bankruptcy trustee, as the proponent of substantive consolidation, presented sufficient evidence on the common identity of the debtor entities and on the harm to be avoided or benefit to be realized from consolidation to establish a prima facie case for consolidation. That there is substantial identity between the entities to be consolidated is undisputed: appellants concede this point in their brief.[FN16] Appellants' real challenge would seem to be to the second part of the prima facie case: did the proponent of consolidation present evidence sufficient to meet his burden of proof that consolidation is necessary to avoid some harm or to realize some benefit? We believe that the answer to this question is "yes." The evidence presented in the hearing held by the bankruptcy court indicates that there are several possible harms to be avoided or benefits to be realized from consolidation relating to the treatment of GPH creditors as compared to SMA creditors. First, King testified that GPH had probably paid some of SMA's unsecured obligations without being contractually obligated to do so, and the bankruptcy court apparently found likewise. Consolidation will help see to it that GPH's creditors are not harmed by such transactions for which GPH received no consideration. Consolidation will also lessen the harm being done to creditors, such as Specialty Roofing and Waterproofing, who did not know that the ownership and management functions involved in the operation of the various motels involved had been separated and that one entity held the fee simple title to, and leasehold interests in, these motels and another entity operated them-creditors who, in effect, relied on the combined credit of both entities in dealing with one of the entities. In addition, consolidation will benefit GPH creditors (administrative and priority creditors) because a larger portion of each of their claims will be paid than if consolidation did not occur-both because their claims would be paid from the larger pool of assets resulting from consolidation and because substantive consolidation eliminates claims that either debtor has against the other.

FN16. In its arguments to the bankruptcy court in *In re Gainesville P-H Properties*, Eastgroup argued that, because GPH and SMA are so closely related, GPH should be bound by the findings entered in previous litigation between Eastgroup and SMA. *See* 87 B.R. at 712.

[11] Because the trustee, as proponent of consolidation, established a prima facie case for substantive consolidation, it was incumbent on the appellants to show that (1) they relied solely on SMA's separate credit; and (2) they will be prejudiced by substantive consolidation. While we acknowledge that they have shown that they will be prejudiced by substantive consolidation, we do not believe that appellants have established that they relied solely on SMA's separate credit in dealing with SMA. Appellants point to two pieces of evidence which, they contend, prove that they relied on the separate credit of SMA: (1) the testimony by Georgia King that both GPH and SMA held themselves out to the public and to their creditors as separate corporations and (2) the fact that Eastgroup pursued a court fight over the identity of the tenant in the lease contracts with Eastgroup and that the bankruptcy and district ***252** courts held that SMA was the tenant.[FN17] That GPH and SMA may have, in general, held themselves out to the public and to their creditors as separate corporations does not mean that appellants did not rely on the credit of both corporations. Nor does Eastgroup's litigation over the identity of its tenant satisfy its burden. That litigation only proves that Eastgroup's tenant was SMA; it proves nothing about whether Eastgroup relied on SMA's separate credit in deciding to deal with SMA.[FN18] Because appellants failed to prove that they relied on the separate credit of SMA in deciding to deal with it, they have failed to carry their burden of proof and their appeal must fail.

FN17. We note that this evidence regarding the identity of Eastgroup's tenant only applies to Eastgroup's defense that it relied on SMA's separate credit; it does not support the defense of Olshan and Macy.

FN18. To the extent that the bankruptcy opinions in these two cases, *In re Gaines-*

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ville P-H Properties, Inc., 87 B.R. 709 (Bankr.M.D.Fla.1988), and *In re Southern Motel Assocs., Ltd.*, 81 B.R. 112 (Bankr.M.D.Fla.1987), serve to show that Eastgroup knew of some sort of relationship between GPH and SMA and that a portion of the rent it received was based on motel occupancy, this litigation may actually undercut Eastgroup's defense of sole reliance on SMA's credit. *See In re Snider Bros., Inc.*, 18 B.R. at 235, 237, 238.

III. CONCLUSION

We AFFIRM the order of the bankruptcy court granting substantive consolidation in the bankruptcy cases of GPH and SMA.

C.A.11 (Fla.),1991.
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Soviero v. Franklin National Bank of Long Island, 328 F.2d 446 (2d Cir. 1964).

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328 F.2d 446
(Cite as: 328 F.2d 446)

United States Court of Appeals Second Circuit.
Joseph F. SOVIERO, Jr., Trustee in Bankruptcy of Raphan Carpet Corporation, Trustee-Appellee,
v.
The FRANKLIN NATIONAL BANK OF LONG ISLAND, Claimant-Appellant.
No. 162, Docket 28262.

Argued Nov. 8, 1963.
Decided Feb. 24, 1964.

Bankruptcy proceeding. The United States District Court for the Eastern District of New York, Walter Bruchhausen, J., fonfirmed a turnover order, and claimant appealed. The Court of Appeals, Leonard P. Moore, Circuit Judge, held that under circumstances, in view of unity of interest and ownership, corporations would be deemed but instrumentalities of bankrupt without separate existence of their own, and their claims to property lacked sufficient substance to preclude exercise of summary jurisdiction, even though corporations were not organized to defraud or hinder creditors.

Affirmed.

West Headnotes

[1] Bankruptcy 51 2046

51 Bankruptcy
51I In General
51I(C) Jurisdiction
51k2046 k. Jurisdiction Over Property. Most Cited Cases
(Formerly 51k288(5), 51k298(5))
Bankruptcy court has power to adjudicate summarily rights and claims to property which is in actual or constructive possession of court, but where trustee does not have actual physical possession, jurisdiction turns on constructive possession.

[2] Bankruptcy 51 2046

51 Bankruptcy
51I In General
51I(C) Jurisdiction
51k2046 k. Jurisdiction Over Property. Most Cited Cases
(Formerly 51k288(6), 51k288(7))
Bankrupt and, consequently, court, is deemed to have constructive possession, so as to permit exercise of summary jurisdiction, where at time of filing petition property is held by one whose adverse claim lacks substance and is at best only colorable, but where claim discloses contested matter of right, involving some fair doubt and reasonable room for controversy, merits can be determined only in plenary suit.

[3] Bankruptcy 51 2046

51 Bankruptcy
51I In General
51I(C) Jurisdiction
51k2046 k. Jurisdiction Over Property. Most Cited Cases
(Formerly 51k288(6), 51k288(7))
Under circumstances, in view of unity of interest and ownership, corporations would be deemed but instrumentalities of bankrupt without separate existence of their own, and their claims to property lacked sufficient substance to preclude exercise of summary jurisdiction, even though corporations were not organized to defraud or hinder creditors. Bankr.Act, § 67, sub. d, 11 U.S.C.A. § 107, sub. d.

[4] Bankruptcy 51 3063.1

51 Bankruptcy
51IX Administration
51IX(B) Possession, Use, Sale, or Lease of Assets
51k3063 Collection and Recovery for Estate; Turnover
51k3063.1 k. In General. Most Cited Cases
(Formerly 51k3063, 51k136(8), 51k136)
A turnover order is a judicial innovation by which court of bankruptcy seeks efficiently and expeditiously to accomplish ends prescribed by statute.
***446** Abraham & Koenig, New York City (Jacob W.

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328 F.2d 446
(Cite as: 328 F.2d 446)

Abraham and Herbert J. Silver, New York City, of counsel), for trustee-appellee.

Levin & Weintraub, New York City (Elias Mann, New York City, and Herman A. Bursky, Brooklyn, of counsel), for claimant-appellant.

Before WATERMAN, MOORE and SMITH, Circuit Judges.

LEONARD P. MOORE, Circuit Judge.

Pursuant to an order to show cause, the Trustee in bankruptcy of the Raphan Carpet Corporation sought an adjudication that the assets of thirteen separate corporations, each bearing 'Raphan' in its corporate name ('Affiliates') and ***447** the assets of the 1081 Hempstead Turnpike Realty Corp. ('Realty') in fact belonged to the bankrupt, and requested leave to sell the fixtures of certain Affiliates free and clear of liens and encumbrances. The Franklin National Bank of Long Island (the 'Bank') by answer, claimed a lien on the fixtures of those Affiliates which had executed chattel mortgages securing a loan made by it to the bankrupt. The Bank alleged that the fixtures were owned by the Affiliates and were not the bankrupt's property, and that the Referee in bankruptcy lacked jurisdiction to summarily adjudicate title to property adversely held without the instigation of a plenary suit. After a hearing, the Referee determined that the assets of the Affiliates and Realty belonged to the bankrupt and that they should be administered as part of the bankrupt estate. The Referee's findings and turnover order were confirmed by the District Court. The Bank appeals.

[1][2] The preliminary question to be determined is whether the court properly exercised summary jurisdiction or whether a plenary suit was necessary. 'A bankruptcy court has the power to adjudicate summarily rights and claims to property which is in the actual or constructive possession of the court.' Cline v. Kaplan, 323 U.S. 97, 98, 65 S.Ct. 155, 156, 89 L.Ed. 97 (1944); see also Thompson v. Magnolia Co., 309 U.S. 478, 481, 60 S.Ct. 628, 84 L.Ed. 876 (1940). Where the trustee does not have actual physical possession, as in the case at bar, jurisdiction turns on constructive possession. The bankrupt and, consequently, the court, is deemed to have constructive possession where at the time of the filing of the petition in bankruptcy the property in question is held by one whose adverse claim lacks substance and is at best only colorable. However, where the adverse claim " discloses a contested matter of right, involving some fair doubt and reasonable room for controversy," and is not 'without color of merit, and a mere pretense,' Harrison v. Chamberlin, 271 U.S. 191, 195, 46 S.Ct. 467, 469, 70 L.Ed. 897 (1926), the merits of the claim can be determined only in a plenary suit. See Sahn v. Pagno, 302 F.2d 629 (2d Cir.), cert. denied, 371 U.S. 819, 83 S.Ct. 34, 9 L.Ed.2d 59 (1962); In re Meiselman, 105 F.2d 995, 997 (2d Cir. 1939). See generally 2 Collier, Bankruptcy, P23.07 (14th ed. 1962); Seligson and King, Jurisdiction and Venue in Bankruptcy, 36 Ref.J. 36, 37 (1962). On this appeal we must determine whether the adverse claims of corporate separateness presented such a fair doubt or a reasonable controversy as to render the Referee's order piercing the corporate entities unjustified.

At the hearing before the Referee, the facts surrounding the various Raphan enterprises were not in dispute. The Referee found that Henry S. Raphan and Herman Raphan were President and Secretary, respectively, the sole directors and stockholders of the bankrupt, the Affiliates and Realty. The Affiliates, like the bankrupt, were engaged in selling carpeting at retail. Realty, as the name suggests, owned the land and building where the bankrupt conducted business. The bankrupt paid the monies to finance the organization of the Affiliates and Realty. Although each corporation filed separate tax returns, individual accounting records were kept by the same staff of bookkeepers at the bankrupt's place of business. None of the corporations maintained corporate minutes reflecting their activities. Henry S. Raphan informed creditors that the bankrupt was a consolidated enterprise and issued a consolidated financial statement which listed, without separation, assets of the Affiliates and Realty as those of the bankrupt. The Affiliates had no working capital and whenever they required funds they were provided by the bankrupt with bookkeeping entries setting up the payments as loans and exchanges. When one Affiliate failed, the bankrupt paid the losses. In almost all instances, the bankrupt signed and remained liable on the Affiliates' leases, provided security deposits where necessary, and at times paid rent for some of them.

***448** The Affiliates were situated in various cities in New York, Connecticut and New Jersey, while the

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bankrupt was located on Long Island. Although each Affiliate maintained a bank account from which it paid local obligations, such as rent and utilities, the proceeds of their carpet sales were turned over to the bankrupt for deposit in its account. The Affiliates sold only by sample. Inventories were arbitrarily assigned to each one at the end of the year where they were reflected in the consolidated financial statement and relied upon for tax purposes. Suppliers shipped merchandise directly to the Affiliates, but billed, and were paid by, the bankrupt. The bankrupt paid all labor charges for installation of carpets sold by the Affiliates, their advertising charges, union dues and welfare payments, insurance and accounting charges, and at the end of the year charged each Affiliate with an arbitrary portion thereof by bookkeeping entries. All guarantees given to purchasers were in the bankrupt's name and did not mention the Affiliate which made the sale. The bankrupt's stationery and advertising referred to the Affiliates as branches.

The Referee found that the bankrupt had conveyed gratuitously to Realty its only asset, the land and building where the bankrupt was located. The bankrupt was the sole tenant of the property, and no lease existed and no rental was paid. Payment of principal and interest on mortgages, taxes, insurance and other expenses of Realty was made by the bankrupt by issuing checks in the exact amount required to Realty which in turn would issue its own check for the same sum.

From these and many other facts, the Referee concluded that the Affiliates and Realty were but instrumentalities of the bankrupt with no separate existence of their own. Consequently, there existed a unity of interest and ownership common to all corporations, and that to adhere to the separate corporate entities theory would result in an injustice to the bankrupt's creditors.

[3] It is difficult to imagine a better example of commingling of assets and functions and of the flagrant disregard of corporate forms than as here demonstrated by the bankrupt. One gains the distinct impression that the bankrupt held up the veils of the fourteen collateral corporations primarily, if not solely, for the benefit of the tax gatherer, but otherwise completely disregarded them. Even Salome's could not have been more diaphanous. On these facts, we are convinced that the claims of individual corporate entities advanced for the Affiliates and Realty are 'without color of merit, and a mere pretense.' Harrison v. Chamberlin, supra, 276 U.S. at 195, 46 S.Ct. at 469, 70 L.Ed. 897. The Referee's use of a summary proceeding was thus entirely proper. See Fish v. East, 114 F.2d 177 (10th Cir. 1940); In re Schoenberg, 70 F.2d 321 (2d Cir. 1934); In re Eilers Music House, 270 F. 915 (9th Cir.), cert. denied, 257 U.S. 646, 42 S.Ct. 55, 66 L.Ed. 414 (1921); In re Muncie Pulp Co., 139 F. 546 (2d Cir.), cert. denied, 202 U.S. 621, 26 S.Ct. 766, 50 L.Ed. 1175 (1905).

[4] Although we hold that the Referee properly decided the preliminary jurisdictional issue, the question of the propriety of the issuance of the turnover order remains. A turnover order is 'a judicial innovation by which the court (of bankruptcy) seeks efficiently and expeditiously to accomplish ends prescribed by the statute.' Maggio v. Zeitz, 333 U.S. 56, 61, 68 S.Ct. 401, 92 L.Ed. 476 (1948). We cannot agree with the Bank's contention that the corporate veils may be pierced only where the Referee finds that the subsidiary corporations were organized to defraud or hinder creditors. Cf. Bankruptcy Act, § 67(d) 11 U.S.C.A. § 107(d). Contra, Maule Industries Inc. v. Gerstel, 232 F.2d 294 (5th Cir. 1956). In Stone v. Eacho, 127 F.2d 284 (4th Cir.), cert. denied, 317 U.S. 635, 63 S.Ct. 54, 87 L.Ed. 512 (1942), where the facts closely resembled those of the instant case, the court affirmed the issuance of the turnover order, ignoring the corporate entity of ***449** a subsidiary corporation, for only then could 'all the creditors receive that equality of treatment which it is the purpose of the bankruptcy act to afford.' 127 F.2d at 288. A similar conclusion is fully warranted here.

The district court's confirmation of the turnover order is affirmed.

C.A.N.Y. 1964.
Soviero v. Franklin Nat. Bank of Long Island
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Fish v. East, 114 F.2d 177 (10th Cir. 1940).

Westlaw

114 F.2d 177
(Cite as: 114 F.2d 177)

Circuit Court of Appeals, Tenth Circuit.
FISH et al.
v.
EAST (four cases).
TIGER PLACERS CO.
v.
COHEN et al.
BLUE RIVER CO.
v.
EAST.
Nos. 1925, 1955, 1968, 2005, 2007, 2023.

June 29, 1940.
Rehearing Denied Sept. 4, 1940.

37. Bankruptcy 467(4) 4A finding by the referee in bankruptcy upon conflicting evidence, where affirmed by the District Judge and supported by substantial evidence, may not be set aside by the Circuit Court of Appeals on review.

Appeals from the District Court of the United States for the District of Colorado; J. Foster Symes, Judge.

Proceeding between Erland F. Fish and others and John H. East, Jr., as trustee in bankruptcy of the Royal Tiger Mines Company, bankrupt, involving a turnover order. Action by Erland F. Fish against John H. East, Jr., as trustee in bankruptcy of the Royal Tiger Mines Company, a bankrupt, to require the trustee to convey certain property to plaintiff, and to quiet title thereto. Proceeding between Erland F. Fish and others and John H. East, Jr., as trustee in bankruptcy of the Royal Tiger Mines Company, bankrupt, also involving a turnover order. Proceeding by Harry Cohen, doing business as Samuel Cohen Company, and others to have the Tiger Placers Company declared a bankrupt, wherein John H. East, Jr., trustee in bankruptcy, intervened. Proceedings by the Blue River Company against John H. East, Jr., as trustee in bankruptcy of the Royal Tiger Mines, a bankrupt, for reimbursement, wherein the trustee filed answer and cross-petition. Proceeding by Erland F. Fish against John H. East, Jr., as trustee in bankruptcy of the Royal Tiger Mines Company, bankrupt, to obtain a lien on property in possession of the bankruptcy court. From adverse judgments, the first named parties in each case appeal.

Affirmed

West Headnotes

[1] Bankruptcy 51 2649

51 Bankruptcy
51V The Estate
51V(F) Fraudulent Transfers
51k2649 k. Intent of Debtor. Most Cited Cases
(Formerly 51k180)
The fact that directors of bankrupt mining corporation may have honestly believed that large profits could be made by placer operations would not erase taint of illegality from contract by which they attempted to divert assets of the corporation to placer company away from its creditors. '35 C.S.A. c. 71, §§ 14, 15, 17.

[2] Fraudulent Conveyances 186 64(1)

186 Fraudulent Conveyances
186I Transfers and Transactions Invalid
186I(F) Intent of Grantor
186k63 Intent to Defraud Pre-Existing Creditors
186k64 In General
186k64(1) k. In General. Most Cited Cases
A conveyance is illegal not only if made with an intent to defraud the creditors of the grantor, but also if made with an intent to hinder and delay them. '35 C.S.A. c. 71, §§ 14, 15, 17.

[3] Fraudulent Conveyances 186 64(1)

186 Fraudulent Conveyances
186I Transfers and Transactions Invalid
186I(F) Intent of Grantor
186k63 Intent to Defraud Pre-Existing Creditors
186k64 In General

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186k64(1) k. In General. Most Cited Cases
(Formerly 184k64(1))
The belief of an embarrassed debtor, though reasonably well founded, that he may be able to weather a financial storm if suits of creditors can be staved off for a season is no justification for building of obstructions that will hold his creditors at bay. 35 C.S.A. c. 71, Secs. 14, 15, 17.

[4] Fraudulent Conveyances 186 209

186 Fraudulent Conveyances
186III Remedies of Creditors and Purchasers
186III(A) Persons Entitled to Assert Invalidity
186k207 Subsequent Creditors
186k209 k. Effect of Fraud as to Pre-Existing Creditors. Most Cited Cases
(Formerly 186k9)
Under Colorado law, a conveyance intended to defraud creditors is voidable not only as to existing creditors, but also as to future creditors. '35 C.S.A. c. 71, §§ 14, 15, 17.

[5] Fraudulent Conveyances 186 162.1

186 Fraudulent Conveyances
186I Transfers and Transactions Invalid
186I(L) Knowledge and Intent of Grantee
186k161 Participation in Fraudulent Intent
186k162.1 k. Necessity of Participation in Fraudulent Intent. Most Cited Cases
(Formerly 186k162(1))
An intent to defraud creditors must be participated in by both parties, grantor and grantee, or mortgagor and mortgagee, in order that the conveyance or mortgage be void. '35 C.S.A. c. 71 §§ 14, 15, 17.

[6] Fraudulent Conveyances 186 163

186 Fraudulent Conveyances
186I Transfers and Transactions Invalid
186I(L) Knowledge and Intent of Grantee
186k161 Participation in Fraudulent Intent
186k163 k. Operation and Effect. Most Cited Cases

Fraudulent Conveyances 186 298(1)

186 Fraudulent Conveyances
186III Remedies of Creditors and Purchasers
186III(I) Evidence
186k294 Weight and Sufficiency
186k298 Intent of Grantor
186k298(1) k. Intent to Defraud Pre-Existing Creditors. Most Cited Cases
Under Colorado law, a sale of property, though for a full consideration, may be void if made by the owner with intent to hinder, delay, or defraud his creditors, and if the vendee participated in such intent, and the intent may be inferred from facts and circumstances. '35 C.S.A. c. 71, §§ 14, 15, 17.

[7] Limitation of Actions 241 65(2)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(B) Performance of Condition, Demand, and Notice
241k65 Conditions Precedent in General
241k65(2) k. Preliminary Action, Judgment, or Execution. Most Cited Cases
Under Colorado law, limitations against the right of a trustee in bankruptcy as the representative of a creditor to set aside a contract as a fraudulent conveyance will not begin to run until the creditor's rights have accrued by reduction of his claim to final judgment and the return of his execution nulla bona, and the fact that he might have sued out a writ of attachment does not affect such operation. Bankr.Act § 70, sub. e, 11 U.S.C.A. § 110, sub. e; '35 C.S.A. c. 71, §§ 14, 15, 17.

[8] Vendor and Purchaser 400 231(4)

400 Vendor and Purchaser
400V Rights and Liabilities of Parties
400V(C) Bona Fide Purchasers
400k225 Notice
400k231 Records
400k231(4) k. Persons Affected with Notice and Notice of Instruments Not in Chain of Title. Most Cited Cases
(Formerly 400k23(4))
A recorded deed is constructive notice of its contents to all persons claiming what is thereby conveyed, under the same chain of title, but is not notice to other persons.

[9] Fraudulent Conveyances 186 139

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186 Fraudulent Conveyances
186I Transfers and Transactions Invalid
186I(K) Retention of Possession or Apparent Title by Grantor
186k139 k. Absolute Sales and Conveyances. Most Cited Cases
Under Colorado law, a sale by a vendor, of chattels in his possession or under his control, not followed by delivery, may be void against creditors of the vendor, and rights of the parties may not be affected by any transfer subsequent to time of sale. '35 C.S.A. c. 71, §§ 14, 15, 17.

[10] Fraudulent Conveyances 186 132(3)

186 Fraudulent Conveyances
186I Transfers and Transactions Invalid
186I(K) Retention of Possession or Apparent Title by Grantor
186k131 Element or Evidence of Fraud
186k132 As to Creditors
186k132(3) k. Substitutes for Change of Possession. Most Cited Cases
Under Colorado law, a sale not accompanied by delivery and followed by actual and continued change of possession may be fraudulent as to creditors of the vendor, notwithstanding such creditors had knowledge of the sale. '35 C.S.A. c. 71, §§ 14, 15, 17.

[11] Fraudulent Conveyances 186 132(3)

186 Fraudulent Conveyances
186I Transfers and Transactions Invalid
186I(K) Retention of Possession or Apparent Title by Grantor
186k131 Element or Evidence of Fraud
186k132 As to Creditors
186k132(3) k. Substitutes for Change of Possession. Most Cited Cases
Under Colorado law, the recording of a bill of sale is not notice to creditors of the vendor. '35 C.S.A. c. 71, §§ 14, 15, 17.

[12] Fraudulent Conveyances 186 132(1)

186 Fraudulent Conveyances
186I Transfers and Transactions Invalid
186I(K) Retention of Possession or Apparent Title by Grantor
186k131 Element or Evidence of Fraud
186k132 As to Creditors
186k132(1) k. In General. Most Cited Cases
The Colorado statute declaring that the sale of chattels is fraudulent unless accompanied by immediate delivery admits of no explanation excusing delivery. '35 C.S.A. c. 71, §§ 14, 15, 17.

[13] Fraudulent Conveyances 186 150

186 Fraudulent Conveyances
186I Transfers and Transactions Invalid
186I(K) Retention of Possession or Apparent Title by Grantor
186k147 Sufficiency of Transfer of Possession
186k150 k. Actual and Substantial Change of Possession. Most Cited Cases

Fraudulent Conveyances 186 151

186 Fraudulent Conveyances
186I Transfers and Transactions Invalid
186I(K) Retention of Possession or Apparent Title by Grantor
186k147 Sufficiency of Transfer of Possession
186k151 k. Visible and Notorious Possession. Most Cited Cases
Under Colorado statute requiring immediate delivery of goods sold, the vendee must take actual possession, and the possession must be open, notorious, unequivocal, and such as to apprise the community that the goods have changed hands, or the sale may be void as to creditors of the vendor. '35 C.S.A. c. 71, §§ 14, 15, 17.

[14] Fraudulent Conveyances 186 132(1)

186 Fraudulent Conveyances
186I Transfers and Transactions Invalid
186I(K) Retention of Possession or Apparent Title by Grantor
186k131 Element or Evidence of Fraud
186k132 As to Creditors
186k132(1) k. In General. Most Cited Cases
The Colorado statute requiring immediate delivery of goods sold does not permit the transaction to rest

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upon the declarations of good faith of the parties. ' 35 C.S.A. c. 71, §§ 14, 15, 17.

[15] Fraudulent Conveyances 186 132(1)

186 Fraudulent Conveyances
186I Transfers and Transactions Invalid
186I(K) Retention of Possession or Apparent Title by Grantor
186k131 Element or Evidence of Fraud
186k132 As to Creditors
186k132(1) k. In General. Most Cited Cases

Under Colorado statute requiring immediate delivery of goods sold, nondelivery is not excused by proving that the sale was in fact bona fide. '35 C.S.A. c. 71, §§ 14, 15, 17.

[16] Fraudulent Conveyances 186 152

186 Fraudulent Conveyances
186I Transfers and Transactions Invalid
186I(K) Retention of Possession or Apparent Title by Grantor
186k147 Sufficiency of Transfer of Possession
186k152 k. Exclusive or Concurrent Possession. Most Cited Cases

The Colorado statute requiring an immediate delivery of goods sold will not permit of a concurrent or joint possession by vendor and vendee, and possession must be exclusive of the vendor. '35 C.S.A. c. 71, §§ 14, 15, 17.

[17] Bankruptcy 51 2063

51 Bankruptcy
51I In General
51I(C) Jurisdiction
51k2063 k. Determination of Jurisdictional Questions. Most Cited Cases
(Formerly 51k288(14))

Evidence supported finding of referee that actual possession of all property of debtor mining corporation, except dredge, was in debtor at date voluntary petition in bankruptcy was filed, so as to give bankruptcy court jurisdiction thereof, though the property had been leased to a subsidiary and by the subsidiary to a third corporation. Bankr.Act § 70, sub. e, 11 U.S.C.A. § 110, sub. e; '35 C.S.A. c. 71, §§ 14, 15, 17.

[18] Bankruptcy 51 2050

51 Bankruptcy
51I In General
51I(C) Jurisdiction
51k2048 Actions or Proceedings by Trustee or Debtor
51k2050 k. Turnover Proceedings. Most Cited Cases
(Formerly 51k288(5))

Constructive possession of bankrupt's property, as basis for a turnover order may exist where the property is in hands of the bankrupt's agent or lessee or sublessee, or is held by one with only a colorable claim. Bankr.Act § 70, sub. e, 11 U.S.C.A. § 110, sub. e.

[19] Bankruptcy 51 2063

51 Bankruptcy
51I In General
51I(C) Jurisdiction
51k2063 k. Determination of Jurisdictional Questions. Most Cited Cases
(Formerly 51k288(7))

The bankruptcy court, for purpose of determining whether alleged adverse claims to bankrupt's property are substantial or merely colorable, may examine into all the evidence and admissions submitted, and, as a part of its findings on which conclusion that jurisdiction for a turnover order exists, express itself in a qualified sense on the merits of the controversy. Bankr.Act § 70, sub. e, 11 U.S.C.A. § 110, sub. e; '35 C.S.A. c. 71, §§ 14, 15, 17.

[20] Bankruptcy 51 3787

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3785 Findings of Fact
51k3787 k. Particular Cases and Issues. Most Cited Cases
(Formerly 51k467(4))

A finding by referee in bankruptcy, approved by the trial court, that subsidiary was a mere instrumentality of bankrupt in the operation of a portion of its business, and that claims by subsidiary of right to posses-

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sion and ownership of bankrupt's property were unsubstantial and colorable only, would not be disturbed on appeal if supported by substantial evidence. Bankr.Act § 70, sub. e, 11 U.S.C.A. § 110, sub. e; '35 C.S.A. c. 71, §§ 14, 15, 17.

[21] Corporations 101 1.4(1)

101 Corporations
101I Incorporation and Organization
101k1.4 Disregarding Corporate Entity
101k1.4(1) k. In General. Most Cited Cases
(Formerly 101k1)
Corporate entity may be disregarded where not to do so will defeat public convenience, justify wrong, or protect fraud.

[22] Bankruptcy 51 2050

51 Bankruptcy
51I In General
51I(C) Jurisdiction
51k2048 Actions or Proceedings by Trustee or Debtor
51k2050 k. Turnover Proceedings. Most Cited Cases
(Formerly 51k288(4))
Where separate books for bankrupt and subsidiary were kept by the same bookkeepers, but no actual distinction was made between transactions of one and those of the other, and the personal property of each was commingled without reasonable possibility of identification, the subsidiary could be regarded as a mere "instrumentality" of the bankrupt, as basis for turnover order. Bankr.Act § 70, sub. e, 11 U.S.C.A. § 110, sub. e.

[23] Corporations 101 1.7(2)

101 Corporations
101I Incorporation and Organization
101k1.7 Pleading and Procedure in Determining Corporate Entity
101k1.7(2) k. Evidence and Fact Questions. Most Cited Cases
(Formerly 101k1)
Whether a subsidiary is a mere instrumentality of parent corporation, so as to permit disregarding the corporate entity, is primarily a question of fact and degree.

[24] Corporations 101 1.5(3)

101 Corporations
101I Incorporation and Organization
101k1.5 Separate Corporations, Disregarding Separate Entities
101k1.5(3) k. Parent and Subsidiary Corporations. Most Cited Cases
(Formerly 101k1)
Whether subsidiary is mere "instrumentality" of parent corporation so as to permit disregarding the corporate entity depends on whether parent corporation owns a majority of the capital stock of subsidiary, the parent and subsidiary have common directors or officers, the parent corporation finances subsidiary, the subsidiary has grossly inadequate capital, the parent corporation pays salaries or expenses or losses of subsidiary, the subsidiary has substantially no business except with parent corporation or no assets except those conveyed to it by parent corporation, the subsidiary is referred to as such by parent corporation or as a department or division, the directors or executives of subsidiary do not act in the interests of subsidiary, but take direction from parent corporation, and the formal requirements of the subsidiary as an independent corporation are not observed.

[25] Bankruptcy 51 3066(1)

51 Bankruptcy
51IX Administration
51IX(B) Possession, Use, Sale, or Lease of Assets
51k3063 Collection and Recovery for Estate; Turnover
51k3066 Proceedings
51k3066(1) k. In General. Most Cited Cases
(Formerly 51k288(15))
In allowing turnover in a summary proceeding in bankruptcy, even where priorities between separate creditors are involved, recognition thereof is not generally then determined, though priorities in bankruptcy under equitable principles may be recognized and observed. Bankr.Act § 70, sub. e, 11 U.S.C.A. § 110, sub. e.

[26] Execution 161 278

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161 Execution
161XI Sale
161XI(F) Title and Rights of Purchase
161k277 Possession
161k278 k. In General. Most Cited Cases

In Colorado, a judgment debtor may remain in possession of real property until sheriff's deeds actually issue, and title and possession of premises remain in debtor until sheriff's deed is issued and actually delivered, the sheriff having authority to execute process solely from statute, acting as a ministerial officer.

[27] Bankruptcy 51 2367

51 Bankruptcy
51IV Effect of Bankruptcy Relief; Injunction and Stay
51IV(A) In General
51k2363 Protection Against Discrimination or Collection Efforts in General; "Fresh Start."
51k2367 k. Injunction or Stay of Other Proceedings. Most Cited Cases
(Formerly 51k217(3), 51k217.2)

An adjudication of bankruptcy draws to the bankruptcy court jurisdiction to administer all property of the bankrupt, real and personal, though it may be subject to a valid lien acquired by judgment or the levy of an execution more than four months prior to date of the bankruptcy, and a sale under such lien may be enjoined, and the property sold by the trustee, unless the bankruptcy court, in the exercise of its discretion, otherwise directs, as a stay of execution does not interfere with the lien, but merely controls its enforcement. Bankr.Act § 70, sub. e, 11 U.S.C.A. § 110, sub. e.

[28] Bankruptcy 51 2369

51 Bankruptcy
51IV Effect of Bankruptcy Relief; Injunction and Stay
51IV(A) In General
51k2363 Protection Against Discrimination or Collection Efforts in General; "Fresh Start."
51k2369 k. State Court Proceedings. Most Cited Cases
(Formerly 51k217(3), 51k217.2)

Where sheriff has made a levy by virtue of a scire facias on goods of the bankrupt more than four months prior to bankruptcy, and a venditioni exponas has been issued to make a sale, pending which voluntary petition is filed, the venditioni exponas must be stayed, notwithstanding validity of the levy. Bankr.Act § 70, sub. e, 11 U.S.C.A. § 110, sub. e.

[29] Bankruptcy 51 2050

51 Bankruptcy
51I In General
51I(C) Jurisdiction
51k2048 Actions or Proceedings by Trustee or Debtor
51k2050 k. Turnover Proceedings. Most Cited Cases
(Formerly 51k288(5))

Where, pursuant to a stipulation, sheriff's deeds were issued to and in the name of trustee in bankruptcy, and were deposited with the bankruptcy court while the referee had question of his jurisdiction under consideration, any jurisdiction of state court in state court proceedings on date of bankruptcy was terminated. Bankr.Act. § 70, sub. e, 11 U.S.C.A. § 110, sub. e.

[30] Bankruptcy 51 2046

51 Bankruptcy
51I In General
51I(C) Jurisdiction
51k2046 k. Jurisdiction Over Property. Most Cited Cases
(Formerly 51k288(5))

The possession lawfully obtained by officers of the bankruptcy court, of property claimed by them, draws to the court jurisdiction of all questions of title thereto or liens thereon. Bankr.Act § 70, sub. e, 11 U.S.C.A. § 110, sub. e.

[31] Bankruptcy 51 2058.1

51 Bankruptcy
51I In General
51I(C) Jurisdiction
51k2058 Consent to or Waiver of Objections to Jurisdiction or Venue
51k2058.1 k. In General. Most Cited Cases
(Formerly 51k2058, 51k288(16))

Admission of bankruptcy court's jurisdiction over property in legal effect admitted possession. Bankr.Act § 70, sub. e, 11 U.S.C.A. § 110, sub. e.

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[32] Bankruptcy 51 3061

51 Bankruptcy
51IX Administration
51IX(B) Possession, Use, Sale, or Lease of Assets
51k3061 k. In General. Most Cited Cases
(Formerly 51k288(5))
The holder of tax certificates covering lode property as well as placer ground belonging to bankrupt had no right by virtue thereof to possession of the property, as against trustee in bankruptcy. Bankr.Act § 70, sub. e, 11 U.S.C.A. § 110, sub. e.

[33] Bankruptcy 51 3061

51 Bankruptcy
51IX Administration
51IX(B) Possession, Use, Sale, or Lease of Assets
51k3061 k. In General. Most Cited Cases
(Formerly 51k288(5))
The acquisition of an assigned judgment constituting a lien on property of bankrupt neither vested title in assignee nor entitled him to possession of the property, as against assignee in bankruptcy. Bankr.Act § 70, sub. e, 11 U.S.C.A. § 110, sub. e.

[34] Bankruptcy 51 3061

51 Bankruptcy
51IX Administration
51IX(B) Possession, Use, Sale, or Lease of Assets
51k3061 k. In General. Most Cited Cases
(Formerly 51k288(5))
Money furnished bankrupt by stockholder to protect its property would be in the nature of loans or advances, and would not support claim of right to possession as against trustee in bankruptcy. Bankr.Act § 70, sub. e, 11 U.S.C.A. § 110, sub. e.

[35] Bankruptcy 51 2060.1

51 Bankruptcy
51I In General
51I(C) Jurisdiction
51k2060 Exclusive, Conflicting, or Concurrent Jurisdiction
51k2060.1 k. In General. Most Cited Cases
(Formerly 51k2060, 51k212)
The jurisdiction of bankruptcy court to adjudicate controversies growing out of agreement between alleged creditor and trustee in bankruptcy was exclusive, and precluded alleged creditor from bringing a civil action in the same court for purpose of quieting title to the property involved in the bankruptcy proceeding. Bankr.Act § 70, sub. e, 11 U.S.C.A. § 110, sub. e.

[36] Bankruptcy 51 2281

51 Bankruptcy
51III The Case
51III(D) Involuntary Cases
51k2281 k. In General. Most Cited Cases
(Formerly 51k60, 51k55)
Where parent corporation was adjudicated a bankrupt and a turn-over order was entered requiring surrender of property by subsidiary on ground that subsidiary was a mere “alter ego” of parent corporation, separate creditors of subsidiary were entitled to have subsidiary adjudicated bankrupt on ground that it had involuntarily suffered the appointment of a trustee to take charge of its property. Bankr.Act § 3, sub. a(5), 11 U.S.C.A. § 21, sub. a(5).

[37] Bankruptcy 51 3785.1

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3785 Findings of Fact
51k3785.1 k. In General. Most Cited Cases
(Formerly 51k3785, 51k467(4))
A finding by the referee in bankruptcy upon conflicting evidence, where affirmed by the District Judge and supported by substantial evidence, may not be set aside by the Circuit Court of Appeals on review.

[38] Bankruptcy 51 2123

51 Bankruptcy
51II Courts; Proceedings in General
51II(A) In General
51k2123 k. Bankruptcy Judges. Most Cited Cases

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(Formerly 51k221)
A "referee in bankruptcy" is not a "judge" within Bankruptcy Act definition of "judge" nor within statute relating to disqualification of judges for bias or prejudice. Bankr.Act § 1(20), 11 U.S.C.A. § 1(20); Jud.Code § 21, 28 U.S.C.A. § 25.

[39] Bankruptcy 51 2123

51 Bankruptcy
51II Courts; Proceedings in General
51II(A) In General
51k2123 k. Bankruptcy Judges. Most Cited Cases
(Formerly 51k221)
The "referee in bankruptcy" is an "officer of the bankruptcy court" appointed and removable only by the judge of the United States District Court. Bankr.Act §§ 1(22), 34(1), 11 U.S.C.A. §§ 1(22), 62(1).

[40] Bankruptcy 51 2123

51 Bankruptcy
51II Courts; Proceedings in General
51II(A) In General
51k2123 k. Bankruptcy Judges. Most Cited Cases
(Formerly 51k221)
A party aggrieved by an order of a referee in bankruptcy may file a petition for review, but cannot secure his disqualification for bias or prejudice. Bankr.Act § 39, subs. a(10), c, 11 U.S.C.A. § 67, subs. a(10), c.

[41] Bankruptcy 51 2492

51 Bankruptcy
51V The Estate
51V(A) In General
51k2492 k. Creation of Estate; Time. Most Cited Cases
(Formerly 51k101)
Bankruptcy court was vested with possession of bankrupts' assets as of date petitions were filed, with power to prevent depletion.

[42] Bankruptcy 51 2045

51 Bankruptcy
51I In General
51I(C) Jurisdiction
51k2045 k. Particular Proceedings or Issues. Most Cited Cases
(Formerly 51k272)
Where bankruptcy court had withheld money deposited by lessee with bankrupt and had placed it in general funds of the bankruptcy estate, whether the money might be used to pay expenses and fees of litigation with lessee was within jurisdiction of the bankruptcy court. Bankr.Act § 68, sub. a, 11 U.S.C.A. § 108, sub. a.

[43] Bankruptcy 51 3061

51 Bankruptcy
51IX Administration
51IX(B) Possession, Use, Sale, or Lease of Assets
51k3061 k. In General. Most Cited Cases
(Formerly 51k249)
Permitting operation of dredge by sublessee pending appeal in litigation between trustee in bankruptcy of lessor and sublessee was not an abuse of the bankruptcy court's powers.

[44] Bankruptcy 51 2903

51 Bankruptcy
51VII Claims
51VII(D) Proof; Filing
51k2903 k. Amendment or Withdrawal. Most Cited Cases
(Formerly 51k336)
Denying request to withdraw exhibits to claim theretofore duly filed for lien on property in possession of bankruptcy court, but permitting withdrawal of claim or so much thereof as claimant desired, was not error.

[45] Bankruptcy 51 3072(1)

51 Bankruptcy
51IX Administration
51IX(B) Possession, Use, Sale, or Lease of Assets
51k3067 Sale or Assignment of Property
51k3072 Manner and Terms
51k3072(1) k. In General. Most Cited Cases
(Formerly 51k262(3))

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Trustee in bankruptcy by virtue of claimant's withdrawal of claim for lien on property then in custody and jurisdiction of the bankruptcy court could cause such property to be sold in bankruptcy free of encumbrances, including the lien of claimant. Bankr.Act § 23, sub. b, 11 U.S.C.A. § 46, sub. b.

[46] Bankruptcy 51 2901.1

51 Bankruptcy
51VII Claims
51VII(D) Proof; Filing
51k2901 Sufficiency of Filing
51k2901.1 k. In General. Most Cited Cases
(Formerly 51k2901, 51k334)

Director by whom funds were advanced for acquisition by bankrupt of tax and judgment liens was entitled to benefit of the liens in securing reimbursement, irrespective of expiration of period for filing general claims, but was not entitled to allowance for any excess not satisfied by the securities.

***181** Warwick Downing, Richard Downing, and Frederick P. Cranston, all of Denver, Colo., Donald M. Hill, of Boston, Mass., and W. W. Grant, of Denver, Colo. (Donald M. Hill, Jr., of Boston, Mass., on the brief), for appellants.

John W. Shireman and Thos. K. Hudson, both of Denver, Colo. (Norma L. Comstock, of Denver, Colo., on the brief), for appellees.

Before PHILLIPS, BRATTON, and WILLIAMS, Circuit Judges.

WILLIAMS, Circuit Judge.

Six separate appeals, as above numbered and styled, are hereinafter considered and determined.

At date of filing petitions in bankruptcy Richard Downing was vice-president and director of Royal Tiger Mines Company, and also president of the Tiger Placers Company. Warwick Downing and Richard Downing have been attorneys for the Mines Company since 1928. They have represented Fish since November, 1936. They organized the Placers Company, and have represented it since its organization in 1932. The Downings, John A. Traylor, president of bankrupt, and an engineer connected with the Securities Commission of Illinois drafted the contract (October 22, 1932) between the Mines Company and the Placers Company. The Downings and John A. Traylor organized the Blue River Company for Fish and Usher, II, and formulated and drafted the contract between the Placers Company and Blue River Company of August 13, 1937. After said voluntary (bankruptcy) petition was filed (February 26, 1938), and prior to order of adjudication, Fish and Usher, II, attempted to procure the issuance of a sheriff's deed, without succeeding, on the Whatley certificates whereby the Mines Company's property would be conveyed to Fish. Fish purchased the Scott and Whatley certificates a week after the adjudication.

Fish participated in the organization of the Placers Company and was a director of the bankrupt throughout the active business life of the Placers Company. He refused to stand for re-election in April of 1936 and began purchasing claims against the said Mines Company in November, 1936, using the company's attorneys as his attorneys for that purpose. He was a director of the Mines Company during the period in which two of the judgments on which he now bases his own claims were taken against the bankrupt, and the labor claims in the Scott case, represented by the two sheriff's certificates of purchase, were incurred during his directorship. No taxes were paid on the Mines Company's real property after 1928, nor during all the time Fish was a director of the bankrupt, although some money had been available which could have been so applied. Fish purchased the Summit County tax sale certificates on the Mines Company's property outstanding in November, 1936, using in part the bankrupt's money in such purchase.

Another judgment entered on foreclosure of mechanic's liens was assigned to and is still held by Western Development and Realization Corporation, which is the Downings' personal holding company.

John A. Traylor, president of the said Mines Company, until August, 1937, also the president of the Placers Company, was the dominant force in both companies. He was also potentially manager of both companies. At all times during the history of the bankrupt he had sufficient proxies to name the personnel of its board of directors, and this condition existed with the Placers Company until 1935.

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Samuel Usher, II, was a director of and in charge of the Boston office of the bankrupt for sixteen years, being its assistant secretary, and also assistant secretary of the Placers Company, as well as director of Blue River Company. He attempted to procure sheriff's deed to Fish on March 1, 1938. Gaspar Bacon was a director of the Placers Company and is now a director of the Blue River Company. Horace Hildreth was vice-president and director of the Placers Company and now director of the Blue River Company.

The directors of the Blue River Company, shortly after its organization, were Fish, Hildreth, Donald M. Hill, Bacon and Usher.

***182** The court found that an additional object of making that lease and organizing the Placers Company to receive the grant or demise as lessee was 'to hinder and delay creditors' of the Mines Company, direct evidence of such fact.beiwg found in the minutes of the meeting of the board of directors of the bankrupt held November 2, 1932, at which a resolution was adopted to the effect that the stock of the Placers Company should be issued to Edward Cunningham, Erland F. Fish, and John A. Traylor, as trustees for the Mines Company, and the president of the Placers Company, stating that one of the reasons for this arrangement was that it was desired to have the stock 'out of the name of Mines Company, so it could not be attached.' In re Holbrook Shoe & Leather Co., D.C., 165 F. 973; In re Looschen Piano Case Co., D.C., 261 F. 93; Shapiro v. Wilgus, 287 U.S. 348, 53 S.Ct. 142, 77 L.Ed. 355, 85 A.L.R. 128.

At time the Placers Company was formed, no conveyance of property to it-neither deeds nor bills of sale- was delivered, and the contract between the two companies was not recorded until May 21, 1933. Neither change in possession was made nor any such intention indicated.

Under statutes of Colorado relating to conveyances in fraud of creditors, it is provided:

'Every conveyance or assignment in writing or otherwise, of any estate or interest in lands, or in goods or things in action, or of any rents and profits issuing thereupon, and every charge upon lands, goods or things in action, or upon the rents and profits thereof, made with the intent to hinder, delay or defraud creditors or other persons of their lawful suits, damages, forfeitures, debt or demands, and every bond or other evidence of debt given, suits commenced, decree or judgment suffered with the like intent, as against the person so hindered, delayed or defrauded, shall be void. (G.S., Sec. 1526; G.L., Sec. 1267; R.S., p. 340, Sec. 17; L. '61, p. 245, Sec. 17; R.S. '08, Sec. 2671; C.L. Sec. 5116.)' 1935 Colo.Stat.Ann.,ch. 71, Sec. 17.

'Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold or assigned, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith, and this presumption shall be conclusive (G.S., Sec 1523; G.L., Sec. 1264; R.S., p. 339, Sec. 14; L. '61, p. 244, Sec. 15; R.S. '08, Sec. 2668; C.L., Sec. 5113.)' 1935 Colo.Stat.Ann.,ch. 71, Sec. 14.

'The term 'creditors,' as used in the last section, shall be construed to include all persons who shall be creditors of the vendor or assignor, at any time whilst such goods and chattels shall remain in his possession or control. (G.S., Sec. 1524; G.L., Sec. 1264; R.S., p. 340, Sec. 15; L. '61, p. 245, Sec. 15; R.S. '08, Sec. 2669; C.L. Sec. 5114.)' 1935 Colo.Stat.Ann.,ch. 71, Sec. 15.

[1][2][3] The fact that Traylor and the other directors of the Mines Company may have honestly believed that large profits could be made by placer operations does not change the illegality of the contract by which they attempted to divert assets of the corporation to the Placers Company away from its creditors. Not only is a conveyance illegal if made with an intent to defraud the creditors of the grantor, but also equally illegal if made with an intent to hinder and delay them. Many an embarrassed debtor holds the genuine belief that if suits can be staved off for a season, he will weather a financial storm, and pay his debts in full. Shapiro v. Wilgus, 287 U.S. 348, 53 S.Ct 142, 77 L.Ed. 355, 85 A.L.R. 128, 131; Means v. Dowd, 128 U.S. 273, 281, 9 S.Ct. 65, 32 L.Ed. 429. The belief, even though reasonably well founded, does not clothe such debtor with a privilege to build up obstructions that will hold his creditors at bay.

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In Curran v. Rothschild, 14 Colo.App. 497, 60 P. 1111, the debtor conveyed his property to a corporation in return for its stock, for the purpose of delaying his creditors in enforcing their claims, though not for the purpose of defrauding them in the sense of nonpayment, on the contrary, with an honest belief that by such action the interest of the creditors would be benefited, and without any present or future benefit to himself. The transfer was held to be fraudulent because made with intent to delay creditors.

[4] Under Colorado decisions, a conveyance intended to defraud creditors not only is voidable to existing, but also as to ***183** future, creditors. A person need not have been an existing creditor at the time the conveyance was executed in order to invoke the protection of the section. House v. Johnson, 19 Colo.App. 524, 76 P. 743.

[5] Such intent must be participated in by both parties, grantor and grantee, or mortgagor and mortgagee, but when such is the case, it is settled that the conveyance or mortgage is null and void. Livingston v. Swofford Bros. Dry Good Co., 12 Colo.App. 331, 56 P. 355.

Whether the intent be to hinder and delay creditors or to defraud them, the legal effect is the same. Italian-American Bank v. Lepore, 79 Colo. 466, 246 P. 792.

[6] A sale of property, though for a full consideration, may be void if made by the owner with intent to hinder, delay or defraud his creditors, if the vendee participated in any such intent, and such intent may be inferred from facts and circumstances. Helm v. Brewster, 42 Colo. 25, 93 P. 1101.

[7] The right of the trustee as the representative of a creditor under Sec. 70, sub. e of the Bankruptcy Act, 11 U.S.C.A. 110, sub. e, to set aside the contract as a fraudulent conveyance has not been affected by any statute of limitation, which under Colorado statutes will not begin to run against an action to set aside a voluntary conveyance until the creditor's right has accrued by reducing his claim to final judgment and the return of his execution nulla bona. The fact that he might have sued out a writ of attachment does not affect the matter. Rose v. Dunklee, 12 Colo.App. 403, 56 P. 342.

[8] A recorded deed is constructive notice of its contents to all persons claiming what is thereby conveyed, under the same chain of title, but is not notice to other persons. Gillet v. Gaffney, 3 Colo. 351; Rose v. Dunklee, 12 Colo.App. 403, 56 P. 342; Judd v. Robinson, 41 Colo. 222, 92 P. 724, 124 Am.St.Rep. 128, 14 Ann.Cas. 1018.

[9] Under Colorado statute a sale by a vendor of chattels in his possession or under his control, not followed by delivery, may be void against creditors of the vendor. Goff v. Landon, 5 Colo.App. 452, 39 P. 69; Baur v. Beall, 14 Colo. 383, 23 P. 345; Goad v. Corrington, 61 Colo. 427, 158 P. 284; Austin v. Terry, 38 Colo. 407, 88 P. 189. Rights of the parties may not be affected by any transfer made subsequent to the time of sale. Autrey v. Bowen, 7 Colo.App. 408, 43 P. 908; Ray v. Raymond, 8 Colo. 467, 9 P. 15; Bassinger v. Spangler, 9 Colo. 175, 10 P. 809; Sweeney v. Coe, 12 Colo. 485, 21 P. 705; Atchison v. Graham, 14 Colo. 217, 23 P. 876; Allen v. Steiger, 17 Colo. 552, 31 P. 226; Felt v. Cleghorn, 2 Colo.App. 4, 29 P. 813.

[10] A sale not accompanied by delivery and followed by actual and continued change of possession may be fraudulent and void as to the creditors of the vendor, notwithstanding such creditors had knowledge of the sale. Helgert v. Stewart, 20 Colo.App. 202, 77 P. 1091; Davis v. Patterson, 69 Colo. 226, 193 P. 662; Bartell v. Griffin, 47 Colo. 569, 108 P. 171; Lloyd v. Williams, 6 Colo.App. 157, 40 P. 243; Willis v. Roberts, 18 Colo.App. 149, 70 P. 445.

[11][12] The recording of a bill of sale is no notice to the creditors of the vendor. Bassinger v. Spangler, supra; Sweeney v. Coe, supra. The Colorado statute admits of no explanation excusing a delivery. Ray v. Raymond supra; Allen v. Steiger, supra.

[13][14] The vendee must take actual possession and the possession must be open, notorious, unequivocal, and such as to apprise the community that the goods have changed hands, or the sale may be void as to the creditors of the vendor. This statute does not permit the transaction to rest upon the declarations of good faith of the parties. Lloyd v. Williams, supra; Bassinger v. Spangler, supra; Sweeney v. Coe, supra.

[15] A case is not taken out of the statute by proving

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that the sale was in fact bona fide. Bartell v. Griffin, 47 Colo. 569, 108 P. 171.

[16] A concurrent or joint possession of vendor and vendee is not admissible. The possession must be exclusive of the vendor. Donovan v. Gathe, 3 Colo.App. 151, 154, 32 P. 436; Cook v. Mann, 6 Colo. 21; Wilcox v. Jackson, 7 Colo. 521, 4 P. 966; Bassinger v. Spangler, supra.

As far back as 1936 counsel for the Mines Company was considering possibility of a bankruptcy proceeding and avoiding judgments by having a friendly stockholder acquire the property by tax deed. In connection with negotiations between Fish's attorney, Donald M. Hill, and Warwick Downing, the effect of bankruptcy proceedings was discussed. Warwick Downing ***184** explained that if bankruptcy was brought about the court would sell all the assets divested of liens, in which even 'we' would have first claim to the purchase price amounting to approximately $75,000 and no doubt could acquire the property for that sum.

At hearing upon 'Objections and Answers' of the Placers Company, Blue River Company and Fish to the turnover order, held June 2, 1939, before the referee, 'further objections' being filed on that day by said appellants, counsel for respondents stated that Fish was the 'chief party in interest' and 'the chief client' represented by them.

The Placers Company, organized in 1932, was an instrumentality or subsidiary as a means to raise money from the public for the purposes of the bankrupt. Throughout the fifteen years of the Mines Company's existence it had had no material income except from loans and that derived form sale of its stock to the public. In 1931 and 1932 it had raised about $75,000 by the sale of its own promissory notes. In 1932 it could find no purchasers for its stock or its notes. A plan was formulated and adopted that the Mines Company would form a subsidiary corporation, having a financial structure to be dominated by the Mines Company, and give to the subsidiary a contract, substantially in favor of the Mines Company, that would invest the subsidiary with ostensible ownership of the dredge with right to dredge such ground of the Mines Company as was susceptible to operations by placer mining methods. The securities to be sold to the public were to be shares of the preferred stock of the subsidiary, one-half of the proceeds to go to the Mines Company and one-half to the subsidiary, and the subsidiary's common stock to be retained by the said Mines Company, except such as it should deem desirable to give away as bonuses to promote the sale of the subsidiary's securities. The investors in the preferred stock were not to share in the control of the subsidiary unless it failed to pay three consecutive dividends, in which event, the preferred stock was to have voting rights. By retention of the common stock of the subsidiary the Mines Company would be able to dominate the subsidiary. The plan was formulated by counsel for the Mines Company, and said John A. Traylor. The directors were John A. Traylor, Richard Downing, Warwick Downing, Douglas A. Roller, an attorney in the same suite with the Downings, and Floyd J. Wilson, a friend of the Downings. Warwick Downing became its first president and Richard Downing its first secretary.

In lease contract between the parent (Mines Company) and its subsidiary (Placers Company), Trustee's Exhibit 23, it purported to grant to the Placers Company the dredge, including parts of three old dredges, and all the drilling and testing equipment, granting to the Placers Company a 'prorating working right' in such machine shops as the Mines Company might thereafter own and maintain upon the Placers Company paying its share of the cost of operation and maintenance, taxes, insurance, wear and tear of the machinery and equipment, depreciation and overhead, and cost of labor and materials used. The Mines Company granted a leasehold interest in and the right to operate by placer mining methods parts or areas of certain of its lode and placer claims, and the right to retain gold and associated metals recovered by placer mining operations, and provided that a map of the affected areas was to be prepared, none of the operation to interfere with or injure any of the operations of the Mines Company, present or future, or interfere with or injure any improvements, structures, roads, ditches, pipe lines, buildings or easements of the Mines Company then or thereafter existing, nor be carried on upon any property of the bankrupt then owned or thereafter acquired, which might be required for the Mines Company's future operations.

The Mines Company assigned to the Placers Company an agreement between it and the town of Breckenridge relating to the operation of the dredge

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through the town, all options acquired by it or which might thereafter be acquired by it, and agreed to cause John A. Traylor to assign all options held by him on lots and mining claims in the town of Breckenridge, and specifying as to certain property as listed, leased to the Placers Company the use of the Mines Company's water and water rights in such quantities and at such points as would be convenient to both parties, provided such use of the water should not interfere or injure any operations of the Mines Company, and that such use should at all times be subordinate to the use of the water by the bankrupt. The Placers Company was to pay the parent on a ***185** monthly basis a percentage of the gross proceeds or net proceed to cover payment of taxes on real estate; was required to notify the Mines Company of the discovery of any lode or ore or mineral deposit and agreed to aid and assist in developing or producing the same. The Mines Company had the right to inspect the operations of the Placers Company at all times. The original contract was made for fifteen years, and was later in aid of securing an additional loan extended for an indefinite period.

At the examination under Sec. 21, sub. a, 11 U.S.C.A. 44, sub. a, held in September, 1939, the following testimony was given: ‘The Placers Company was organized in September of 1932. It was the child of the Mines Company. At the time of its incorporation, it, of course, had no stockholders. It was formed as an instrumentality or subsidiary of the Mines Company for the purpose of offering its stock to the public on a basis of a financial set-up created and dominated by the Mines Company. The (Royal Tiger) Mines Company furnished it with the instrumentalities to raise money from the public.‘

The testimony further showed that the Mines Company and Placers Company were operated as one enterprise, with various forms of securities.

John A. Traylor stated that the general purpose of organizing the Placers Company was conceived to be the shortest way of raising the necessary finances for Mines Company. The only assets of the Placers Company came from the bankrupt, the Placers Company being organized to realize capital for the benefit of the Mines Company. John A. Traylor was president of Mines Company and also as manager dominated both companies. He was always able to procure sufficient proxies to name the directors of the Mines Company, and until 1935 the same condition existed as to the Placers Company, and its control had been through the stockholding of the Mines Company.

The annual statements furnished to stockholders of the Mines Company, issued by its board of directors, refer to the Placers Company as its subsidiary. The Placers Company was regarded by John A. Traylor as being so far the property of the Mines Company that he recommended its sale.

On December 13, 1936, Traylor wrote Usher, II, that the most critical situation concerning both companies was the sale of the property for taxes as the taking up of the three judgments had already been taken care of by two generous and loyal stockholders. When the tax titles were purchased, $500 of the Mines Company's money had been applied thereon.

The preferred stock of the Placers Company was sold and the money used indiscriminately for the purposes of both companies. Checks were passed between the two companies as the purposes of the respective companies required and as John A. Traylor directed. There was a commingling of property, the funds being shifted as required from one company to another. It was stated that they operated under a sort of ‘brotherly relation,‘ the Placers Company being always ‘short of money.‘

Without regard as to which company held the record title to realty, the Placers Company had the right to operate placer deposits and the Mines Company owned the surface and lode rights below the placer deposits. Personal property as to both companies was stored, without distinguishing marks, in a common warehouse in Breckenridge.

Practically all property owned by the Placers Company was the right to extract gold from placer deposits. The area affected by the two companies was never mapped, the operations of the Placers Company being required to be so conducted as not to interfere with the operations of the Mines Company.

In making reports to the taxing authorities the Placers Company always reported real estate standing in its name as that of the bankrupt. This was done so that all contiguous property of the bankrupt could be assessed as one producing mine and result in the assessment of taxes on real estate of the Mines Com-

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pany on the basis of the production of gold through the Placers Company's operations, at all times the real estate as to both companies being treated as one unit for tax purposes. The Placers Company paid taxes only on the dredge and personal property held by it. The Mines Company paid no taxes after 1929.

When the state of Colorado imposed the sales tax a dummy account was set up on the books of the Mines Company, prior to ***186** the effective date of the sales tax statute, showing that the Placers Company owed $10,000, this being done to avoid Colorado sales tax on property of the bankrupt used by the Placers Company.

The method of stock selling adopted was to provide money for both companies.

Separate books of account were kept by the two companies, a summary of the transactions being set out in the record (Tr. pp. 569, 570). In order to procure a permit to sell securities of the Placers Company in the state of Illinois the bankrupt company guaranteed the payment of debts of the Placers Company to the extent of $45,000.

The Mines Company extended the Placers Company's contract indefinitely in order that the Placers Company could increase the mortgage on the dredge in the sum of $25,000.

The balance ($1,503.40) left of the $30,000 sent by Fish to Downing on November 16, 1936, was turned over to John A. Traylor for the enterprise, the two concerns being in effect one. (Tr. pp. 84, 85).

The operation of the Placers Company was unsuccessful although gold was mined of a value approximating $120,000. After the money from the sale of preferred stock was exhausted, the company raised $50,000 in addition by mortgaging the dredge, and later increased the mortgage to $75,000, all of which was spent. By december, 1935, the subsidiary was without money and in debt. The Placers Company's active business life ceased in December, 1935. At date of this bankruptcy, the Placers Company had no employees, and its property, except the dredge, was virtually in the hands of Traylor, who was paying watchmen employed by the Mines Company to look after all property, including the dredge, which sank in November, 1937.

After the turnover order of June 3, 1939, three creditors, on June 6, 1939, filed an involuntary petition against the Placers Company, in which East, as bankruptcy trustee of the Mines Company, with leave of court, intervened, praying that his right as to the Placers Company be protected by appropriate order. On August 30th, adjudication as to the Placers Company was made by the District Court, said order being the subject of the appeal in Case No. 2005.

The Placers Company in the spring of 1937 was financially a wreck, about $200,000 having been spent, but the boat could not run, its operations showing a loss prior to that time. It ceased operating in December, 1935. Between December, 1935, and the spring of 1937, efforts were made to raise new money or make leases. Directors Blake, Bacon and Hildreth attempting to protect the property, out of their negotiations in Boston developed the suggestion by Usher to get Fish to put up the money. Fish came to Colorado in the spring of 1937 to investigate the possibilities in erecting a custom ore mill at Breckenridge, but Traylor (John A.) discouraged him and instead interested him in the placer proposition. Traylor (John A.) gave to Fish all the confidential information at hand in regard to the extent and value of the placer deposits. A verbal agreement was reached between Fish and said Traylor, and Fish began the purchase of equipment for the dredge in May, 1937.

This situation developed the formation of the Blue River Company, a Wyoming corporation organized by the Downings as attorneys for Fish, the directorate of which consisted of persons who were associated with the bankrupt and Placers Company as follows:

Erland F. Fish, president (director of the bankrupt Mines Company from November 1, 1932 to April 8, 1936); Gaspar G. Bacon, director (a director of the Placers Company during 1936, but resigned as such on August 10, 1937); Horace E. Hildreth, vice-president (director of the Placers Company during 1936, but resigned as such on August 10, 1937); Donald M. Hill, attorney, resident of Boston, Massachusetts, and for years attorney for the Mines Company and also the Placers Company and such attorney at time of the creation of the Blue River Company and continued to act as attorney for the Mines Company and the Placers Company to the date of adjudication of Placers Company as bankrupt, also Fish's

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personal attorney; Samuel Usher, II, treasurer of Mines Company and for sixteen years its assistant secretary and in charge of its office and that of the Placers Company in Boston, Massachusetts, since April 8, 1936, and now a director of the said Mines Company, and the same Samuel Usher, II, who signed its petition in bankruptcy.

Fish, Hildreth and Usher and counsel formulated a contract (of August 13, 1937) to be executed by the Placers Company, and when they were assured same would ***187** be accepted, Hildreth, Bacon and Usher resigned from the board of the Placers Company and became directors of the Blue River Company.

By the contract, Fish received more than he had asked; Traylor endeavored to put in some means of getting money for the Mines Company, vigorously opposed the contract, refused to sign it and resigned as director and president of the Placers Company. Blue River Company was granted a lease on property and rights granted by the Mines Company to Placers Company under said agreement of October 22, 1932, and other property which the Placers Company had acquired by the right to the fee within the corporate limits of the town of Breckenridge and adjacent thereto, including options, etc. The lease states that persons interested in the pre-organization of the Blue River Company had paid for the benefit of the Placers Company $11,598.20, being amounts due workmen and employees. Blue River Company agreed to pay overdue accounts or liabilities of the Placers Company which in its opinion should be paid to protect and preserve the property leased, ‘at or before the time that any emergency may arise concerning any such accounts or liabilities,‘ not exceeding a total of $20,000, and to pay not more than $3,000 on options to purchase property, the title of which was to go to the Placers Company, and to pay the expenses of putting the dredge in operation, it being recited that predecessors in interest of the lessee had expended large sums since April, 1937, for such purposes and the lessee should have the benefit of such expenditures. The royalty was to be certain percentages of net profits, ranging from 25 per cent. to 75 per cent., the term of the lease to be for five years. If the total net profits during the term did not equal $600,000 then the lease was to continue so long thereafter as might be desired by the Blue River Company and not terminate until the total net profits should reach the sum of $600,000. (See Exhibit 11 attached to the Fish deposition and Trustee's Exhibit 28.)

In formation of the Blue River Company, a new corporation chartered with the right to mine, the same general scheme as used in 1932 in organizing the Placers Company was adopted.

Fish, his sister, and Bacon apparently furnished the money, Fish being the principal stockholder and so controlling the company that Hildreth, its manager and one of its directors, thought that it did not make much difference ‘which was which and had never considered what effect the possibility of Fish's taking title under his certificates of purchase to all the properties included in Blue River Company's lease might have on that company.‘

Blue River Company had exclusive possession of the dredge and at the date of bankruptcy of the Mines Company was engaged in putting it in operable condition.

In the town of Breckenridge, on land which belongs to the Mines Company, large machine shops are located, called the Tonopah shops, and also a house used as an office as well as a sleeping place for employees which has always been used by the Mines Company and the Placers Company as necessity required. The shops and office and the land on which they stand are the property of the Mines Company, purchased from the Tonopah Placers Company in 1926 or 1927. The Placers Company had the right to use the shops for limited purposes under lease of October 22, 1932. Under the Blue River Company contract that company claimed the right to, and was actually, using the shops, and also was using the office at the date of bankruptcy, when it had a great deal of its surplus materials and machinery stored in the shops, using such shops and office as its business required. The Placers Company was dormant, although a large part of its books and records, as well as the books and records of the bankrupt, were kept in said office at Breckenridge.

The Blue River Company was not at any time in the exclusive possession of the office or machine shops. These were used by the Mines Company to such extent as its purposes required and its watchmen were in charge of all the said bankrupt's property, including the office and machine shops at the date of bankruptcy.

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After the decision of the referee on January 28, 1939, the Blue River Company completed the rehabilitation of the dredge and in March was beginning to commence mining operations. The trustee filed a petition for a restraining order to prevent the extraction of gold from the property of the bankrupt, asking that an order be made against Blue River Company Fish, Hildreth, Warwick, Downing, Richard Downing and Frederick P. Cranston, which was heard on March 24th, 1939, and restraining order issued against Blue River Company and Erland F. Fish upon admission***188** of counsel as to facts of jurisdiction. This order was the subject of petition for review, but before being heard an order was made by the District Judge, on May 3, 1939, permitting the operation of the dredge on terms and conditions, Blue River Company being permitted to make application for reimbursement of its operating expenses, and on July 26, 1939, filed two petitions before the referee relative thereto. The trustee filed his answer and cross-petition and a hearing was had on July 31, 1939. After decision of the referee, his order was the subject of a petition for review and was affirmed, except as to a certain 15% royalty provision, which was stricken. These questions are for determination in Case No. 2007.

Fish was a member of a stockholders' committee which was investigating the affairs of the bankrupt at the time it was about to collapse in 1932. The minutes of September 22, 1932, show that he was sitting as a member of the board, but it is explained that while he was present he was not at that time a director. He was present at the meeting at which the formation of the Placers Company was discussed and became a director of the Mines Company, November 1, 1932 (Stockholders' Meeting Minutes, November 1, 1932, Trustee's Exhibit 11), after Placers Company was formed, and continued to be a director until after Placers Company collapsed in December of 1935. In April of 1936 he refused to stand for re-election as a member of the board of directors, telling Traylor (John A.) that he would be of more service off the board than on it. He assured said Traylor that he would purchase the tax certificates if a favorable price could be obtained and would take no advantage of the company nor of the stockholders.

On November 14, 1936, Warwick Downing wrote to Hill to the effect that large stockholders ought to go together and put up $25,000 to purchase the tax certificates. Consideration was being given at that time to the matter of bankruptcy and the possibility of acquiring all of the assets at a reduced price.

Fish forwarded $30,000 to Warwick Downing two days later with which to purchase the certificates and outstanding judgments. The price at which the tax certificates were offered by Summit County was $25,000; $500 belonging to the Mines Company being then in the county treasurer's hands, a part of the proceeds from certain machinery that had been sold by the Mines Company and removed from the county. The county treasurer had not applied the $500 to the payment of taxes and Downing was successful in having this $500 applied on the purchase of the certificates.

Summary Jurisdiction of the Bankruptcy Court.

[17] Appellee (trustee) contends that the Mines Company was in actual the pond on which it floated and the surrounding bank area. The referee found, sustained by substantial evidence, that the actual possession of the property covered by the Fish tax certificates and the judgments, including all the Placers Company ground and lode claims, was in Mines Company, except the dredge boat and contents, pond and bank area, at time of filing petition in bankruptcy. It had been the practice of the Mines Company, concurred in by the Placers Company, to report all the real property in its name to the assessor for taxation purposes, including that standing in the name of the Placers Company.

It not being known how extensive the placer ground was, certain of the claims were to be operated in accordance with direction of the Mines Company. The Placers Company in petition signed by its attorneys on May 27, 1939, states that no question existed as to the jurisdiction of the bankruptcy court over the interest of the property which was included in the agreement of October 22, 1932, consisting of a lessor's interest.

Whatever claim or possession the Placers Company had as lessee, its physical possession and that of the Mines Company was not separated, neither having the right to exclude the other during the life of the lease as long as the Placers Company complied with such agreement. The map probably was not made as

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agreed not only on account of the cost but also the difficulties involved. As to the possession of certain property consisting of the dredge and such parts of equipment mentioned in the October 22, 1932, agreement, a great amount of machinery, material and equipment located in the machine shops at Breckenridge which is listed in the Mines Company's schedule as its property, and stated to be located in the shops or in the office building, much of this property connected with the lode properties of the Mines Company ***189** is stated to be stored in the machine shops. The Mines Company's schedules included general statements including 'all other personal property and fixtures in the yard around the shops, in the assay office, laboratory, and retort house, office, and staff residence.' The Blue River Company as lessee of the Placers Company was in the sole occupancy and possession of the dredge at the date of bankruptcy. It was repairing the dredge and also using the shops and office of the Mines Company to such extent as was reasonably necessary for such purpose. Blue River Company had no greater right to the use of these properties than its lessor (Placers Company) had under its contract of October 22, 1932. Neither Blue River Company, Fish, nor the Placers company was on the date of bankruptcy in the sole and exclusive possession of the shops and office.

The possession by the Mines Company of its property including lode claims, personal property connected therewith or thereon, placer ground, personal property thereon, machine shops and office, and personal property therein, is consistent with the qualified possession for use existing in Blue River Company or Placers Company at the date of bankruptcy.

Fish's right to possession of the lode claims under the tax certificates, sheriff's certificates and transcript of judgment is the same as to all the placer ground and all other property covered by the tax certificates, sheriff's certificates and transcript of judgment.

The evidence without taking into consideration the admission of jurisdiction as of record substantially supports the finding of the referee that actual possession of all the property except the dredge, and personalty with it, the pond and its surrounding bank area, was in the Mines Company at date of filing of voluntary petition in bankruptcy. The undisputed evidence and circumstances in connection with the admissions of record support the finding of the referee as approved by the court as to jurisdiction. The referee in considering all of the evidence heard by him for turnover orders including that not controverted given under Section 21a covering the relationship between the Mines Company and the Placers Company found that it was one enterprise and that the Placers Company was a subsidiary of the Mines Company, its alter ego, organized, controlled and managed for the sole purpose of carrying on where the bankrupt company could not well do so.

[18] Constructive possession may exist where the property is in the hands of the Mines Company's agent or lessee or sublessee or held by one with only a colorable claim, jurisdiction for a turnover order existing. Taubel-Scott-Kitzmiller v. Fox, et al., Trustees, 264 U.S. 426, 44 S.Ct. 396, 68 L.Ed. 770; Keaton et al. v. Looney, 10 Cir., 111 F.2d 34.

[19] The bankruptcy court for purpose of determining whether alleged adverse claims are substantial or merely colorable may examine into all the evidence and admissions submitted and as a part of its findings on which conclusion that jurisdiction exists express itself in a qualified sense on the merits of the controversy. Irving Trust Co. v. Fleming, 4 Cir., 73 F.2d 423; In re Eilers Music House, 9 Cir., 270 F. 915, and authorities cited on page 924; In re Franklin Suit & Skirt Co., D.C., 197 F. 591, 600; Cohen v. Hessel, 3 Cir., 278 F. 929; In re Holbrook Shoe & Leather Co., D.C., 165 F. 973.

[20] The referee found, which finding was sustained and approved by the court, that the Placers Company was merely a subsidiary or instrumentality of the Mines Company in the operation of a portion of its business, and that in the operation of the placer ground, the Placers Company, a separate corporation, is an agent of the Mines Company and its asserted claims to possession and ownership of the Mines Company's property are unsubstantial and colorable only, and that in the agreement of October 22, 1932, as between the two corporations is void as to the trustee as being intended to delay and hinder bankrupt's creditors, there being no such delivery or change of possession of the property as to be effective against creditors of the Mines Company, and all its property, both real and personal, being so commingled that the separating it for purpose of administration or delivery could not be done. In re Looschen Piano Case Co., D.C., 261 F. 93; In re Holbrook Shoe & Leather Co.,

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supra; In re Franklin Suit & Skirt Co., D.C., supra. This finding by referee approved by trial court will not be disturbed on appeal if supported by substantial evidence. Alexander v. Theleman, 10 Cir., 69 F.2d 610; Mullen v. First Nat. Bank of Ardmore, 10 Cir., 57 F.2d 711; Reiss v. Reardon, 8 Cir., 18 F.2d 200.

***190** In September, 1932, John A. Traylor, its president, proposed a plan 'to realize capital for the Royal Tiger Mines' which led to the formation of the Placers Company as an instrumentality and subsidiary of the Mines Company, and was dominated by it in the set-up, the said Traylor, the two Downings, Douglas Roller, attorney, with offices in the Downing suite in Denver, Colorado, and Floyd J. Wilson, a friend of the Downings, being directors of the said company.

A contract with the said Placers Company was formulated by said John A. Traylor, the Downings, and a representative of the Securities Commission of Illinois, the bankrupt (Mines Company) guaranteeing the cost of constructing, rebuilding, and enlarging the dredge and putting it into operation, the said Placers Company not to consummate obligations without its consent. (Trustee's Exhibit 11, Minutes, November 2, 1932, p. 174, Tr.)

At that time the bankrupt had options on certain lots and mining claims within the town of Breckenridge, some in its own name and other in the name of John A. Traylor, its president, with expectancy to acquire others (pp. 302, 564, 565, Tr.). These options were afterwards exercised and title to the property taken in the name of the Placers Company with funds provided by the bankrupt (pp. 302, 303, 1 Tr.), which owned the surface and sub-placer rights, the Placers Company having the right to dredge gravel deposits. The officers of the Placers Company who were also officers of the Mines Company reported this property to the taxing authorities for assessment in the name of and as the property of the Mines Company.

In transactions between the two companies, there was no distinct or separate action of the two boards of directors. Money was transferred from one to the other as John A. Traylor directed.

Neither does any of the ground outside of the limits of the town of Breckenridge stand in the name of the Placers Company nor of that included in descriptions in tax certificates purchased by Fish or for Fish in 1936, nor the Summit County tax certificates covering the shops and property in the town of Breckenridge including that which stands partly in the name of the Mines Company (bankrupt) and partly in the Placers Company.

The county assessor's office record discloses that all of the land except as above stated stands in the name of the Mines Company. With respect to this property the officers of the Placers Company, who were also officers of the Mines Company, also reported this property to the taxing authorities as the property of the Mines Company. The minutes of the bankrupt are concisely abstracted in the decision of the referee (pp. 172-180, Tr.). The original Mines Company minute book is Trustee's Exhibit 11, which is not printed in the record but transmitted to the court as an original exhibit. An examination of these minutes discloses that the Mines Company was operating or dominating the business of the Placers Company as its own, and in order that the Placers could sell stock in Illinois, the Mines Company guaranteed the payment of certain of its debts (p. 175, Tr.); it was paying commissions to the salesmen of the Placers Company stock; its directors were visiting the property and reporting as to the progress of the rehabilitation of the dredge (p. 176, Tr.); discussions between the Mines Company and Placers Company were had as to the manner of handling inter-company loans of $46,000 (p. 178, Tr.); it was necessary to place a mortgage on the dredge to finance the Placers Company, which was facilitated (p. 179, Tr.); reports were being made to the Mines Company by Placers Company as to the figures and amount of money necessary to put the dredge into sound operating condition; the Mines Company changed the terms of the agreement of October 22, 1932, with the Placers Company so that the mortgage by it on the dredge could be increased to $75,000 (p. 180, Tr.). The minutes as referred to by the referee in his decision bear out the testimony that the two companies were operated 'just as one enterprise with various forms of securities' (p. 277, Tr.). The Mines Company was giving away shares of common stock in the Placers Company to stimulate sales by it of preferred stock. The companies were so connected and no map of the area affected by the Placers Company contract was made as required. As late as November 16, 1936, when Downing turned over $1,503.40 of Fish's money, the balance remaining in his hands, no distinction was made between the two companies, it being turned over to John A. Traylor to be used for the Mines Company and/or the

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Placers Company, as occasion should arise.

Traylor sent $1,000 of same to Usher, II, as payment on account for his use, both ***191** companies being indebted to him. John A. Traylor did not know which company received the benefit of the remainder, money being transferred from one company to another throughout this period as John A. Traylor or Richard Downing directed.

The Placers Company paid accounts of the Mines Company and the latter bought material for the Placers Company. According to the evidence of John A. Traylor 'when one company had money they both had money.' The personal property of the Mines Company and the Placers Company is commingled without reasonable possibility of identification.

The real estate affected by the contract of October 22, 1932, between the two companies as to the surface and sub-placer rights belongs to the Mines Company. As to the Placer deposits the area of which is not reasonably determinable, the Placers Company holds at most only a leasehold interest as lessee. The Mines Company owns the lode rights in all real estate standing in the name of both companies.

Separate books for the two companies were kept by the same bookkeepers, audited by the same auditors using the same offices and office equipment the transactions being only nominally different on account of the use of different names, but no actual distinction made between the transactions of one corporation and that of the other. The primary purpose was to raise money for the Mines Company. The business of Mines Company was to exploit its placer deposits and except for a small amount of ground sluicing the Mines Company conducted all its business in the name of the Placers Company.

[21] Corporate entity may be disregarded where not to do so will defeat public convenience, justify wrong or protect fraud. Henry v. Dolley et al., 10 Cir., 99 F.2d 94; Taylor v. Standard Gas & Electric Company, 10 Cir., 96 F.2d 693; Id., 306 U.S. 307, 59 S.Ct. 543, 83 L.Ed. 669. The board of each company was at all times made up of members of the dominating group of their employees or their attorneys.

[22][23][24] The flexibility of the board members of the Placers Company is demonstrated by the facility by which individual directors got on or off he board when the group's policies and plans required such action. The preferred stockholders finally took apparent control of the board of the Placers Company through Hildreth, Bacon, and Blake AFTER the business of the Placers Company had collapsed, but relinquished immediately that control when Fish's interests required that they act on the Blue River board.

The instrumentality rule here has application. The determination as to whether a subsidiary is an instrumentality is primarily a question of fact and degree. The following determinative circumstances are recognized:

(1) The parent corporation owns all or majority of the capital stock of the subsidiary. (2) The parent and subsidiary corporations have common directors of officers. (3) The parent corporation finances the subsidiary. (4) The parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation. (5) The subsidiary has grossly inadequate capital. (6) The parent corporation pays the salaries or expenses or losses of the subsidiary. (7) The subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation. (8) In the papers of the parent corporation, and in the statements of its officers, 'the subsidiary' is referred to as such or as a department or division. (9) The directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take direction from the parent corporation. (10) The formal legal requirements of the subsidiary as a separate and independent corporation are not observed.

The instrumentality rule in situations similar to that in the instant case has often been applied. Many involved turnover orders and most of them have been repeatedly quoted as authority.[FN1]

***192** [25] In allowing turnover in a summary proceeding, even where separate creditors as to priorities are involved, the issue of recognition of same is not as a rule then determined, though priorities in bankruptcy under equitable principles may be recognized and observed. In re Rieger, Kapner & Altmark, D.C. 157 F. 609; In re Eilers Music House, supra.

[26] In Colorado, debtor has the right to remain in possession of real property until sheriff's deeds actu-

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ally issue, practically the same as under the Ohio Statutes upon which Willis v. Beeler, 6 Cir., 90 F.2d 538, was predicated, and title and possession of the premises remain in the judgment debtor until the sheriff's deed is issued and actually delivered, the sheriff having authority to execute process solely from the statute, acting as a ministerial officer. McArthur, Rec., v. Boynton, 19 Colo.App. 234, 74 P. 540; Manning v. Strehlow, 11 Colo. 451, 18 P. 625; Hayes et al. v. New York Gold M. Co., 2 Colo. 273; Paxton v. Heron, 41 Colo. 147, 92 P. 15, 124 Am.St.Rep. 123; Farmers' Union Mut. prot. Ass'n v. San Luis State Bank, 86 Colo. 293, 281 P. 366, 66 A.L.R. 1166.

In Willis v. Beeler, supra, it is said (90 F.2d 542): 'The record shows that the company had actual possession of the land, buildings and property in dispute, using it in the conduct of its business at the time of the filing of the petition in bankruptcy. The trustee, ever since his appointment, has had possession in fact of the land, buildings and property. Thus while the proceeds from the sale of the realty were appropriated to the payment of the judgment if and when sale should be made and confirmed, the levy did not confer constructive or actual possession thereof. All of the realty, including the fixtures, therefore passed into the custody of the bankruptcy court upon the filing of the petition.'

[27][28] An adjudication of bankruptcy draws to the bankruptcy court jurisdiction to administer all property of the bankrupt, real and personal, though it may be subject to a valid lien acquired by judgment or the levy of an execution more than four months prior to the date of bankruptcy; and a sale under such lien may be enjoined, and the property sold by the trustee, unless the bankruptcy court, in the exercise of its discretion, may otherwise direct, as a stay of execution does not interfere with the lien, merely controlling its enforcement. A sheriff having made a levy by virtue of a fieri facias on the goods of the bankrupt more than four months prior to bankruptcy, a venditioni exponas being issued to make a sale, pending which the defendant files a voluntary petition, notwithstanding the validity of the levy, the venditioni exponas must be stayed, it not being essential to the levy that it should be executed, the goods having been drawn into the control of the bankruptcy court. In re Baughman, D.C., 138 F. 742, and In re Vastbinder, D.C. 132 F. 718.

[29] See Metcalf v. Barker, 187 U.S. 165, 23 S.Ct. 67, 47 L.Ed. 122, where a creditor's bill, by which not only did the complainant secure a specific lien, but the court in which it was filed obtained direct jurisdiction over the property against which the equity was asserted, it being with reference to such situation that the bankruptcy proceedings may have no effect. In the present case the res is not under such jurisdiction of another court.

In addition, under a stipulation between Fish and the trustee, by the issuance of sheriff's deeds to and in the name of the trustee in bankruptcy, and the deposit of such deeds in the custody of the bankruptcy court, same being made while the referee had the question of his jurisdiction under consideration, the effect of the stipulation and the execution and delivery of these deeds to and in the name of the trustee with the approval of the referee terminated question of state court proceedings. If the state court had any jurisdiction at the date of bankruptcy, it was by this action terminated. In re Kornit Mfg. Co., D.C., 192 F. 392; Wiswall v. Campbell, 93 U.S. 347, 23 L.Ed. 923; In re Hoover-McClintock Motor Car Co., D.C. 1 F.2d 660; Page v. Arkansas Nat. Gas. Corp., 8 Cir., 53 F.2d 27, 28; In re Hollingsworth & Whitney Company, D.C., 233 F. 446.

[30] The possession lawfully obtained by officers of the bankruptcy court of property claimed by them, drawing to the court jurisdiction of all questions of title thereto or liens thereon, is recognized. In re ***193** Hollingsworth & Whitney Company, supra; In re Robinson, D.C., W. D. Wash., 237 F. 102; Isaacs v. Hobbs Tie & Timber Co., 282 U.S. 734, 51 S.Ct. 270, 75 L.Ed. 645; Straton v. New, 283 U.S. 318, 51 S.Ct. 465, 75 L.Ed. 1060.

'Erland F. Fish enters an appearance and files plea to the jurisdiction of the court to enter the (turnover) order applied for by the trustee. Three days were consumed in taking evidence relating to the subject whether or not the bankrupt was in possession of the property at date of the filing of the petition in bankruptcy, in order to ascertain the probable jurisdiction of the court. 'The attorney for Fish then in open court admitted jurisdiction.' Therefore, the court having jurisdiction is required to consider the petition of the trustee upon the merits based upon the evidence taken at the hearing.'

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The foregoing recital under record made by referee is under date of November 25, 1938, and marked 'Received and filed November 25, 1938 (signed) Frank McLaughlin, Referee in Bankruptcy.'

On November 26, 1938, stipulation between the trustee in bankruptcy, John H. East, Jr., and Erland F. Fish, appears in the transcript as follows: 'It is recited that Erland F. Fish is the holder of three (3) Certificates of Purchase, each issued by the Sheriff of Summit County, Colorado, on the 28th day of August, 1937, and the parties desire to preserve and protect the rights of both or either Mr. Fish, or the Trustee, as the case may be, and have deeds issued in accordance with and within the time provided by the act of Colorado, Laws of 1937, page 472. Therefore the parties agree that the said three sheriff's deeds be issued to John H. East, Jr., Trustee in Bankruptcy herein, as stakeholder and stakeholder only, and that a copy of this stipulation, with the approval of the referee endorsed thereon, shall be the request of the parties hereto to issue deeds accordingly. This stipulation shall be without prejudice to the rights of either party and neither party shall be considered as having gained or lost anything by reason hereof, excepting only that it is the intent hereof that deeds may be issued upon said Certificates of Purchase for the protection of the rights and title of Mr. Fish or the Trustee, as the case may be. It is also understood that Mr. Fish does not hereby consent to any jurisdiction of this Court which this Court did not heretofore possess, nor to any enlargement thereof by reason of this Stipulation. Both parties agree that Sheriff's Certificates of Purchase may be withdrawn and surrendered to the said Sheriff for the purpose of carrying into effect this Stipulation. Dated November 26, 1938. (signed) John H. East, Jr., Trustee in Bankruptcy, John W. Shireman, Norma L. Comstock, attorneys for Trustee Herein, Erland F. Fish by Frederick Cranston, his attorney.'

The stipulation is marked 'Received and filed November 26, 1938 (signed) Frank McLaughlin, Referee in Bankruptcy.' (Tr. 103, 104).

The following appears in the transcript as further stipulated:

'It is Hereby Stipulated by and between the Trustee in Bankruptcy herein and Erland F. Fish, as follows:

'That if previous stipulation dated this day between the same parties relating to three (3) Certificates of Purchase issued by the Sheriff of Summit County, Colorado, is carried out and performed by the Sheriff of Summit County, Colorado, and Sheriff's Deed forthwith issued to John H. East, Jr., Trustee in Bankruptcy, both parties agree to save said Sheriff harmless, and release him for all liability for so doing. Dated November 26, 1938. (signed) John H. East, Jr., Trustee in Bankruptcy herein, John W. Shireman, Norma L. Comstock, Attorneys for Trustee in Bankruptcy herein, Erland F. Fish, by Frederick Cranston, His attorney. Approved: Frank McLaughlin, Referee, Received and filed 4 P.M., November 26, 1938. Frank McLaughlin, Referee in Bankruptcy.'

On page 105 of the transcript the following appears:

'Order. Upon Motion of Erland F. Fish, It Is Ordered: That memorandum decision dated November 25, 1938, be amended to conform to the facts in the following particulars and in the following language:

'That the sentence in the fifth paragraph of said memorandum decision 'The Attorney for Mr. Fish, then, in open court, admitted jurisdiction' be amended so that as amended the same shall read as follows:

'"The Attorney for Mr. Fish then, in open court, admitted jurisdiction as to all property of The Royal Tiger Mines Company.'

***194** 'Dated at Denver, Colorado, this 1st day of December, 1938. (signed) Frank McLaughlin, Referee in Bankruptcy. Received and filed December 1, 1938. Frank McLaughlin, Referee in Bankruptcy.'

On November 7, 1938, the Placers Company stated of record in court that it did not claim ownership of anything except through its lessee, the Blue River Company, to-wit, the dredge boat and other properties belonging to it. (Tr. pp. 63, 526, 527.) The evidence showed that John A. Traylor, president of the Mines Company, was at that time paying watchmen for the purpose of watching all the property, the Mines Company having continuously for many years asserted possession of all such property.

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In re Granite City Bank of Dell Rapids, S.D., 8 Cir., 137 F. 818, it was held: 'An adjudication in bankruptcy operated as a seizure of the bankrupt's property, by which it is taken in custodia legis wherever situated within the United States, and the title and right of possession pass by operation of law to the trustee, as custodian for the court, at once on his selection and qualification. Whether property is within the district or not is immaterial to affect the exclusive right of the court which made the adjudication to direct its sale, and to determine all claims thereto, on proper notice to the parties in interest, whether they reside within or without the district; the filing of the petition in bankruptcy itself being a caveat to all the world.'

See, also, Mueller v. Nugent, 184 U.S. 1, 22 S.Ct. 269, 46 L.Ed. 405; International Bank v. Sherman, 101 U.S. 403, 406, 25 L.Ed. 866; In re Rodgers, 7 Cir., 125 F. 169.

[31] Admission of jurisdiction in legal effect admits possession, the Placers Company not claiming ownership or possession of anything but the dredge boat and other properties belonging to it or connected with it, which were not included in the turnover order.

[32] Fish was the holder of the tax certificates covering this lode property as well as the placer ground, but by virtue thereof (certificates and transcript of judgment) he had no right to possession nor does the entire transcript of evidence contain any evidence to the effect that at the date of bankruptcy he held possession of any of the property.

[33] The acquisition by him in August, 1937, of an assigned judgment to DuPont de Nemours, constituting a lien on the property, neither vested title in him nor entitled him to possession of the property. Farmers' Union Mut. Prot. Ass'n v. San Luis State Bank, supra; Lane v. Morris, 77 Colo. 343, 237 P. 154; Paxton v. Heron, supra; Bailey v. Erny, 68 Colo. 211, 189 P. 18; Carlson v. Howes, 69 Colo. 246, 193 P. 490.

[34] In his objection and answer to petition for turnover order, he stated that he employed watchmen at his own expense for purpose of protecting and preserving said properties and by so doing had lawful possession thereof (pp. 63, 64, 65, Tr.), but no evidence, either from him or his employees, Hildreth and Allen, or otherwise, appears in the record, in support of such statement. Though he may have furnished the Mines Company with moneys to protect its properties, such would be in the nature of loans or advances, and not support claim of right to possession. His admission of jurisdiction of the bankruptcy court of all the property of the bankrupt (Tr. pp. 101, 102), disposed of any question of possession by him as to the lode claim and chattels except as same were connected with the dredge. He does contend that the res was in the possession of the state courts and thus that the bankruptcy court had no jurisdiction thereof, which has no support in this record.

There are certain other properties consisting of placer mining claims, both in and outside the town of Breckenridge, the record title to which stands in the name of Mines Company under the agreement between it and the Placers Company of October 22, 1932 (Tr. pp. 562-567), and certain chattel property located thereon, of which the Placers Company claimed to be in possession. In this agreement of October 22, 1932, Mines Company was designated and contract executed as lessor and the Placers Company as lessee. There are also certain other placer claims in the town of Breckenridge, the record title to which stands in the Placers Company, and certain personal property thereon located, of which the Placers Company claims possession. The nature of its possession was stated by the Placers Company in its objection and answer to petition for turnover order (Tr. pp. 62, 63), as follows: 'This respondent through its lessee, Blue River Company, is ***195** the owner and in the exclusive possession of a dredge boat and other properties belonging to it, sought to be affected by the turnover order, and has been the owner and in continuous and exclusive possession of same since October 22, 1932; that the major portion of its property was conveyed to it under an agreement dated October 22, 1932, and recorded May 21, 1933, in Book 122 at page 96 of the records of the County Clerk and Recorder of Summit County, Colorado; * * * '.

The referee found that the actual possession of the property covered by the Fish tax certificates and the liens by virtue of the judgments was in the Mines Company at the time of the filing of the petition in bankruptcy. The tax certificates held by Fish covered all the placer ground as well as the lode claims as it had been the custom of the Mines Company and Placers Company to report all the real property to the

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assessor for taxation purposes in name of bankrupt (Tr. pp. 300, 302, 317, 391, 444, 566), including that standing of record in the name of the Placers Company, assessed in name of Mines Company. As to such property standing in the name of the Placers Company, it was acquired and title taken for the benefit of Mines Company under the options provided for in the terms of the Placers Company agreement of October 22, 1932 (Tr. 564), the money being derived from Mines Company through the sale of its stock in the Placers Company (pp. 302, 303, Tr.), and Placers Company claimed possession only as stated in its response as to the Blue River Company. Said contract provided that the Placers Company was granted a leasehold interest in and the right to operate parts or areas of certain of the claims, and the right to retain gold recovered by such operations provided that a map was to be made, which was not done, and provided that the operations of the Placers Company should not interefere with any operations of Mines Company, or interfere with or injure any improvements, structures, etc., then or thereafter existing, nor be carried on upon any property of the Mines Company, then or thereafter acquired, which might be required for its future operations (Tr. . 564). Mines Company was to retain the lode rights below the placer deposits and all surface rights, it was not known how extensive the placer ground was, and certain of the claims were to be operated in accordance with directions of Mines Company. (Tr. pp. 391, 563, 565.)

The Placers Company in petition signed by its attorneys on May 27, 1939 (Tr. pp. 526-529), states that there is no question as to the jurisdiction of the bankruptcy court over the interest in the property which was included in the agreement (October 22, 1932), said property consisting of a lessor's interest, previously in its answer and objections to petition for turnover order (Tr. pp. 62, 63), it is implied that parts or all of this property was granted to it by the October 22, 1932, agreement. Examination of the document or agreement itself and of the evidence with relation to the occupation, use and treatment of the ground for tax purposes, supports the contention of the trustee. Whatever claim of possession the Placers Company had was (Tr. pp. 526-529), as lessee. The physical possession of the lessee and that of the lessor in this real property as long as it continued under said agreement cannot be separated, neither having the right to exclude the other. The reason the map was never made, obviously, was on account of the expense and the difficulty in making same (Tr. pp. 445, 506, 507).

The Placers Company also claims now to have been in the actual possession of certain personalty, including the dredge and dredge parts, as well as certain other equipment mentioned generally in the October 22, 1932, agreement. There is an amount of machinery, material, and equipment located in the machine shops at Breckenridge, which is scheduled (schedule signed by Downing) as property of Mines Company, and stated to be located in the shops or in the office building. Much of this property came from the lode properties of Mines Company and is stated to be stored in the machine shops. These schedules contained general statements including ‘all other personal property and fixtures‘ in the shops, in the yard around the shops, in the assay office, laboratory and retort house, office and staff residence. All this personal property is commingled and unmarked so as to be indistinguishable as property of Mines Company or property of the Placers Company.

There appears to be no question that the Blue River Company, as lessee of the Placers Company, was in the sole occupancy, and possession of the dredge at the date of bankruptcy, at which time it was repairing the dredge and using the shops and office only to such extent as was reasonably necessary to the repairing of the dredge. Appellants contend that Mr. Shireman, attorney***196** for appellee, in effect admitted that Blue River Company was in the exclusive possession of the shops and office.

The evidence of A. P. Stuard was in part as follows (Tr. p. 521):

‘Q. You have observed the operation of this dredge boat. Do you know who is in possession now of the dredge boat? A. I suppose the Blue River Company because the checks of the fellows working are signed by the Blue River Company.

‘Q. You have seen a number of checks on the pay roll for the operation of the dredge boat? A. Yes.

‘Q. Do you remember on February 28, 1938, who was in possession?

‘Mr. Shireman: There is no question as to that date,

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The Blue River Company was there.

'Mr. Cranston: It may be stipulated then that the Blue River was in possession of the dredge boat on February 28, 1938?

'Mr. Shireman: That is right. In actual possession and repairing the dredge boat at that date. In the shops and office.'

That was during the examination of the witness, the statement being made as to what his evidence would be and not as to stipulation of legal effect that they were in possession as exclusive, absolute owners. The Blue River Company was in possession under its contract.

In the record as Trustee's Exhibit 28, denominated a lease, the Placers Company therein called the lessor, and the Blue River Company as lessee, it is recited that the lessor owns a dredge boat and other property used and necessary in connection with the operation and maintenance of its said dredge boat, and has 'granted, demised and let, and by these presents do grant, demise and let for mining purposes unto the said lessee all of the above described property, together with any real estate hereinafter acquired, together with all appurtenances, together with any and all other property and rights granted to the lessor under said agreement between the lessor and the Company hereinabove referred to.'

Fish's attorneys, in open court, at conclusion of the hearing on the turnover order, admitted jurisdiction as to all property of Mines Company, and all appellants admitted jurisdiction on May 17, 1939, by written petition in which they stated that at no time had there been any question of the jurisdiction of the bankruptcy court over the property of Mines Company nor any question as to the jurisdiction of the referee over Mines Company's interest in the property which was included in the October 22, 1932, agreement constituting lessor's interest in the real property described therein.

In case No. 1925 orders of the District Judge of May 18, 1939, and June 1, 1939, nunc pro tunc, affirmed referee's order of January 28, 1939, holding that the bankruptcy court had jurisdiction of Mines Company and summary jurisdiction of the claims against Mines Company, to-wit, the claims of Fish and John B. Traylor, and the lease from Mines Company to the Lacers Company and summary jurisdiction as to property of Mines Company claimed at any time by the Lacers Company, and denying pleas of Fish and the Placers Company as to bankruptcy jurisdiction, and sustaining the plea of Blue River Company as to the bankruptcy jurisdiction as to its franchise as a corporation, and the dredge boat and its contents, and the pond and its surrounding bank area, and otherwise that the turnover order should be granted unconditionally against Fish and the Placers Company, and unconditionally against Blue River Company with the stated exceptions.

[35] Case No. 1955 is as to an action by Fish against trustee East in which Fish prayed that the property be adjudicated in such civil action to be his and East as trustee directed to convey same to him and title thereto be quieted in him. A motion to dismiss the action having been filed by the trustee was sustained by the court. Fish amended his complaint, the trustee renewed his motion to dismiss which was sustained by the court and Fish stood on same as amended and the action was dismissed, and the court held that the bankruptcy court not only had jurisdiction as to property involved in that action, but also jurisdiction as to the claim of Fish[FN2] in ***197** which a lien was sought on the rem, the controversy between Fish and trustee East relative thereto being retained in the bankruptcy court for future consideration. The question involved is whether Fish can commence and maintain such civil action in the District Court for the determination of controversies which at that time are being litigated in the same court as a court of bankruptcy. In framing his complaint against trustee East, Fish exhibited portions, but not all, of the record in the bankruptcy proceeding, the action commenced being in the same court where the bankruptcy proceeding is pending. The trustee proceeded directly to file a motion to dismiss, attaching to his motion as exhibits portions of the record in the bankruptcy proceeding omitted by plaintiff Fish which disclosed as to whether Fish had a claim on which relief as prayed for by him could be granted in such civil action. Such record in the proceeding in the bankruptcy court was that at date of filing petition in bankruptcy, the bankrupt had possession of the property in controversy, not only had title thereto, but also at the time when Fish commenced his civil action, such title was in trustee East under sheriff's deed issued to him pursuant to stipulations between the parties as made in the bankruptcy proceeding and approved by the referee. See copies

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of date, November 26, 1938, as herein, supra, set out (pp. 42-44).

The record disclosed that the sheriff's deeds, as well as the title sought to be quieted in him, which he seeks to obtain were then in the possession of and jurisdiction of the bankruptcy court.

As to the court's jurisdiction and power to adjudicate all such matters and as to the court's jurisdiction, see In re Tax Service Ass'n, 305 U.S. 160, 59 S.Ct. 131, 83 L.Ed. 100; Taubel-Scott-Kitzmiller Co. v. Fox, 264 U.S. 426, 44 S.Ct. 396, 68 L.Ed. 770; May v. Henderson, 268 U.S. 111, 45 S.Ct. 456, 69 L.Ed. 870.

At the hearing on trustee's petition for a turnover order, the existence of an agreement under which Fish purchased the certificates under arrangement with Mines Company, or its representative, was proved and the referee held that Fish had no right to the property itself, but only to establish claim based thereon. Fish in filing such attested claim in the bankruptcy court admitted the existence of such an agreement in that he swore that the bankrupt was indebted to him, attaching the sheriff's certificates and assigned judgments to his claim as evidence of the debt, seeking a preference or priority.[FN3]

In considering the trustee's motion to dismiss, the District Court took judicial notice of its own records for the purpose of determining what matters relative to such matter had been considered by the bankruptcy court, what decision had been made and what was for future disposition in the bankruptcy court. Thompson v. Maxwell Land-Grant & Ry. Co., 168 U.S. 451, 18 S.Ct. 121, 42 L.Ed. 539; Bienville Water Supply Co. v. City of Mobile, 186 U.S. 212, 22 S.Ct. 820, 46 L.Ed. 1132, 1133; Egan v. Hart, 165 U.S. 188, 17 S.Ct. 300, 41 L.Ed. 680.

The jurisdiction of the bankruptcy court to adjudicate the controversies growing out of the agreement between Fish and the trustee as filed with the court is controlling and exclusive, and may neither be surrendered nor control over such matter confided to a different tribunal. United States F. & G. Co. v. Bray, 225 U.S. 205, 32 S.Ct. 620, 56 L.Ed. 1055.

The complaint as amended stated no facts entitling plaintiff to relief in that it shows no right in Fish to institute the civil action, no jurisdiction in the court outside of the bankruptcy jurisdiction to grant the relief for which prayer was made, nor leave obtained to institute such action. The controversy between Fish and the trustee in the respects raised by the civil action rests exclusively in the bankruptcy jurisdiction and could be tried only in the bankruptcy court. The contention of Fish based on rights which might have been raised by him in another jurisdiction of the court had not jurisdiction of the bankruptcy court attached, or had no such agreement been made between him and the trustee East as approved by the referee as to trustee East's acquisition of the sheriff's certificates of purchase, etc., cannot now be heard in a civil law action.

In Case No. 1968 is involved an order by the District Judge of August 4, 1939, in which he affirmed order of referee of June 3, 1939, wherein the referee directed the Tiger Placers Company, Fish, and Blue River Company to turn over to the trustee ***198** and impound with Richard Downing books containing minutes of stockholders' and directors' meetings, stock books, account books, and property and books of the Tiger Placers Company and the Blue River Company, and the same as to Richard Downing of Denver and Horace E. Hildreth of Breckenridge for inspection and making copies thereof by East as trustee in bankruptcy, and to turn over all properties to said trustee belonging to the Mines Company which is held by them ‘except that said Blue River Company may retain possession of that certain dredge located in the Town of Breckenridge, Summit County, Colorado, and known as the Tiger Dredge No. 1, ‘ and also such real estate owned by or claimed by the Mines Company or the Placers Company, as therein specified.

[36] Appeal Case 2005. Within a few days after the referee entered the order directing the Placers Company and the other respondents to surrender to the trustee of the Mines Company the said assets, involuntary petition in bankruptcy on the part of Harry Cohen, doing business as Samuel Cohen Company, Frank Stafford, and Carl A. Kaiser, not parties to any of the proceedings of the Mines Company bankruptcy matter, was filed against the Placers Company, in which John H. East, Jr., as said trustee, intervened.

A petition for stay of proceedings upon said involuntary petition was denied, and trial was had on the merits.

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The involuntary petition alleged the commission of two acts of bankruptcy, one on the third ground, later withdrawn, and the other being the fifth ground set forth in Section 3, sub. a of the Bankruptcy Act, 11 U.S.C.A. 21, sub. a. The fifth ground relied upon, that the entry by the referee of the order directing the Placers Company to surrender its property to the trustee of Mines Company constituted the suffering involuntarily by it of the appointment of a trustee to take charge of its property.

The pertinent portion of the order is as follows: ‘ * * * said The Tiger Placers Company is ordered and directed forthwith to surrender and turn over to John H. East, Jr., as trustee in bankruptcy of The Royal Tiger Mines Company all of the property described in the subjoined list which it has in its possession or under its control; and also any and all other property of the Royal Tiger Mines Company and The Tiger Placers Company which it has in its possession or under its control, wheresoever the same may be, and whether or not the same be described in said subjoined list; * * * .‘

It is admitted that the claims of these petitioning creditors are sufficient in number and amount, that the Tiger Placers Company is such a one as may be adjudicated a bankrupt, and that at the time the petition was filed it was unable to pay its debts as they matured.

The other appellee, John H. East, Jr., as such trustee in bankruptcy of the Mines Company, and as such intervenor claims possession of the property of the Placers Company. The background is interesting and instructive only as explaining the appearance of the appellee East, trustee, herein as intervenor.

The findings on which the turnover order was based are that the Mines Company and the Placers Company are alter ego of each other, and constituted but one business enterprise, and that the Placers Company was organized and a lease made to it as lessee for the purpose of hindering and delaying creditors of the Mines Company.

The turnover order requiring the Placers Company to surrender the property was made June 3, 1939. The time within which creditors could file claims in the Mines Company bankruptcy proceedings expired on September 2, 1938, nine months prior to the making of the turnover order. The creditors' petition was filed against the appellant June 6, 1939, three days after the turnover order was made.

The language of Chapter 3, Sec. 3, sub. a(5) of the Bankruptcy Act, 11 U.S.C.A. 21, sub. a(5), provides: ‘ * * * While insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property; * * * .‘

In Duparquet Huot & M. Co. v. Evans, 297 U.S. 216, 56 S.Ct. 412, 80 L.Ed. 591, the matter arose under the provision of Section 77B of the Bankruptcy Act 11 U.S.C.A. 207, which permitted an involuntary reorganization petition to be filed if a prior equity receivership was pending against the debtor. It was there held that such receivership must be a general one for liquidation or for cognate purposes, and must be ***199** general as contrasted with a receivership incidental to the enforcement of a lien.[FN4]

In directing the property claimed by the appellant to be turned over to East, as trustee, this was after the referee had found that the two companies were entirely identical, alter ego of each other and so constituted as doing business under two organizations and both names, and that the parent company organized the subsidiary, the Placers Company, in order to hinder and delay creditors of the Mines Company. Creditors of the Placers Company that had been accumulated in the meantime may have the right to elect their own trustee and proceed under such rights as may be available by intervention.[FN5]

Creditors of the Placers Company, though it be an instrumentality of the Mines Company, may be entitled to be paid from the Placers Company in preference to the claims of the Mines Company. Such questions may be raised[FN6] and protection sought.

[37] Case No. 2007. Paragraph 3 of the lease of August 13, 1937, is a demise from Placers Company direct to the Blue River Company to have and to hold for a definite period, and by paragraphs 4 and 4-g. the Blue River Company was to comply with all the terms and conditions of the lease of October 22, 1932, from the Mines Company to the Placers Company and under paragraph 6 thereof a royalty plan was worked out which would restore 75 per cent. of

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the operating proceeds to the Placers Company. On January 28, 1939, the referee in bankruptcy, in his finding and order, said: 'The validity of the Blue River lease, as to the bankrupt's property, depends upon the validity of the contract held by the Placers Company which herein has been found (in cases 1925 and 1968) to be void as against the creditors of the bankrupt, and was void as against the creditors of the bankrupt and was void as to the successor in interest who had knowledge and notice of that invalidity. That includes the Blue River Company.' (Case on appeal No. 1925, Tr. pp. 209, 210.)[FN7]

The machine shops and office were included in the property ordered to be turned over to the trustee. The modification of the order of May 3, 1939, was by adding the additional provision: 'That at the time that this Order and Decree remains in full force and effect and the said Horace E. Hildreth is absent from Summit County, ***200** Colorado, then Tom E. Allen may and shall be employed by the said Blue River Company as superintendent, and as such shall be custodian of Blue River Company and/or Trustee of the gold and silver amalgam and gold nuggets, as hereinabove provided, and during the absence of the said Hildreth, have and be subject to all of the rights, duties and liabilities granted to or imposed upon the said Horace E. Hildreth by the terms hereof.'

And further that:

'Except as herein expressly modified or amended, the said Order and Decree of May 3, 1939, shall continue in full force and effect according to its terms until the expiration thereof or the further Order of Court.

'Dated June 14, 1939.'

After this order was made certain reports and maps appear to have been filed in the office of the referee, but not admitted in evidence nor considered. On pp. 20 to 24 of the transcript relating to appeal in case No. 2007, an application appears to have been filed on August 2, 1939, with the clerk of the District Court to disqualify the referee. A hearing on petitions for reimbursement of the Blue River Company was held on July 31, 1939. The transcript does not disclose that said application to disqualify was either heard or passed on by the District Judge. On July 26, 1939, Blue River Company filed two petitions for reimbursement. On same day the trustee filed his answer and cross-petition. The matter was heard on July 31, 1939. Disputes concerning the ownership of the ground upon which the dredge operated were considered. Upon conflicting evidence the referee fixed the rate of compensation for the shops at $15 per day and authorized the trustee to amend his answer, and on August 4, 1939, an amendment was filed in which he asked compensation for the use of material after date of bankruptcy and prior to May 9, 1939, and that 15 per cent of the net mint returns from gold be retained in the registry of the bankruptcy court until the actual ownership of the premises be determined. On August 4, 1939, nunc pro tunc order was entered setting over to the trustee $3,050 as general funds of the bankruptcy estate, allowing compensation for the shops at a rate of $15 per day and directing the reduction of 15 per cent. of the net mint returns from the sale of gold in a special fund to be set up as 'Tiger Dredge No. 1 Royalty Fund,' none of which was to be expended except upon further order of the court. Petition for review was filed by Blue River Company and upon hearing thereon the District Judge affirmed the order, except as to provision relating to the 15 per cent. royalty which was eliminated. The finding as made by the referee was upon conflicting evidence, being affirmed by the District Judge, and being supported by substantial evidence may not be set aside here on review.

[38][39][40] As to disqualification of the referee, under 28 U.S.C.A. 25, for the disqualification of judges, affidavit must be filed not less than ten days before the beginning of the term of the court or a good cause shall be shown for failure to file it within such time. United States v. Parker, D.C., 23 F.Supp. 880. The application was filed with the clerk of the District Court on August 2, 1939, the hearing to which it related having been held on July 31, 1939. The opening term of the District Court was May 2, 1939. The referee had already made findings and announced order as to the petition for reimbursement. Such written order nunc pro tunc was signed on August 4, 1939 as of July 31, 1939. The referee is not a judge within the meaning of Sec. 1(20) of the Bankruptcy Act, 11 U.S.C.A. 11(20) and of Sec. 21 of the Judicial Code, 28 U.S.C.A. 25. The referee is an officer of the bankruptcy court appointed and removable only by the judge of the United States District Court. Sec. 1(22) and Sec. 34(1), Bankruptcy Act, 11 U.S.C.A. 1(22), 62(1). The District Judge may also at any time for cause transfer a case from one referee to another. Sec. 22, sub. b, 11 U.S.C.A. 45, sub. b,

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Bankruptcy Act. There appears to be no rules either of said district, or in the rules of civil procedure, or in the general orders, relating to the removal or disqualification of referees. A party aggrieved by an order of the referee may file a petition for review. Sec. 39, subs. a(10), c, Bankruptcy Act, 11 U.S.C.A. 67, subs. a(10)c. The assignment of error as to the application to disqualify the referee must be overruled. [FN8]

[41][42][43] As to whether the bankruptcy court had power to withhold money deposited by Blue River Company and place the same in the general funds of the bankruptcy estate, to be held by the trustee, Sec. ***201** 68, sub. a of the Bankruptcy Act provides: 'In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.'[FN9]

The bankruptcy court was vested with the possession of the assets of the bankrupt as of date of filing petition, with power to prevent depletion. Whether the money set over to the trustee to be held in the general funds of the bankruptcy estate may be used to pay the expenses and fees of litigation with the appellant is within the jurisdiction of the bankruptcy court. It does not appear that though the fund has been set over to the general funds of the bankruptcy estate that the same has been illegally used. The order permitting the operation of the dredge pending appeal as made by the bankruptcy court under its limitations does not appear to be an abuse of its powers.

[44][45] Case No. 2023. As to order made by the District Judge on October 25, 1939, denying Fish's request to withdraw exhibits to claim theretofore duly filed for lien on property in possession of the bankruptcy court, and being in the files of the bankruptcy court, but on his request being permitted to withdraw his claim or so much thereof as he desired and the holding that the trustee in bankruptcy by virtue of Fish's withdrawal of his claim for a lien on property then in custody and jurisdiction of the bankruptcy court could cause such property to be sold in bankruptcy free and clear of all liens and encumbrances, including the lien of Fish as claims, is without error. [FN10]

The judgments in cases No. 1925, 1968, 2023, 1955, 2005, and 2007 are affirmed.[FN11]

On Petition for Rehearing.
PER CURIAM.

[46] Counsel for appellants have filed a petition for rehearing in which they assert that the opinion of the court leaves Erland F. Fish without remedy for the funds advanced by him for the bankrupts to acquire the tax and judgment liens. We did not so intend. To secure reimbursement for the funds so advanced, Fish is entitled to benefit of the judgment and tax liens. The statutory time for filing general claims having expired and Fish having withdrawn his claim, he is not entitled to an allowance for any excess of such advances not satisfied by his securities. But a secured creditor does not lose his lien by failure to file a claim. Remington on Bankruptcy, vol. 2, Sec. 910; Ward v. First Nat. Bank of Ironton, Ohio, 6 Cir., 202 F. 609, 612; Courtney v. Fidelity Trust Co., 6 Cir. 219 F. 57, 63; In re Cherokee Public Service Co., 8 Cir., 94 F.2d 536, 538. The trustee took the bankrupt estate subject to Fish's lien.

Hence, Fish is still entitled to the benefit of his securities and may enforce them in a proper proceeding. He may, if he so elect, file a petition against the trustee in the bankruptcy court seeking an enforcement of his securities and in that event, the referee should order sale of the tax and judgment liens to satisfy Fish's advances unless the trustee make reimbursement to Fish therefor.

The referee reserved any rights that the Blue River Company may have to file claim for reclamation. It was not the intention of this court to pass upon or foreclose any right that the Blue River Company may have by way of reclamation.

It is so ordered. In other respects, the petition for rehearing is denied.

FN1. Henry v. Dolley et al., 10 Cir., 99 F.2d 94; Taylor v. Standard Gas & Electric Co., 10 Cir., 96 F.2d 693; Id., 306 U.S. 307, 59 S.Ct. 543, 83 L.Ed. 669; Forbush Co. v. Bartley, 10 Cir., 78 F.2d 805; In re Muncie Pulp Co., 2 Cir., 139 F. 546; Hamilton Ridge Lbr. Sales Corp. v. Wilson, 4 Cir., 25 F.2d 592; In re Rieger, Kapner & Altmark, D.C., 157 F. 609; In re Lake & Co., D.C., 5 F.Supp. 179; Irving Trust Co. v. Fleming, 4

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Cir., 73 F.2d 423; Commerce Trust Co. v. Woodbury, 8 Cir., 77 F.2d 478; Trustee's System Co. v. Payne, 3 Cir., 65 F.2d 103; Cent. Rep. B. & T. Co. v. Caldwell, 8 Cir., 58 F.2d 721; W. A. Liller B. Co. v. Reynolds, 4 Cir., 247 F. 90; In re Holbrook Shoe & L. Co., D.C., 165 F. 973; Industrial Research Corp. v. General Motors Corp., D.C., 29 F.2d 623; Page v. Arkansas Nat. Gas Corp., 8 Cir., 53 F.2d 27; In re Schoenberg, 2 Cir., 70 F.2d 321.

FN2. Tr. in No. 1925, p. 20, Proof of Debt Due Individual (Secured and Unsecured): ' * * * Erland F. Fish * * * made oath and says that The Royal Tiger Mines Company, the corporation by whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition and still is justly and truly indebted to said deponent in the following sums: A. * * * B. * * * C. * * * D. * * * E. * * * F. * * * G. * * * H. * * * . That said claim is not a preferred claim except for the principal sum of $86,060.54.'

FN3. See note 2, supra.

FN4. Standard Accident Ins. Co. v. E. T. Sheftall & Co., 5 Cir., 53 F.2d 40, 19 A.B.R.,N.S., 49; Bramwell v. United States Fidelity & Guaranty Co., 269 U.S. 483, 46 S.Ct. 176, 70 L.Ed. 368; In re International Coal Mining Co., D.C., 143 F.665; Adams v. United States, 9 Cir., 24 F.2d 907; Walker v. Morgan & Bird Gravel Co., 5 Cir., 20 F.2d 547.

FN5. Oriel v. Russell, 278 U.S. 358, 49 S.Ct. 173, 73 L.Ed. 419; Farmers' & Mechanics' National Bank v. Wilkinson, 266 U.S. 503, 45 S.Ct. 144, 69 L.Ed. 408.

FN6. Carroll v. Stern, 6 Cir., 223 F. 723.

FN7. In the finding and order of the referee it is also said:

'The plea to the jurisdiction as to the Blue River Company is sustained in the following particulars:

'1. As to the franchise and rights of the Blue River Company as a corporation.

'2. To the Dredge boat, which was in the possession of the Blue River Company at the date of the filing of the petition in bankruptcy and to which for that reason summary jurisdiction does not attach.

'3. To any property of the Blue River Company which is not described either directly or indirectly in the lease from the Tiger Placers Company to the Blue River Company, dated August 13, 1937.

'4. To the real property upon which the dredge boat is actually now floating, whether the same is, or is not covered by the lease agreement of August 13, 1937, for the reason that that limited area of ground was in the actual possession of the Blue River Company, connected with its actual possession of the dredge boat.

'The pleas to the jurisdiction of the Blue River Company as to all other property which it claims to have acquired from the bankrupt company or the Tiger Placers Company ought to be overruled and denied, for the reason that that property was not, at the date of the filing of the petition in bankruptcy, in the possession of the Blue River Company, but is in the possession of the bankrupt and/or its subsidiary.

'Any claim to that property which the Blue River Company claims against the creditors of the bankrupt is colorable and invalid.

'The petition of the trustee for the 'Turn Over' order against the Tiger Placers Company and as against Erland F. Fish ought to be granted unconditionally.

'The petition of the trustee for a 'Turn Over' order against the Blue River Company is denied as to the exceptions hereinabove stated and ought to be otherwise granted unconditionally.'

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FN8. Ex parte American Steel Barrel Co., 230 U.S. 35, 33 S.Ct. 1007, 57 L.Ed. 1379; Henry v. Speer, 5 Cir., 201 F. 869.

FN9. Sec. 1, Chandler Act, June 22, 1938, c. 575, 52 Stat. 840, 11 U.S.C.A. 108, sub. a; Bankruptcy Act of 1898, c. 541, Sec. 68, sub. a, 30 Stat. 565; Cumberland Glass Mfg. Co. v. DeWitt, 237 U.S. 447, 35 S.Ct. 636, 59 L.Ed. 1042; In re Rosenbaum Grain Corp. (Nairn v. J. A. Acosta & Co. et al.), 7 Cir., 103 F.2d 656; Prudential Ins. Co. of America v. Nelson, 6 Cir., 101 F.2d 441; Pepper v. Litton, 308 U.S. 295, 60 S.Ct. 238, 84 L.Ed. 281, decided Dec. 4, 1939.

FN10. Sec. 23, sub. b, Bankruptcy Act; 11 U.S.C.A. 46, sub b; In re Jackson Brick & Tile Co., D.C., 189 F. 636, and authorities therein cited; In re Hanson, D.C., 18 F.2d 440; White v. Schloerb, 178 U.S. 542, 20 S.Ct. 1007, 44 L.Ed. 1183; In re Hollingsworth & Whitney Company, supra; In re Drayton, D.C., 135 F. 883, and authorities cited; In re Cann, D.C., 47 F.2d 661; In re Pilsener Brewing Co., 9 Cir., 79 F.2d 63.

FN11. The six cases: Nos. 1925, 1968 and 2023 brought up under one transcript (Tr., pp. 1-752), and the other three cases under separate transcripts, No. 1955 (pp. 1-47), No. 2005 (pp. 1-17) and No. 2007 (pp. 1-79), are consolidated for the purposes of this opinion.

C.A.10 1940.
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