Department of consumer and corporate affairs

INVESTIGATION MANUAL

SUPERINTENDENT OF BANKRUPTCY

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INTRODUCTION

Criminal Policy

PART I

The criminal law is a necessary part of the legal rules of a society. It is necessary in many ways. Besides enforcing compliance with a number of values, it also helps to define these values and to mark the limits to which people may act freely in regard to those values. In our society for example private property is considered a social value. This value can be effectively stated by the law in many ways. One way is by regulating exchanges of property to ensure that these take place in an orderly manner. Another way is to create a system of proof, such as registration, to provide security for the owners. Yet another way is to create offences against property, in order to set limits and to protect the holders of property rights. This is a negative way of stating values, but a most effective one.

The prohibitions contained in the criminal law can give a fair picture (although a negative one) of a given society's values at a given time. But this picture can change, sometimes fairly rapidly. For instance, in Canada, blasphemy was once a capital crime. Adultery was considered criminal. In some countries, such as France, it still is. Recent amendments to the criminal law in Canada show that offences such as gambling and gross indecency are being re-appraised by society. The cases on obscenity in Canada, and especially in the United States, show that there has been an evolution in society's outlook on these offences. In the economic field, the law is becoming more conscious of the consumer's rights.

These changes, which occur constantly in the criminal law, are changes in policy. The important thing to note about them is that they do not necessarily reflect a moral judgment. The fact that blasphemy is no longer prosecuted does not signify that the government has decided that blasphemy is a good thing; it means only that the government has decided that it is no longer a good thing to prosecute blasphemy. Other social controls may still operate to limit this activity: people who blaspheme may be ostracized, won't be invited to parties, etc.

If we looked at all the values of our society, we would see that only a few of them are protected by the criminal law. Thus, in the economic field, there are a number of acts and activities that might appear wrong and unsound, but which do not constitute offences. Reneging on a debt would certainly fit in this class, but it is not an offence. "Sharp practices" may be morally indistinguishable from fraud, yet there is a legal difference between the two. The fact that one activity constitutes a criminal offence and that the other does not can be termed a matter of criminal policy.

Understanding the distinction between immoral or wrong acts on the one hand, and offences on the other is extremely important. Acts are not punishable unless the law says they are.

Conversely, some acts are not in themselves immoral or bad, but may constitute offences. The omission by a business man to keep books may be bad commercial practice but, in itself, unless it is done to cheat his creditors, it is not necessarily evil. However, omission by a bankrupt who has previously been bankrupt to keep proper books is an offence provided for by the Bankruptcy Act.

This then, is an aspect of our criminal policy: the determination of which acts constitute offences. Other aspects of the law are determined by criminal policy, for instance the age at which a person can commit criminal offences in general (7 years of age) or in particular (rape: 14 years of age). Rules of evidence are often matters of criminal policy. In the United States, illegally obtained evidence can never be used in a criminal trial; in Canada it can.

Criminal policy often reflects principles of great importance to a society. Under the rules of the criminal law, an accused person is never obliged to testify against himself. If this rule were studied in depth, it would reveal a far-reaching concept of the relationship of an individual to society. In many cases, criminal policy is political.

Criminal policy must be understood as a background to the process of law enforcement. Every one who is engaged in this process is helping to fulfill the aims of organized society.

Although it is not always easy to take this "long view" of things, it is necessary to do so, in order to understand concepts which are in daily use in our law courts. The concept of legal guilt is an example of this. Law enforcement officers, for instance, sometimes become convinced, during the course of an investigation, of the "guilt" of the person whose activities

they are investigating. The case may raise many questions which are conveniently answered in their minds by the accused's guilt. (The accused's company has just been declared in receivership, no assets have been discovered, yet the accused's wife has recently bought a new house with a 3 car garage . . .). However, unless proof can be made by legal evidence of every legal requirement for a conviction, the accused will be declared not guilty. And not guilty he must be, since guilt before the courts is a legal, not a moral or factual issue.

To accept this concept, and to work well within its confines, requires a high degree of professionalism on the part of the law enforcement officer, and a good knowledge of the criminal policy relating to his field of activity. In this sense criminal policy will mean all the inter-related legal rules covering the field in which the law enforcement officer is engaged.

Understanding the implications of criminal policy will help the law enforcement officer to work more effectively. He will become more sensitive to what are and what are not offences. He will know what is and what is not admissible evidence. And his attitudes will be influenced by this knowledge. He will try to cultivate a scientific detachment in order to become more objective and more efficient.

Criminal law is not a collection of unrelated rules, an inventory of crimes and punishment. Rather does it resemble a very complex machine or better still, a living body, in which each part is essential to the other parts. Every person who is involved in the administration of the law, must possess, in addition to the particular skill which his function demands, a knowledge of the rules of law. Thus, a lawyer should be skilled in trial tactics and cross-examination techniques; this is his particular expertise. An investigator will possess a number of skills: he will generally know how to conduct an interrogation of witnesses and suspects, what to look for on the scene of a crime, how to recognize and identify a modus operandi. However, both the lawyer and the police officer will know a number of things in common, for instance, that the law in most cases requires proof of a "guilty mind" before an accused person may be convicted. This knowledge will have different practical applications: the police officer will search for evidence of this fact during the investigation; the lawyer, if he is acting for the accused will try to weaken or rebut such evidence in court in order to secure an acquittal.

The rule that a "guilty mind" is required in most cases for a conviction is not, in a sense, specialized knowledge. It is part of the general rules of law which serve as a background to the activities of the different participants in the administration of justice. A prosecutor will have these general rules in mind which he asks himself, when preparing the case: "What must I prove". The judge will advert to them where he has to decide whether the Crown has made its case. And the investigator, on a case, will need to know some general rules to answer the question: "What am I looking for".

These general rules of criminal law, as we have used the term here, may concern what is called substantive law, that is the law which defines the conditions required for guilt, or adjective, or ancillary law, which is in a sense the law dealing with enforcement and includes both evidence and procedure. The distinction between substantive and adjective law is, for our purposes, somewhat academic, and is not based on the respective importance of the rules so classified. For instance, the rule that says that an accused person is to be considered innocent of a crime unless proven guilty, is essentially a rule of evidence. It is also a fundamental freedom in a democratic state. The rule that a husband and wife cannot be convicted of having illegally conspired with one another, because they were once considered by the law to be one person and conspiracy requires a multiplicity of persons, is a substantive rule, but this does not have much bearing on most offences. The distinction is a traditional one, however, and the manual will follow it by subdividing the general part into substantive rules, evidentiary rules, and procedural rules.

The substantive law is often divided in two parts, the general and the special. The general part is that part of the law that applies to create the conditions of guilt and innocence: for example, the rule of law relating to criminal responsibility, to insanity, to self defence, etc. The special part concerns the offences.

Our manual will deal with the special part of the criminal law, but only with those offences which are most likely to be encountered by the investigators of the Bankruptcy Branch. These are the offences against property which are included in the criminal code, and the special offences created by the Bankruptcy Act. Efforts will be made to analyse these offences, to compare them and especially, to set out the essential elements of each offence, that is, a list for each offence, of those things which must be proven before a conviction may follow.

The object of this manual then is to give an outline of the general background rules of the criminal law, and to show how these apply to offences encountered in bankruptcy cases. It is to be hoped that investigators of the Branch will be able to rely on the manual for information on the law which they help to enforce; that they will be able through the manual to better understand the law enforcement process and the role of each participant in this process, that through the manual they will gain a more precise knowledge of what evidence is required by each offence, the means of obtaining it, and its weight in court.

I - GENERAL RULES OF CRIMINAL LAW

A. The Components of a Criminal Offence

What is a criminal offence? We have seen, in the part dealing with criminal policy that some acts were prohibited by law, others were not. Obviously, offences are those acts which are prohibited by law. Offences that will be encountered most often by investigators of the Bankruptcy Branch will be Bankruptcy Act offences, and certain Criminal Code offences. These can all be termed criminal offences.

A criminal offence, like any other human activity, is committed by a person as a complete transaction. Legal writers, however, in order to analyse them, have generally separated offences into components. There are three such components in an offence, the legal element, the material element and the mental element.

(a) The legal element is one that is given to us by the law. There can be no offence if there is no law which creates the offence. Thus, reneging on a debt, as such, is not forbidden by law. By the same token, acts which do not conform strictly to the definition given by law of an offence, are not offences. A single example of this case can be found at section 162 of the Criminal Code. According to that section, it is an offence to loiter at night without lawful excuse upon the property of another near a dwelling house. "Night" according to section 2(28) Criminal Code is that period between 9 o'clock in the afternoon and 6 o'clock of the forenoon of the following day. Thus it is not an offence to loiter without lawful excuse near a dwelling house at 8:59 p.m. One minute later, an offence has been committed.

This rule, that the act of which a person is accused must conform exactly to the definition of an offence has a close practical relation with the rules of evidence which we shall see further, in that it answers the question: what must be proven. It also stresses the importance of knowing exactly what a law means: this requires that a law be construed, that is, interpreted in such a manner as to give effect to the will of Parliament. More will be said later about the construction of laws.

The legal component of an offence can also mean that the act done, which is forbidden by law, was not justified by law as being in an exceptional case. The most common occurrence of this situation where an act generally forbidden by law is at the same time excused by law, is self-defence. Killing a human being, if it is done with intent, (and intent means intent to kill or to inflict such injuries as may cause death) is generally an offence. Such is not the case however when the killing is done to protect one's own life and security. This situation is covered

by the law, which recognizes that the circumstances of self-defence can justify an exception to the law prohibiting homicide.

We are given to understand that the example of self-defence to murder is not one that arises often in the ordinary course of bankruptcy investigation; the principle behind legal defences does, however, even in every day practice: searches based on warrants, seizures of documents, arrests. These could all be termed offences were it not for the law which sets them apart as exceptions to the general rule. The law, in effect, says this: trespass and assault under certain rigid conditions are not to be considered offences. These conditions may be the existence of reasonable and probable grounds of arrest, or possession of a warrant to search.

We shall study these situations more fully in our section on procedure. It is useful however to point out that there is a real relationship between the legal component idea and what may be termed police powers, in order to show how legal rules are inter-related, and also to underline the exceptional nature of police powers.

The fact that offences have a legal component (or better still are creatures of the law) entail the following considerations:

1. One must determine the legal source of an offence in order to prosecute;
2. This legal source must be properly construed.

The legal source of offences encountered in bankruptcy investigations:

(a) there is a specific Act which deals with bankruptcy and which contains a section on offences.

(b) the Criminal Code of Canada contains many offences pertaining to the field of bankruptcy.

(1) inchoate offences
(2) general offences of dishonesty
(3) bankruptcy offences

Construction of statutes becomes extremely important for the understanding of bankruptcy and code offences. The golden rule of construction has been stated to be that which follows the plain meaning of the words and when this does not give a clear result, such construction as will give effect to the will of Parliament.

The rule appears simple but certain factors contribute to making this rule somewhat more complex. One such factor is the survival in lawyers' minds of the "strict construction" rule. This rule developed at a time when the criminal law was extremely harsh, when felonies were punished by hanging (and there were some 250 felonies in English law at that time!). In order to mitigate the harshness of the law, judges would interpret statutes in a very rigid manner. The classic example is the statute making it a felony to steal a horse: an acquittal once resulted because the accused had stolen horses! It can be said that the intellectual habit of strictly construing criminal statutes has survived, but in a more moderate form. The main effect of the rule at present is to exclude from the scope of the criminal law those acts which cannot fairly be brought within the meaning of a statute: to exclude reasoning by analogy to create offences, for example, if illegal possession of drugs is an offence and drugs are defined as being those drugs which are mentioned in a schedule of drugs, possession of drugs other than those mentioned in the schedule will not be an offence, even if they are proven to be dangerous.

(b) The material component of an offence

The material component of an offence, sometimes called "actus reus" is that which the statute prohibits. Of course, this will vary in the case of each offence. The material element in certain offences is an act: assault is an example. In other offences, the material element will be an act, followed by consequences for instance in section 231(2) - "every one who unlawfully causes bodily harm to any person or commits an assault that causes bodily harm ..." This distinction may be clearly seen in the offences of dangerous driving and "motor manslaughter". On the part of the accused the act may be the same, the driving may be as careless in one case as in the other. What distinguishes these two offences, however, is that the latter requires that a human death have resulted from the careless driving.

There are other forms that the material element may take. Possession is often such a form, as in possession of narcotics, or stolen goods, or burglar tools. Possession is not easily described as an "act". It is a "continuing act".

Sometimes the material element is an omission or the failure to do something. Failure to file an income tax report is an example of this. Sometimes there are conditions to an offence, and these conditions form part of the material element.

Under the Bankruptcy Act it is an offence for a bankrupt, who has on a previous occasion been a bankrupt, to fail to keep proper books of account. In this case, previous bankruptcy is a condition and it forms part of the offence. Failure to make evidence of this fact will result in an acquittal.

It will appear from the foregoing that the material element is quite variable from one offence to another. It is therefore necessary to identify the "actus" of the offence in order to know what must be proven. For example, in cases where the "actus" is an act and its consequences, it will be necessary to prove the act, the consequences and a cause and effect relationship between the two. This will be the case when the offence charged is fraud. In fraud it is necessary to prove fraudulent means, deceit or falsehood, a loss by the victim (or by the public) and that the loss was due to the act of fraud..

Another reason why it is important to analyse the actus is that in many cases it will have a bearing on the state of mind required. For instance, the offence "assault of a peace officer", the courts have held that not only must the assault be intentional, but that the accused must have known that the victim was a peace officer.

(c) The mental element

Offences are punishable. This face about offences will have serious consequences in the criminal law. If offences are punishable, that is, if the law inflicts some form of suffering on those who commit offences, the law will generally require on the part of the offender a certain blameworthiness. It is because of this requirement that the law does not punish insane persons or very young children. This also applies to normal adult offenders. The law will not be satisfied if a certain act has taken place; it will be necessary to show that the accused person, while committing the act, had a certain state of mind. The state of mind required to turn a forbidden act into an offence is called "mens rea". This expression comes from a Latin phrase which is used by legal writers to signify that a man cannot be guilty of an offence unless he had a "guilty mind" while committing it. This requirement of a guilty mind is extremely difficult to define because the mental element will vary from case to case. We have seen that the material element, the "actus" varies according to the type of offence. So will "mens rea". It will vary both in kind and in intensity. In some cases, it will consist in the voluntariness of an act. Was this act willingly done or was it an accident? In other cases, the mental element will be more complex, as in theft, where the taking must be voluntary, without justification or claim of right and with intent to deprive the owner. Mens rea can also consist in what legal writers call "recklessness". Recklessness is the state of mind of a person who, although aware of the probable

consequences of an act, does that act. It may differ somewhat from "intent" which involves the consequences of an act.

How does one know what kind of state of mind is required by an offence? For instance, section 345 of the Criminal Code which creates an offence consisting in the failure on the part of an insolvent businessman to keep accounts states that no conviction shall obtain if this failure "was not intended to defraud his creditors". In the equivalent section of the Bankruptcy Act this requirement of a fraudulent intent is not present.

In some cases however the statute is completely silent on this point. When this occurs, the rule to apply is that mens rea is still required, unless the statute explicitly excludes it, or excludes it by necessary implication. In other words, mens rea is a component of every offence; the exception serves to confirm the rule.

A word about offences without mens rea: Parliament, being all powerful, can make any conduct an offence, even conduct which is not voluntary. This generally occurs when it does in statutes dealing with public health and the preservation of government revenues. There are no instances of this in the offences that this manual will cover.

What kind of mens rea does the law require when the statute is silent? Generally speaking, if the material element is one which consists of an act plus its consequences, the state of mind necessary to complete the offence will be knowledge of the act and forseeability of the consequences.

One would imagine, at first view, that the requirement of the criminal law concerning states of mind, is an impossible requirement to prove. How can one make evidence of what goes on in a person's mind? This objection was once answered by a judge who said that the state of a man's mind is as much a provable fact as the state of his digestion. Most acts which constitute offences will appear to be voluntary. As to offences which consist in both acts and their consequences, the consequences will generally be foreseeable. Accidents can occur, but it is reasonable to expect that people intend the natural consequences of an act. Thus, if one aims a weapon, pulls the trigger and kills someone, the normal conclusion is that this result was intended. Making evidence of the facts as they happened will probably be sufficient evidence of the mental element.

However, if each offence carries a requirement as to mens rea, it stands to reason that the absence of such mens rea will bring about an acquittal. There are many defences based on absence of mens rea. It will be advisable to have these defences in mind in order to look for facts which can exclude the defence.

Error in certain cases may constitute a defence. In this context, error is defined as a belief in a state of facts that would justify the conduct which constitutes the offence. Against a charge of theft, for instance, it is a good defence to show that the accused believed the thing taken to be his. "A" is charged with theft of an umbrella in a restaurant. He raises as a defence that he entered the restaurant with an umbrella, left it in the umbrella stand and wishing to take it with him on departing, took another umbrella. The error here is squarely on the facts. This defence, unless the judge disbelieves it entirely, should result in an acquittal.

Error on the facts is a permissible defence, error on the law is not. It is no defence to say: "I did not know this particular act was against the law". Section 19 of the Criminal Code states this.

This statement must be qualified. Ignorance of the law in certain very restricted cases, can be a defence. In these cases generally offences with a saving cause, such as is found in section 236, Criminal Code, which states that bona fide belief is a defence, or where the absence of a "claim of right" is an essential element of the offence, the defence can raise ignorance "not of the general law of the land" (such as the fact that murder is frowned upon) but of a particular point of law.

Whenever it appears, in the course of an investigation, that there is a chance that such a defence will be raised, it is a wise rule to draw it to the attention of the attorney who will be responsible for conducting the prosecution.

B. Criminal Responsibility

Our criminal law proceeds on a fundamental assumption: that every person is a free agent and can choose between right and wrong. This assumption is general: it does not prejudge those cases where the prosecution must prove that the accused acted with a certain intent, nor those where the defence claims a state of error, or an accident. It merely states that everyone knows the difference between right and wrong.

There are two exceptions to the principle, both based on experience of life.

Very young children do not know the difference between right and wrong. The criminal law therefore has special provisions concerning the responsibility of children. Section 12 of the Criminal Code states that "no person shall be convicted of an offence ... on his part while he was under the age of seven years". Section 13 of the Criminal Code declares that the Crown must prove that a child between the ages of seven and fourteen "was competent to know the nature and consequences of his conduct and to appreciate that it was wrong", before such a child can be convicted.

As a matter of practical consideration, the case of a child younger than fourteen years would be immediately referred to Juvenile Court.

The other exception to the principle of responsibility is that of insanity. In this case, it is up to the accused who pleads insanity to establish on a balance of probabilities that, at the time of the offence he was "in a state of natural imbecility or (had) disease of the mind to an extent that rendered him incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission (was) wrong".

The problem of insanity need not unduly concern investigators of the Bankruptcy Branch. To our knowledge, it is not often advanced as a defence in cases arising out of bankruptcy. The only application which we can foresee is that of the manic depressive who, in a manic state "makes or causes to be made a gift, conveyance, etc." In any event, it is up to the defence to make evidence of insanity.

The question of criminal responsibility which most concerns investigators of the Bankruptcy Branch is that of the criminal liability of corporations. On the one hand, criminal responsibility is an ethical idea, being based on assumption that people know the difference between right and wrong and are free to choose between them. How can a corporation, "a mindless creature, a thing without a soul" as one judge put it, resolve an ethical problem? On the other hand, personal liability is often inadequate as a means of enforcing

the law. Besides, the Criminal Code, in its section dealing with construction, defines "everyone" and "person" to include "bodies corporate, societies, companies .... etc."

The latter view, that corporations could be held liable for criminal offences was accepted as part of the criminal law. However, many problems arose. How could a corporation engage its liability? What offences could it commit? How could it be brought to trial? How could it be punished if ever it was found guilty?

The last two questions were resolved rather simply: A corporation appears by counsel or agent; should it be found guilty, a fine shall be levied.

The answers to the other questions are slightly more complex. As to liability, a corporation has no mind of its own and therefore must be bound by others. At first, it was thought that only "the directing mind and will" of the corporation, the "alter ego" of the company could implicate the company's liability in a criminal act. This meant looking for a person who was so close to the very personality of a company that his actions became identified with it. This was extended further by the courts to officers who are agents of the company "and something more", as for example the directors and general manager of the company. The final extension of the criminal liability of companies occurred in a case where it was held that an employee who was neither a director, nor a superior officer, but who had complete control over local operations, could engage the company in criminal liability.

To summarize the theory on corporate criminal liability, the basis of this liability is the possibility of identifying an act of one of the company's officers as the act of that company. This is possible when the officer is given complete control or authority over the company's operations, either on a general or a local basis.

The second point where answers present some difficulty is the nature of offences that can be committed by a company. It is not disputed that a company can be held criminally responsible for fraud. But what about other offences? Judges have stated that a company cannot be held liable for offences such as bigamy or murder. Suffice it to say that companies are able to commit most if not all of the offences likely to be encountered by bankruptcy investigators.

C. Participation

Offences describe activities which Parliament has held to be criminal. However, each description of an offence has to be read with the general rules of law in mind. Stealing chickens is an offence because the Criminal Code, at section 269, states that "every one who fraudulently and without colour of right takes ... with intent to deprive ... the owner ...". It is obvious that this covers the chicken thief, because he actually takes. But what about the chicken thief's friend who holds the bag while the thief handles the pullets? What about the thief's other friend who drives the getaway truck and who is keeping an eye open for the farmer? What about his relative who lent his truck, knowing that it was to be used for such an expedition? What about the person who had the idea in the first place but decided, at the last moment, not to come along? It is obvious that all these people are involved, although it is equally obvious that they did not "take" the chickens.

The law deals with this situation at Sections 21 and 22 of the Criminal Code, which are entitled: "Parties to Offence". These sections, by virtue of the Interpretation Act, also apply to Bankruptcy Act offences. The purpose of the two sections is to answer the question: "What are the acts that can implicate a person's responsibility in a criminal offence?".

The principle stated in sections 21 and 22 is that a person may be held completely and individually responsible for a criminal act if his participation in the act is that described in one of the sections. In other words, the sections set out different ways of committing an offence.

The first mode of participation recognized by the law is that of the person who "actually commits" the offence (21(1)(a)). This is the case of the chicken thief. This is also the case of a person who "works" through an innocent agent. In one of Edgar Allan Poe's stories, a gorilla has been employed by his owner to commit murder. It is obvious in this case that the "person" actually committing is the gorilla's owner. Although an exhaustive search of the authorities shows that this particular type of use of an innocent agent is relatively rare, cases may arise where the principle obtains. The example most often seen is that where a messenger is sent to cash a worthless cheque, not knowing that the cheque is worthless. In such a case, the person employing the messenger will be held to be the person "actually committing".

A second mode of participation is that of a person who "does or omits to do anything for the purpose of aiding to commit" the offence. This is the case of the chicken thief's friends who, respectively, hold the bag, drive the getaway truck and lend the truck for committing the crime. The condition required for this type of participation, of course, is that the help given be "for the purpose of committing the offence". In other words, the aider must know that an offence is to be committed.

This sub-section also speaks of an "omission" to do something for the purpose of aiding. This omission must be a "positive" one. It is not criminal to stand by and not react when a crime is being committed, unless the person has a specific duty to perform, which he does not perform in order to aid those who are committing the offence. This would be the case of the night watch-man who, on purpose, omits to lock the door to facilitate the work of a burglar.

It is also a mode of participation to "abet" a crime. To abet, according to the dictionary, is to promote or to instigate. The difference between abetting and other forms of intellectual participation is that this expression is used mainly when the party charged with abetting is present at the scene of the crime and doing something to encourage the main offender.

A very important form of participation is that which is described at 21(2) of the Criminal Code: "Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence".

This is, as we have said, an important form of participation, because it arises frequently and has important evidentiary implications. The principle, simply stated, is that each person involved in an agreement to carry out an unlawful purpose, is a party to any offence committed by any other party to the agreement, provided that the offence was foreseeable as a probable consequence of the carrying out of the agreement. Thus, any party to an agreement to commit a fraud, is also a party to the offence of uttering a forged document if it is foreseeable at the time of the agreement that the fraud will take this form. As a matter of fact, a party to such an agreement will have committed three offences: fraud, uttering a forged document and

conspiracy to commit an indictable offence, to wit, a fraud. Thus, this form of participation is both a way to become a party to an offence and an offence in itself.

The evidentiary implications of a common purpose participation are the following: once it has been established that an accused is a party to a common unlawful purpose, statements made by other parties to the agreement and tending to further the common purpose, can be admitted in evidence against the accused. In a sense, they are considered to be <u>his</u> statements.

Finally, the last form of participation is that of the person who counsels or procures a person to be party to an offence. This is the case even if the offence was committed otherwise than the way it was counselled (the victim was strangled, not poisoned). The person who counsels is also a party to every offence likely to be committed in consequence of the counselling.

All persons who are parties to an offence, whether by actually committing it, or by any other form of participation, as set out above, are guilty in the same degree and liable to the same sentence. In the case of the chicken thief, seen above, all of the persons implicated could be charged with theft and all could receive the same sentence.

The one exception to this principle is that of the accessory after the fact. Section 23 of the Criminal Code defines the accessory after the fact as the person who has been a party to an offence, "receives" "comforts" or "assists" that person for the purpose of helping him to escape. Accessories after the fact, if convicted, are liable to lighter penalties than parties to the offence (406 C.C.).

The last question to arise in connection with participation is that of participation by <u>privity</u>. This expression occurs in a few instances of offences, in particular at section 340(2) of the Criminal Code. Privy means "a participation in interest or knowledge". The practical effect of this expression, where it is used, would be to make a party to an offence of a person who had knowledge of the offence, hoped to reap some benefit from it, and did nothing to prevent it. This, of course, is a very exceptional form of participation and can be invoked only when the statute uses the expression "privy".

D. Inchoate Offences

Before an act can be considered a criminal offence it will have passed through a certain number of stages. Generally, the accused will have thought about the possibility of committing the offence. He may have made some preparation for committing it. He may have contacted partners for help in committing it. Finally, when the act has reached such a degree of completeness that it may be said to conform to the definition of a particular offence as included in a statute, we may speak of the commission of a criminal offence.

It is obvious that not all of these states in the commission of a criminal offence are dangeous to society. Thinking about committing offences can never be dangerous if the thought is not translated into some form of action. Preparation in itself is not dangerous. There is really not much difference in getting out of bed and putting on one's shoes in order to go and commit a hold-up and performing the same actions in order to go to church. However,when the intention to commit a crime is obvious, and when this intention brings about an act which is very "close" to the intended offence, there is no reason why society cannot intervene.

This is why attempts and conspiracies are punishable as distinct offences under our criminal law.

Conspiracy is defined as an agreement between two or more persons to commit a criminal offence, to achieve an unlawful purpose by lawful means, or a lawful purpose by unlawful means. A conspiracy is a distinct offence and may exist both if the main offence is committed and if it is not. The gist of the offence is the criminal meeting of minds. This in itself, says the law, is socially dangerous.

Conspiracy is not a "crime of thought", it requires real intent and real agreement. But once this agreement is reached, a socially dangerous situation has occurred; people who agree have generally committed themselves more fully than people who have individually resolved to do something.

Conspiracy is considered here as a distinct offence covered by section 408 of the Criminal Code. Conspiracy also serves in law as a means of participating in an offence. Let us say that A, B and C conspire together to commit a criminal offence, a robbery. A and B actually commit it and share the spoils with C, their co-conspirator. A, B and C may be charged both with the robbery itself (by relying on section 21(2) in the case of C) and with conspiracy to commit a robbery.

The practice of charging accused persons with both the substantive offence (the main one) and the conspiracy is sometimes frowned upon by the courts as being inconsistent with fair play. However, in legal theory, an accused may be held guilty of both offences. There is evidentiary value in being able to show that a conspiracy existed and investigation officers should be sensitive to evidence of a common design when they investigate an alleged offence.

Attempts are defined at section 24 of the Criminal Code as the doing or committing of anything for the purpose of carrying out an intention to commit an offence, whether or not it is possible under the circumstances to commit the offence. Subsection 2 of section 24 adds that it is a question of law whether an act is an attempt or mere preparation. This difference between preparation to commit an offence and a criminal attempt is one of the most perplexing questions in the law. No completely satisfactory rule has ever been formulated. The Supreme Court of Canada has stated the rule to be that an attempt consists in " . . . an overt act proximate to the crime".

Although it may be difficult to give a satisfactory theoretical definition of an attempt, there should be no practical difficulty in identifying one. Attempts occur in the case of incomplete offences either through resistance on the part of the victim, intervention by a third party, or failure by the offender to carry out his intention. There can be an attempt even if circumstances make the crime impossible. The classic example of this is the pickpocket whose activities sometimes lead him to explore empty pockets. He can be found guilty of attempted theft even if the pocket he was "working" in was empty. Another example is that of abortion, where an attempt can occur even if the method employed was not of such a nature as to cause the foetus to abort, providing that the accused believed the method to be effective.

Attempts and conspiracies are often classified in the same chapter as inchoate offences, because these offences cannot be specifically defined ("doing or omitting anything" is not a very specific definition) and occur as a preliminary to a specific offence. There are differences however in the practical application of these preliminary offences. A conspiracy requires more than one person; an attempt can be committed by only one.

Conspiracy must be specifically charged; the offence of attempt is included in every other offence (with rare exceptions).

Attempts are excluded once the main charge has been proven; conspiracy can co-exist with the main (or substantive) offence.

II - EVIDENCE

A. Burden of Proof

The general rules of criminal law are called substantive rules, as are those that deal with specific offences. The law of evidence is "objective" law, that is, law which serves to give effect to another part of the law. The object of law of evidence is to give effect, in particular cases, to the substantive law. It achieves this by setting standards as to the degree of conviction that a court must have before it can punish; by establishing what facts can get before the court; by listing the different ways these facts can be heard. Evidence is the reality of the court: apart from evidence legally adduced. The court has no knowledge of the outside world.

Evidence in bankruptcy prosecutions will have to conform to the standard in criminal cases. This means that the judge will have to be satisfied that the guilt of the accused has been proven beyond all reasonable doubt.

This is probably the most characteristic and important rule of criminal law. The one that suffers no exceptions. What does it mean?

Let us try to understand it by approaching the rule from the point of view of the society in which we live.

In our society, a citizen is considered to be a free person. This freedom of the citizens is considered to be an essential part of the quality of life in our type of democracy. It is a fundamental freedom.

How does society preserve this freedom of the individual? By certain guarantees in the law and by the organization of its law enforcement program. In criminal law, this translates into a system which can be termed accusatory. In such a system no one can be called to account for his conduct in a general way. When an offence occurs, the person suspected must be specifically charged (or accused) of the offence, and it is up to the person accusing to make good his accusation. (in vulgar terms, this might be called the "put up or shut up" system). Object: to ensure freedom and responsibility.

This is not the only protection the individual has before the law. The prosecution, as we have seen, has to establish the facts which will support a charge; these facts must be established however, to a near certainty. This near certainty has been described as that resulting from proof beyond a reasonable doubt.

Proof beyond a reasonable doubt is hard to define. A reasonable doubt according to the cases, is the doubt that a reasonable man, having heard all of the evidence, might still entertain as to the guilt of the accused.

The cases have been more successful in saying what a reasonable doubt is not. The Ontario Court of Appeal has decided that a reasonable doubt was not one that a reasonable man would have in dealing with his ordinary affairs, because a reasonable man generally bases his decision on the balance of probabilities and does not decide only when he is convinced beyond a reasonable doubt.

It appears therefore, that proof beyond a reasonable doubt is proof that conforms to very high standards. Why does the law insist on so stringent a standard? Because the law, particularly in criminal matters, must inspire trust and be seen as good. By insisting on proof beyond reasonable doubt before punishing, the law is fairly sure that the public will have confidence that only the guilty are punished. If there were any doubt as to this, if society felt that innocent persons were being held in custody, people would become cynical and disrespectful about the legal process.

This attitude of the law concerning prosecutions is called the presumption of innocence. In legal terms, this translates into what is called the onus, or the burden of the prosecution. The prosecution has two burdens, corresponding to the values described above, that is, freedom of the citizen, which results in the accusatory system, and the security and trust of the public, which requires proof beyond reasonable doubt. The first burden or onus, sometimes called the legal burden, is a duty on the prosecution to advance evidence of every element of the crime. The second burden, called the persuasive burden, is really a view which the judge or jury takes of the evidence. This evidence must be convincing to the point where all reasonable doubt is eliminated.

Let us look again at the two burdens in a practical application. Let us take the following facts:

The Crown has decided to proceed against A, B & C on a charge of fraud. The facts are the following:

A, B & C are the directors of a company dealing in "reconditioned motors". Their modus operandi is as follows: The company offers to the public, reconditioned motors at very favourable terms. On reception of the down payment, the customer's car is taken into the garage and kept for two days. The motor is subjected to a thorough steam cleaning, painted bright red, and the car is then delivered. The customer's note for the balance of payment is then discounted to a compliant finance company. Within a few months of operation, during which rent and incidentals are not paid for, the company files an assignment, the directors incorporate a new company, relocate, and continue their operation.

Suppose then that the Crown, knowing all these facts decides to proceed against A, B & C for fraud. The Crown will present evidence of certain facts to the court.

Suppose that the Crown adduces evidence of A's involvement in the operation; suppose that an expert mechanic is called by the Crown to testify to the fact that the engine motor has never been reconditioned. Suppose also that this expert's evidence breaks down under cross-examination and that it develops that his inspection was cursory, that he cannot positively swear that the engine was not reconditioned. This will result in an acquittal. Why? Because the Crown has not fulfilled its first duty, that of establishing the facts necessary for a conviction. Note that the judge, at this time, is not called upon to determine whether or not he is convinced "beyond all reasonable doubt" of the accused's guilt. At this stage, he is only concerned with "counting" the evidence, not weighing it. The acquittal, at this stage, can be considered technical: there is no case, the facts do not justify the conclusion that a crime has been committed. When the evidence is incomplete, the defence lawyer will ask for dismissal by making a motion for non-suit. In jury cases, the judge, at this point, will instruct the jury that there is no possibility of convicting the accused and direct the jury to acquit.

The conclusion to be drawn from this example is that in each offence there are a certain number of facts to be proven. These facts are called "elements of the offence". We will discuss these elements further after our second illustration.

Suppose that in the same case, the expert mechanic's evidence is very strong. He has made a thorough inspection of the engine and it has definitely not been reconditioned. The aggrieved customer then tells his story to the judge and claims that he has been promised a "reconditioned motor" by the accused, in person.

The defence makes a motion of non-suit. The judge refuses it because there is evidence of every element of the crime.

The accused does not present any witnesses nor does he take the stand in his own defence. The judge renders judgment. He acquits the accused. What happened?

What has happened is that the judge is obviously not convinced beyond a reasonable doubt of the accused's guilt. The judge may feel that some of the Crown's evidence was open to different interpretations, that it was not entirely convincing. He may feel that some Crown witnesses were not being entirely candid, and the judge's opinion of the credibility of the witnesses is a matter of discretion. He may feel uncomfortable with the evidence as a whole, and, while recognizing that there is evidence on which he could convict, not feel securely that he should convict.

The second burden that the Crown has to discharge, that a proof beyond reasonable doubt, is not a technical burden. This is one that the judge has to deal with in his own conscience.

These, then, are the two main duties of the prosecution in a criminal case. The matter, however, does not end there. There is yet another standard, the standard applicable in cases where the evidence is evidence of circumstances from which the court is asked to infer the accused's guilt. In these cases, the evidence must meet the following test: that it be not only compatible with the accused's guilt, but incompatible with any rational conclusion other than that of the accused's guilt.

Returning to the legal burden of evidence, the prosecution's duty to adduce evidence of every element of the crime, we must ask ourselves what are the elements of a crime. In the second part of this manual, we shall attempt to set out the different elements of the offences that occur most frequently in bankruptcy cases, both Criminal Code and Bankruptcy Act offences. For the present, let us say that the elements of an offence are the contents of the Crown's case, that which must be proved. In the example above, the offence was fraud.

Fraud is defined by the Criminal Code at section 323(i): "Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security is guilty of an indictable offence and is liable to imprisonment for ten years".

To establish fraud, the Crown must prove:

1. deceit, falsehood or other fraudulent means;

2. a "loss" of property, money or valuable security on the part of a person or the public;

3. a relationship between the loss and the fraudulent means.

This is not sufficient. A fraud has been committed, but by whom? The Crown must also prove:

4. participation of the accused in the fraud.

Finally, and this does not appear specifically in the working of section 323, the Crown must prove a "guilty mind", "mens rea", a "fraudulent intent" on the part of the accused.

The complete summation of the Crown's legal burden of proof would then be:

1. an act of fraud;

2. a loss to the public or to any person;

3. A casual relation between the act of fraud and the loss;

4. the participation of the accused in the act;

5. an intent to defraud on the part of the accused.

The wording of the section will furnish us with numbers 1, 2 and 3. Elements 4 and 5 however, will depend on the general principles of criminal law.

Participation of the accused is dealt with by sections 21, 22 of the Criminal Code.

Intent is a general rule of law which we will deal with in the special part of the manual.

B. What is Evidence?

We have seen that, for purposes of understanding, offences may be divided into components. This may be simplified further for purposes of evidence by saying that the prosecution must generally prove that the accused in one of the ways described in sections 21 and 22, participated in conduct that conforms to the definition given by a section of an Act creating an offence, and that he did this with the prescribed state of mind.

Obviously, if law enforcement agencies have decided to take criminal action against someone, they must have some grounds to do so. Why not then, have the people who made the decision come before a judge and give their reasons for doing so? The accused could then give his side of the story and the judge could decide what facts were important, which of them were true, and conclude on these facts.

Although such a procedure would have the advantage of being extremely simple, it is not the way things happen in court. There are numerous rules concerning not only the ways of presenting evidence, but also concerning the very admissibility of such evidence, whether or not it may be offered as evidence. These rules are justified on a certain number of grounds, most of which boil down to the fact that rules of evidence are for the purpose of protecting the truth and for keeping the issues simple.

It must be remembered that most offences can be tried before judge and jury.

As juries are composed of people who are not specialists of the law, some system must be found to keep them from granting too much weight to things that are not important to the proof of the offence. One rule is to have the judge point out what the jury must consider and what it must not consider in arriving at its verdict. This is frequently done. Another rule is to exclude certain classes of evidence from the jury's knowledge. This is the meaning of our exclusionary rules of evidence.

Some legal systems, like that of France, do not have exclusionary rules. However, the judge or judges deliberates with the jury and presumably point out the dangers inherent in weak evidence. This, of course, is very foreign to our own system, where the jury's principal quality is its independence.

One such exclusionary rule is the rule regarding hearsay evidence. Hearsay evidence is given by a witness as to what another person, who is absent, could have testified. Thus, A will testify that B said something concerning C, who is accused. Hearsay evidence can also be documentary. A letter from A to B concerning C will constitute hearsay as to C.

There are cases when hearsay will not be excluded. The dying declaration of a person who knows that he is dying, will generally be admitted against the accused.

The object of this rule is to safeguard the truth. Hearsay evidence is not guaranteed by an oath; the originator of the statement does not risk his soul (nor a charge of perjury) when he makes the statement, he is not cross-examined as to its truth. This rule may be beneficial to the accused, but it is also beneficial to the court because it eliminates dangerous and uncertain evidence. The exceptional cases where hearsay is admitted show that the general rule is the protection of truth. These exceptional cases are cases where the truth is protected by means other than the oath and cross-examination. In dying declarations, it is presumed that a person, knowing that he is to die, will not do so with a lie on his conscience. It may be said, in this respect, that the official view is that people <u>do</u> have a conscience.

Is there a general rule concerning the admissibility of evidence? One can state that the principle is the following. Every relevant fact may be admitted, unless it belongs to a class of evidence which is excluded. What is relevant?

(1) Direct evidence of the components of the offence.

(2) Evidence indirectly proving the offence.

(3) Evidence affecting the credibility of witnesses.

(4) Evidence affecting the admissibility of evidence.

(5) <u>Corroborative evidence.</u>

The first point is easily understood. Direct evidence of a component of the offence is essential. There can be nothing more relevant than this.

Evidence indirectly proving the offence. This class of relevance is more controversial than the first. The relationship between this evidence and the fact to be proven is a logical relationship. When a witness says to the judge: "I saw the accused shoot the deceased", the judge will only have to ask himself: is the witness telling the truth and did he really see this? But when the witness says: "I found a blood-stained weapon in the possession of the accused", this raises more questions than it does answers. For instance: Was this the weapon used in the offence? How did it get into the accused's possession? Did the accused use it himself?

The fact may be relevant as indirect evidence, but it may prove to be a red herring. In this case, there will probably be a condition to be met before the evidence is admitted. For instance, it will be necessary to prove the relationship between the accused and the fact. Proof of accused's handwriting will have to be made before a document, purportedly written by the accused, will be admitted, unless the relationship is otherwise established.

Motive is rarely part of an offence (it is not necessary to hate anyone to commit murder), but it is generally admissible as a circumstance which, along with others, will point to guilt.

Character is rarely admitted as relevant to prove the offence. (The offence was theft. The accused is a known thief. Therefore the accused committed the offence). It may be admitted in respect to credibility, however, and in certain cases, as to identity.

Facts establishing accused's guilt in other offences are not considered relevant to prove an offence. However, proof of similar facts can be made in order to meet a defence based on honest intent.

Sometimes the law states certain facts to be relevant. On a charge of receiving stolen goods, the fact that the accused, on other occasions, in a given period, received stolen goods, is relevant to prove intent. This is a case of the law declaring certain evidence admissible which would otherwise be questionable.

Some facts have absolutely no bearing on the issue of the offence but are admissible nonetheless on the question of whether or not a witness is to be believed. Suppose that a witness is called on a contested point and that this witness has twice been convicted of perjury.

These convictions for perjury may have nothing to do with the case at hand, let us say a case of fraud. However, the convictions for perjury will have to be taken into account when the time comes to assess the truth of the witnesses' testimony. Thus the fact of the witnesses' former convictions will be admitted in evidence.

Other examples of evidence which can be admitted as to credibility: The fact that the witness has made prior statements inconsistent with his present testimony. Prior convictions of the witness. The fact that a witness has an interest in the outcome of the case.

Evidence which can corroborate other evidence is generally admissible. On a charge of disposing of property to defraud, the fact that the accused was seen at the locale where his property was transported, can be corroborative of testimony that he was present when the transporation took place. Alone, this evidence would be of such negligible value that it might be considered irrelevant. From an independent source, it might acquire weight as a factor tending to show that the main testimony relied upon is true.

Finally facts dealing with the evidence itself and its admissibility are generally admissible. An example of this would be the evidence of continuity of possession of exhibits; the fact that investigators can testify that a document seized in a search has constantly been in their possession and has not been tampered with, has no relation to the value of the contents of this document. The document is no more or less damning because it has been well kept. However, the weight that will be attached to this document will be greater if it is shown that this document is exactly the one that was seized on the accused's premises. The same applies to identification parades.

The description of the other persons in one line-up will have no bearing on whether or not the accused committed the offence. It will be important however in order to help gauge the quality of the identification made by the witnesses.

We have seen examples of relevant evidence. Evidence which would be considered irrelevant would be the following:

Evidence tending to show that the accused's character is such that he could very well have committed an offence.

Evidence that has a very distant bearing on the offence. Accused and co-accused spent their holidays together five years ago.

Evidence of "collatoral" facts. The victim of a rape states that she never had sexual relations with X, a person other than the accused. X cannot be called to dispute her claim. Evidence of this sort although inherently interesting, would be taking the case too far afield.

When refusing to admit evidence, a judge sometimes declares that a fact is not admissible because "it is not evidence". In such a case the judge is merely referring to the probative value of a fact.

C. Types of Evidence

In order to acquit itself of its burdens, the prosecution must adduce evidence of the offence. This chapter will be concerned with the physical form of evidence. How do facts get before the courts? What form does evidence take and why?

Ways of Knowing the Facts

One must have in mind, as regards the question of the form of evidence, the particular role which is played by the judge in our system of law. Our system is accusatory, not inquisitional. Essentially, the judge's role is not to get to the facts, but to judge them as they are presented to him. This neutrality on the part of the judge will dictate what must be proven. The judge's knowledge of the facts will depend on what is presented before him in court, and not on what he may know personally. The general rule is that evidence must be made of every pertinent fact required to reach a conclusion of guilt. There are two exceptions to this rule.

Judicial Knowledge: Certain things need not be proven. Law is never proved in court. It may be argued, but law needs no proof unless it be the law of foreign countries, which is treated for this purpose as an ordinary fact. Things that a judge will need to know as a part of his duties. The physical boundaries of his judicial district, for instance.

Things that an ordinary, unspecialised, intelligent person will know. That Toronto is in the Province of Ontario, that water freezes at 32^{o}F, etc. However, more technical knowledge, (that copper tubing is used in distilling alcohol) is not a part of judicial notice.

When the judge takes judicial notice of a fact, this may mean that he already knows it, or that he has informed himself of the fact. The line between facts that may be judicially noted and facts that must be proven can, at certain times be very thin. It is a sound rule for an investigator to take nothing for granted in this respect.

Admissions by the other party dispenses the prosecution of adducing evidence of the point admitted. For example, on an indictment for receiving stolen goods, the accused may admit he was in possession of goods that were stolen but base his defence on his ignorance of the fact that they were stolen. In such a case, the only proof that the prosecution will have to make will be that of the accused's guilty knowledge.

The judge can have direct contact with certain facts through physical evidence. These include the possiblity of a view when location is important, the presentation of an exhibit, the production of stolen goods, weapons, marks, documents, etc. Exhibits of course must generally be related to the matter at hand by testimony. Although a blood-stained knife can be a very eloquent exhibit in a murder case, this will not be so if testimony brings out that the victim died of gunshot wounds. Even in this type of evidence, testimony is essential in order to give effect to the thing.

Physical or real evidence must not be confused with visual aids which are sometimes used to illustrate the opinions of experts. Enlargements of photographs of fingerprints are not physical evidence. They merely help to understand the evidence.

Physical evidence, within the limitation, can be extremely good evidence. It must be treated carefully, however.

Certain problems may arise in connection with the custody and identification of this evidence. We shall deal with these more specifically in the special part.

Witnesses. The next best thing to seeing something, is hearing a trustworthy person tell about it. If the description of what happened is a good one, if a check can be made of the person's possibilities of observing, if the person gives a guarantee of the truth of what he says, it can safely be held to be true.

This is essentially what witnesses do in court.

The testimony of witnesses is probably the most important evidentiary device in the criminal trial. Most cases in fact turn on the testimony of witnesses.

There are a certain number of problems associated with the question of witnesses. We will review them briefly to try to give a complete picture although we will emphasize a few of these problems which are more likely to be of interest to investigators dealing with bankruptcy offences.

The first question concerning witnesses is: Who can testify? This question stands apart from the subject matter of the testimony. For instance, a lawyer can testify but testimony involving communications between a lawyer and his client is barred.

The ability to testify is called the competency of witnesses and the rule is that everyone is a competent witness. This is a relatively modern rule in criminal law, because there was a time where some classes of witnesses were excluded from giving evidence, convicted felons, for instance, or people who had an interest in the case (including the accused). The rule now is that generally, everyone can give evidence but in some cases where formerly they could not, there are special rules affecting credibility.

Of course, there are certain exceptions to the competency of witnesses. Husbands and wives may not give evidence one against the other except in the case of certain offences (mostly sex offences) and when the offence involves violence or coercion between them (this would exclude bankruptcy offences). (This applies only to legally married people.) Insane persons, if their insanity is established, will be barred from testifying. Very young children are not competent witnesses unless the judge believes that they can give realistic testimony. The competency of these latter classes of witnesses, must be established to the satisfaction of the judge. This is done by examining them before they are sworn.

The next question about witnesses is: how can a witness be brought to testify? This is termed the compellability of witnesses. The rule in this respect is that any competent witness can be forced to give evidence. Here again, there is a difference between the defence and the prosecution. Witnesses who are competent for the defence but not for the prosecution are compellable only by the defence and not by the prosecution.

The actual "compelling" of a witness is done by subpoena. The subpoena is an order by the Court to a witness to attend a given sitting of the court. It is important to have a subpoena delivered to each witness. When the necessity arises to ask for a remand of the case, the judge will often check to see if an effort has been made to deliver subpoenae to all the witnesses. If such is the case, the judge will be satisfied that the Crown has been diligent, and perhaps use his discretion in favour of the remand.

Another question which arises in relation to witnesses is that of their credibility. To what extent must a judge believe what a witness says under oath? This extremely difficult question (what is truth?) has a very simple solution in law. The judge has discretion in the matter of credibility. In jury trials, the credibility of witnesses is up to the jury. In practice this means that the judge or jury will believe whom they choose to believe and appeal courts will generally refuse to intervene.

This is not to say that the judge's decision is an arbitrary one. The judge will normally take into account such factors as character, interest in the outcome of a case, behaviour in the witness box, generally capacity for observation, etc. in his determination of the credibility of the witnesses. However, there is no mathematical formula to apply to in order to determine which witnesses are telling the truth. It is only when the judge bases his decision on patently unjudicial reasons that a Court of Appeal will disturb his findings (as when a judge says "I have known this witness for a long time and he always struck me as an honest person").

This note on the credibility of witnesses has a practical application. Law enforcement officers when they testify, are often credited with fairness and objectivity, because they appear to have no interest in the outcome of the case. This is a reputation to live up to; nothing is more difficult for a law enforcement officer to overcome than the reputation of being biased.

Although the judge or the jury as the case may be, have discretion in the matter of credibility, some witnesses are considered at the outset, to be less credible than others. This is the case, in particular with young children, prostitutes and accomplices. In the case of these witnesses, the law either requires or recommends corroboration. Corroboration is independent evidence connecting the accused to the offence and tending to show the truth of other evidence.

The Question of Young Children

A "child of tender years" is a child of less than 14. When such a witness is presented, the Court must enquire whether or not the child understands the nature of the oath; the court does this by asking the child questions; if the answers are satisfactory, the court holds that the child may be sworn as a witness. In this event, corroboration is not required. Should the court not be satisfied that the child understands the nature of the oath, the child will not be sworn. However, if the judge believes that the child is sufficiently intelligent to give realistic evidence, he will give unsworn testimony, but this testimony will not be sufficient to support a conviction unless it be corroborated in some material part by adequate evidence. It must be noted that unsworn testimony cannot be corroborated by other unsworn testimony.

Accomplices

Accomplices are another class of witness whose testimony is tainted at the outset. The reason for this is both historical and practical. Historical, because the testimony of accomplices was introduced as an exception to the rule against the testimony of felons. Practical, because there is a real possibility that an accomplice who testifies against his accomplices and on the Crown side may be influenced by the thought that "co-operation" with the Crown will gain him a more lenient treatment.

The English guard against the danger of accomplice evidence by both the corroboration rule which we shall see presently, and by an additional rule, that a conviction may not obtain in a case where an accomplice has testified if this accomplice has not already been sentenced.

An accomplice, according to what we think would be the safest view is "one who is concerned with another or others, in committing or attempting to commit any criminal offence". The danger that must be guarded against is the "danger of convicting a person upon the unconfirmed testimony of one who is admittedly a criminal".

Courts sometimes take a narrower view and hold that accomplices are those who may themselves be indicted for the offence. According to this view, a prostitute will not be considered an accomplice of the person accused of living off the avails of prostitution.

We feel that the former view is the safest, that is to consider as an accomplice any person who could be held to be connected with the commission of the offence, even if these persons (because they are juveniles or not strictly within one section) could not be indicated for the offence in question. This would mean that the investigating officer will endeavour whenever he feels that there is a danger that one of his witnesses might be considered an accomplice to find independent evidence in corroboration of the intended testimony.

How does the rule operate? The judge is simply required to warn the jury of the danger inherent in accomplice evidence. He tells them that they may convict if they believe that the accomplice is telling the truth, but that it is dangerous to convict on such testimony, unless it be corroborated in some material particular.

He then defines corroboration and lets the jury resolve if the facts justify holding the witness to be an accomplice, and if his testimony is in fact corroborated.

In cases where the judge sits without a jury the judge is generally held to be aware of the accomplice evidence rule and to have "charged himself" accordingly. Sometimes judges will advert expressly to the rule during their judgment, so that the court of appeal will know, if there is an appeal, that the judge had the rule in mind and that there was no "non-direction" on this point.

III - PROCEDURE

Procedure is that part of the law which deals with the "how" of things, the application of legal rules to a specific instance. Rules of procedure can be very minutely detailed: they can also be framed in very general, sweeping language as we have seen in the case of rules of evidence. Procedure, like evidence, is not merely functional; it also is a matter of criminal policy in that it may embody certain safeguards of individual freedom.

In the following pages, we will attempt to give a description of criminal procedure as it appears in the practice of law enforcement from the investigation to the trial. This description will reflect certain characteristics of the criminal law which have been brought out in previous parts of this manual. In the second part of the manual, we will emphasize the procedural aspects of bankruptcy investigations, in particular, the search and seizure of documents.

A - Preliminary Concepts

Criminal procedure is concerned with the enforcement of the law in an orderly, equitable manner and with due respect for the rights both of the accused person and of society. The ideas suggested in this definition, order, equity and respect for rights, will be reflected by a number of provisions in the criminal procedure. However, before we can understand procedure in its application, we will have to be familiar with some preliminary concepts. These are the classification of offences and the jursidiction of the courts.

1. Classification of offences

In the abstract, all criminal offences are serious and should be treated by the law with the utmost care. In practice, some offences are more serious than others, and obviously require a particularly high standard of legal treatment.

In the past, the distinction between offences was quite clear: there were felonies and misdemeanours; felonies were punishable by death.

This distinction was abolished and at present the criminal law recognizes two categories of offences: indictable offences and summary conviction offences. The qualifying words "indictable" and "summary conviction" refer to types of procedure rather than to some characteristic inherent in each category of offence: the distinction between the offences is a procedural one.

There is only one way to determine whether an offence belongs to the "indictable" category or the "summary conviction" category, and that is to refer to the statute which creates the offence. For instance, section 233 of the Criminal Code declares kidnapping to be an indictable offence, and section 162 of the Criminal Code declares trespassing at night to be a summary conviction offence. Most Bankruptcy Act offences are summary conviction offences, although section 156 offences can be both: "... is guilty of an offence and is liable on summary conviction to imprisonment for a term not exceeding one year or on conviction under indictment for a term not exceeding three years..." This latter type of offence , the "mixed" offence, demonstrates that the distinction is wholly procedural.

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There will be a number of extremely important differences in the legal treatment of each category of offence. Here are some of them, presented in table form:

Indictable Offences	Summary Conviction Offences
1) Arrest Everyone can arrest without warrant a person found committing . . . A peace officer may arrest before or after on reasonable grounds of . . .	Must be by warrant or by a peace officer who finds a person committing . . .
2) Preliminary Hearing As a rule a hearing is held	No hearing is held
3) Court Trial by jury is the rule	Trial by magistrate
4) Time Limitations As a rule, none Bankruptcy Act offences: 5 years s. 178	As a rule, 6 months Bankruptcy Act offences: 3 years s. 179
5) Type of Procedure Indictment	Information
6) Punishment As a rule, liability for two years or more Bankruptcy Act offences: 3 years maximum	As a rule, liability for six months or less and/or for $500.00 fine. Bankruptcy Act offences: 1 year, $1,000.00 maximum

The distinction between these categories of offences is justified on the basis of expediency. Summary conviction procedure is, as its name indicates, much faster than procedure by indictment. Moreover, the important right to a trial by jury does not exist in these cases. The law has therefore reserved summary conviction procedure to offences which carry a lesser punishment than indictable offences. The placing of an offence in one category rather than in the other is yet another illustration of criminal policy.

The effect of the classification of offences in one or the other category is highly important, as shown by the table. The fact that an offence is indictable or summary conviction will determine which courts will deal with the offence, what procedure will be followed, what sentence can be rendered. It will also bear on the possibilities of arrest.

As concerns "mixed" offences, for example, section 156 of the Bankruptcy Act, these are either summary conviction or indictable at the option of the prosecution. This means that the prosecution, when it has a choice, must indicate whether it intends to proceed by indictment or by summary conviction.

2. Jurisdiction of the courts

Jurisdiction is a matter of legal powers. The power to hear a case can be termed trial jurisdiction; the power to issue a search warrant can be termed investigative jurisdiction.

a) Trial jurisdiction

Bankruptcy courts do not have jurisdiction to hear the trial of offences. Their power is restricted to granting authorizations for criminal proceedings (Bankruptcy Act, sec. 163 (3)). 176(3)

The ordinary criminal courts have jurisdiction over bankruptcy offences, both Criminal Code and Bankruptcy Act offences.

The first distinction to be made concerns indictable and summary conviction offences. The latter are always judged by a magistrate, who sits without a jury. A preliminary hearing is never held. This will be the case for the offences described at sections 157, 158, 159, 160 and 161 of the Bankruptcy Act, and 156, if the prosecution does not elect to proceed by indictment. 170, 171 172, 173, 174

As for indictable offences, the rule is that the accused person has a right to a trial by jury. In the case of extremely serious offences, such as murder, the accused must have a jury trial. In other cases, cases which arise frequently and where the offence may not be as serious, such as lottery, or theft of a thing worth less than $50.00, the right to trial by jury has been removed by the law, which states that these cases must be tried by a magistrate.

In all other cases of indictable offences, the accused has the option of being tried by a judge with a jury, a judge alone, or a magistrate. He expresses this choice at his first appearance in court.

What does each choice represent in the way of advantages?

Trial before a magistrate can be very rapid. It can generally take place within very few days from the date of the appearance. People who plead guilty will often do so before a magistrate.

Trial before a judge sitting without a jury gives the accused the advantage of a preliminary hearing and spares him the disadvantages of a jury trial when his counsel thinks that a jury trial would not be in his best interests.

Finally, the option for a trial before a judge and jury gives the accused the right to appear before his peers and the advantages of knowing what he is up against because a preliminary hearing is held in this case.

The matter does not end there. If an accused person has chosen a jury trial and been sent to his trial after a preliminary hearing, he can within certain time limits, make another election and choose to go back before a judge alone.

What is the difference between these courts? Generally, it is a matter of legal hierarchy. A judge sitting with a jury constitutes a superior Court of criminal jurisdiction. However, in most areas, the distinction is one of function. In Montreal, for instance, the same person can sit both as a judge of the Sessions of the Peace and as a magistrate.

b) Pre-trial jurisdiction

Criminal investigation often requires exceptional measures which conflict with individual rights: the right to privacy, in the case of searches, property rights, when seizures are involved, freedom of the person when an arrest is made. These exceptional measures are justified by a higher order of necessity, that of enforcing the criminal law. However, recognizing the conflict, the law has, in most cases, provided for the requirement of judicial authorization of these drastic measures. There are advantages to this procedure: the investigator who acts under the authority of a court warrant is protected against subsequent action for damages.

Pre-trial jurisdiction is the power to grant these exceptional measures used in law enforcement. We shall study pre-trial jurisdiction in the special part of the manual dealing with the collection of evidence.

B. The Trial Process

a) Once the investigation has been completed, the trial may take place. The first problem is that of bringing the accused to trial. This is done presently either by arrest or by summons. An arrest can be with or without warrant. Section 434, Criminal Code, authorizes anyone to arrest a person found committing an indictable offence. A peace officer may arrest without warrant in the cases described at section 435 of the Criminal Code.

Both warrants of arrest and summonses are issued by a Justice of the Peace who has received an information. The information is a written and sworn document by a person alleging that he has reasonable and probable grounds for believing that another person has committed an offence. (See sections 439, 695 and 696, Criminal Code.) The Criminal Code sets out forms that may be used as models for written procedure. The information can be drawn up in Form 2.

It is to be noted that an information is not considered as an "official" document, in the sense that a Peace Officer or an official has to sign it. Anyone can file an information. In fact, when a policeman or an investigator does so, he is merely exercising the duty of an ordinary citizen. This is characteristic of our criminal procedure. The responsibility of enforcing the law is seen as the duty of each citizen.

b) The first court appearance of the accused, either on a summons or a warrant, is before a magistrate. The object of this procedure is to control the custody of the accused when he has been arrested, to set bail in those cases where the accused is entitled to it, to put the accused to his election (to let him choose the court he wants: judge and jury, judge alone or magistrate) in those cases where the accused has the choice, to fix the date for a preliminary hearing when the accused has chosen a mode of trial which calls for such a hearing, to hear the plea (guilty or not guilty) in cases where the magistrate has jurisdiction, and in those same cases, to fix a date for trial by magistrate when a plea of "not guilty" has been taken.

c) The preliminary inquiry or hearing is a procedure designed to "test" the prosecution's case in order to find out whether there is evidence enough to send the accused to his trial. This procedure is held whenever an accused person has chosen trial by jury or by judge alone, never when he has chosen trial by magistrate. Evidence is given under oath, the witnesses may be cross-examined and the accused may tender evidence if he so wishes.

The preliminary enquiry is an important procedure because of its influence on the trial. Witnesses who have been heard at the preliminary enquiry and who are unavailable at trial because of death, absence from the country, insanity or serious illness, can be dispensed with, and their evidence read into the record, if, at the preliminary enquiry, the accused had full opportunity to cross-examine. This does not occur too often but the possibility must never be overlooked, especially when one of the witnesses at the enquiry is not a resident of this country.

Another important effect of the preliminary enquiry is to let the accused know what he is up against. If the preliminary enquiry shows strong prosecution evidence, the accused, under advice of his counsel, may be more inclined to change his plea to a plea of "guilty".

In this respect, it must be pointed out that it is highly improper for an investigator to engage in what is called "plea negotiations" with an accused person. Should an accused person make overtures in connection with a plea of "guilty", he must immediately be referred to the Crown Attorney.

The preliminary enquiry results in the magistrate either sending the accused to his trial or freeing him from the charges against him if the evidence does not warrant further prosecution.

When the accused is sent to trial, an indictment is drawn up and signed by the Attorney General or a person authorized by him. The indictment is the formal charge. In cases before the magistrate, the information is treated as an indictment.

d) The trial may be held before a magistrate, a judge or a judge with a jury. Whatever form it takes, there are certain standard phases which will occur. The trial is divided into two parts, the prosecution and the defence.

In the first part, the prosecution's role is to discharge the evidentiary burdens: to adduce evidence sufficient to establish the commission of an offence and to persuade the judge or jury beyond any reasonable doubt of the guilt of the accused. The role of the defence is to attempt to show weaknesses in this evidence.

If the prosecution succeeds in its first objective, to adduce evidence of a criminal offence, the defence is faced with a choice. Should it rest and count on the possibility of doubt on the part of the judge or jury, or should it try to establish an evidentiary basis for that doubt? If the latter course is decided upon, the defence will present its evidence.

When either party presents evidence, it must do so according to certain rules. A party presenting a witness must examine his witness by asking questions which are not leading questions. Leading questions are those which indicate the answer that is required or preferred. (Example: "Did you see the accused strike the victim?" rather than: "What did you see?") This phase of the examination is called the examination in chief. Once it is finished, the witness is available for cross-examination. The rule concerning leading questions does not apply to cross-examination. Questions in cross-examination are often phrased in a leading manner: "Is it not a fact that you are blind in one eye?" After cross-examination, with the judge's permission if the cross-examination has brought out new facts, the party producing the witness can re-examine him.

This is the procedure for every witness, either Crown witnesses or defence witnesses.

After the Crown and defence have both presented their cases, the judge or jury hear arguments based on the evidence. If the trial is held before a jury, the judge then instructs the jury (charges them) in the law. After deliberating, the judge or jury render a verdict: guilty, guilty of a lesser offence, not guilty. The trial is over. The accused either walks out of court or is held for sentencing.

Because of the procedure at trial being in such close parallel (prosecution case, defence case), it may appear that the Crown Attorney's role and that of defence counsel are mirror images of each other. This is not so. The defence attorney has much more latitude to play upon emotions than does the prosecutor. The prosecutor's role has been described by the courts as that of a "minister of justice, a servant of the truth" who has no case to win or lose, but whose duty it is to present all the relevant evidence, favorable or unfavorable to the accused. This view of his role by the courts will probably colour the prosecuting attorney's

style. He will attempt, at all stages, to proceed as objectively as possible. Investigators may at times be surprised by a Crown Attorney's dispassionate attitude. This is the proper attitude, however, and should be imitated by everyone connected with the prosecution's case.

Finally, a word about sentencing. Sentencing is the responsibility of the judge who must balance many factors in arriving at a proper sentence. The courts hold the view that "protection of society" is the main object of a sentence. However, as there are many ways to arrive at this objective, sentencing habits are not uniform. The courts will generally consider the following factors when sentencing:

- The objective gravity of the offence, determined by the maximum sentence that may, by law, be imposed.

- The subject gravity of the act. Was the offence premeditated, what actual harm was done to the victim or victims.

- The person of the accused - Is the accused a young man or an old man? What education does he have, what are his family ties? What are the chances of his committing another offence? Does he have a criminal record?

- Social factors: is the offence one that is prevalent? It is necessary to make an example of the accused in order to deter others?

Investigators can furnish the Crown Attorney with information relating to the factors considered in sentencing. One example could be statistics of the commission in a given area of a certain offence. This information, and other pertinent facts, could greatly assist the Crown Attorney in speaking to sentence.

Special Part

PART II

In the first part of this manual, we have seen some of the general rules of criminal law, evidence, and procedure. The second part will deal with specific offences and the manner to go about proving them.

Both the Criminal Code and the Bankruptcy Act create offences. Some of these are exclusive to either Act, such as conspiracy, which is created by the Criminal Code, and the offences of omission (failure to attend the 1st meeting of creditors, for instance) which is created by section 156(a) of the Bankruptcy Act. Other offences are found under both acts although they may differ in detail. The Criminal Code, for instance, at section 345, incriminates the fact for a trader to fail to keep proper books. Section 158 of the Bankruptcy Act creates an offence which is very similar. This apparent duplication can be of practical use as regards both evidence and investigation procedures. As regards evidence, the evidentiary requirements may differ from one Act to another. In some cases, the Bankruptcy Act may have created presumptions which do not exist under the Criminal Code. The components of the offences may differ in detail: in the example mentioned above, the Bankruptcy Act does not apply unless the bankrupt has on a previous occasion been bankrupt or made a proposal. The Criminal Code covers the case of first bankruptcies. Finally, investigative procedure may be facilitated by use of search warrants, which are available under the Criminal Code, and not under the Bankruptcy Act.

We shall set out in table form, the Bankruptcy Act offences and those Criminal Code offences which are likely to be encountered in bankruptcy investigations. Each table will set out the text of the offence. The components to be proven, whether mens rea is necessary, and the manner of proving both the components and the mens rea.

I - Evidentiary requirements:

This part of the manual deals with the question of what must be proven in cases prepared by investigators of the Branch. We shall approach this question generally, by describing some requirements that are common to all or many offences, and specifically, by studying each offence, setting out its evidentiary requirements and suggesting the type of evidence that can meet these requirements.

A. General Evidentiary Requirements

Both Bankruptcy Act and Criminal Code offences carry certain common requirements. It is necessary for instance, whatever offence is being prosecuted, to show that the accused is the person who committed the offence; this can be done by evidence of identification. As we have seen in the first part of the manual, most offences require proof of a criminal state of mind; the method of proving this state of mind is generally the same in the offences with which we shall deal. Often, more particular require - ments still affect a good number of offences. Because of this fact, we shall deal with each of these requirements in this part.

1. Identification of persons and documents

a) Identification of the accused - In most cases involving bankruptcy investigators, identification is not a problem and proof of identity is little more than a formality, although an important one. This is generally achieved by having a witness who knows the accused point him out in court, thus relating what is said about him to the specific person standing at the bar.

In some cases, identification becomes a crucial part of the prosecution. Cases in which the accused's participation is an offence does not appear clearly will present problems that can be solved only by identification. In some cases of removal of assets, for instance, where the accused disclaims all knowledge of the loss of assets, or where the loss is explained by theft or fire, it may be possible to establish a connection with the accused by identification through eye witnesses or voice identification. If such a situation occurs, it may be necessary to have recourse to techniques such as identification parades. In this case, police authorities should be consulted because they have both the experience and the facilities to carry out proper identification parades.

b) Identification of documents - Except in certain cases which we will discuss in a following chapter, documents do not speak for themselves and it is necessary to provide for their identification. This can be done mainly in two ways: by testimony and handwriting evidence.

Witness identification of documents generally goes to the nature of the document itself. For example, let us suppose that a cancelled cheque has come into the possession of the prosecution, who wants to file it as an exhibit. This

cancelled cheque, alone, is not sufficient evidence of a payment; it is necessary to complete its message by testimony (or other evidence) indicating that it was drawn on a certain account and paid out on a certain date. We speak of identification in this respect because the witness is generally asked: "What is this document?"

Identification of the document by handwriting evidence (of which more will be said in the chapter dealing with expert evidence), tends to establish the identity of the maker of the document, and thus to establish participation in an offence. It may happen that both questions of identification arise in the case of a single document. In that case, it will be up to the prosecution to establish, by "technical" evidence, what the document is, (i.e. a cheque), and who made it (drawn by the accused).

2. State of mind

As we have seen in the general part of the manual, a state of mind is almost always a component of an offence. These states of mind can be either general or specific. Intent to defraud, for instance, is a specific state of mind.

In most cases, proof that the accused has done a certain act will also be proof that he had a certain state of mind. Given circumstances of insolvency. The fact that an accused has destroyed his books and records will certainly indicate to most people that he intends to defraud. In other cases, it may be necessary to prove a state of mind by other evidence.

This evidence can be direct: a confession by the accused. It can be a combination of evidence: statements by the accused, shown by testimony or records to be untrue. For instance, the accused, examined by the official receiver, omits to declare certain assets. The fact that he had these assets is established by other evidence. His omission to declare the assets could be considered significant evidence of intent to defraud (besides being an offence to the Bankruptcy Act). Finally, evidence of state of mind can be circumstantial. In one case involving the concealment of assets, the judge declared that because of the circumstances surrounding the transaction, the relationship of the parties, the limited period of time between the transfer and the assignment, the defendant must have known that she was defrauding her creditors.

In the same case, the accused being the wife of a trader who had taken over her husband's business, when he became ill, it was suggested that ignorance of business practices were to be blamed for her actions rather than an intent to defraud. The judge was not impressed by this argument because the accused "had declared that she looked after the store and made purchases and sales", and was therefore not ignorant of the business. Such a circumstance, that a person has been in business and has exercised responsibility, can be very pertinent evidence of a state of mind.

Intent to defraud is a particular state of mind which is required in certain offences. It involves acting with the aim, or at least the knowledge that the action will deprive someone of his rights. Again, this can be established by circumstances.

3. Proof of bankruptcy, status and official capacity

a) Bankruptcy. The Bankruptcy Act defines a bankrupt as "a person who has made an assignment or against whom a receiving order has been made or the legal status of such a person". Bankruptcy is "the state of being bankrupt or the fact of becoming bankrupt". Bankruptcy can thus be established by filing a copy of the receiving order or the assignment. This will also be sufficient proof of the date of the bankruptcy.

The fact that a person is a bankrupt can be established by the procedure described above, combined with the identification of the accused as the person to whom the receiving order applies or who has made the assignment. It is also possible to make evidence of bankruptcy by the testimony of witnesses who have direct knowledge of the fact.

b) Trustee - In some cases, it will be necessary to prove that an accused person is a trustee. In cases where it must be proven that the trustee has been appointed in a particular bankruptcy, a certificate on the part of the official receiver or the copy of a court order, and identification of the accused person as that person named in the court order or certificate, will constitute such evidence. (ex. 160e) In cases where the fact to be proven is the fact that the accused person is a trustee "at large" (as in 160f), such proof can be had, by the production of a copy of the trustee's current licence and by his identification as the rightful holder of that licence.

In cases such as those mentioned at 156(a) p. 169 where the offence refers to the trustee, usually in relation to some obligation on the part of the bankrupt, testimonial evidence should be sufficient, especially as the trustee will be present on these occasions to show failure on the part of the bankrupt to carry out one of the duties imposed upon him by the law. The fact that a specific person is a trustee will rarely be contested in this case; it will be up to the defendant to rebut the fact if it is not true.

c) Company official - In many cases, it will be necessary to prove the official capacity of an accused person as an officer of a company. This can be done by producing a copy of the entry in the corporation books, in due form. (In the case of such a copy, the law requires notice of seven days at least. It might be useful to point out to the prosecuting attorney that part of the Crown's case is the production of a copy, in order to draw his attention to the necessity of giving notice). see C. Evidence Act

If, for some reason, (ex. the corporation's secretary is the accused), such a copy is not available, the corporation books seized and offered in evidence will be sufficient. In the absence of either form of evidence, testimony should be enough to establish the official capacity of the accused.

In all cases, it will be necessary to identify the accused person as that person to whom the documentary evidence applies.

d) Omissions - Section 156(a) is an example of this type of offence. Generally, evidence of these offences will be made by testimony of the person in relation to whom this duty is owed, for example, the trustee. The omission, in this case, will be treated as an ordinary fact and evidence can be made in any way.

e) Negative averments and exceptions - Negative averments refer to the duty of the prosecution to prove that a situation did not exist at the time of the offence. The classic example is that of rape, where it must be established that the victim was not the wife of the accused. An example in bankruptcy offences would be section 156(a): failure to accomplish the duty prescribed at 117(d), which states that the bankrupt must file a statement of his affairs within seven days unless the time is extended by the official receiver. This negative requirement must be proven by the prosecution. It can be done by testimony of the official receiver. p. 129

In many offences, the phrase "without reasonable cause" is used. This phrase would seem to indicate a negative averment, and so it does. However, the requirement in this case can often be met by evidence of a state of mind. For instance, the requirement that the bankrupt must "make disclosure to the trustee of all property disposed by gift" ... unless there is reasonable cause for his failure to make such disclosure, can be met by evidence showing that the bankrupt knew of the disposal by gift. If such is the case, the court would very likely draw the conclusion that the bankrupt had no reasonable cause to fail to make disclosure to the trustee.

B. Special Evidentiary Requirements

Each offence, whether under the Criminal Code or the Bankruptcy Act, has its own special requirements. An investigator on a case must know with some accuracy what he is looking for. He must be sensitive to specific items of potential evidence which are relevant to one or more requirements of a particular offence.

Let us suppose that it is discovered that a bankrupt has, some months before his bankruptcy, made a gift of some property to a friend; he has omitted to disclose this fact to the trustee.

This, in itself, constitutes an offence to the Bankruptcy Act, section 156(a), referring to 117(g).

Suppose that additional facts are present: that the bankrupt gave the property to a very close friend and at the time of the gift, was heard to remark that this did not matter very much as he was going to lose the property anyway because of an impending bankruptcy.

These additional facts would suggest the possibility of being able to prove intent to defraud, under section 335 of the Criminal Code.

It is therefore important to know what each offence requires to be proven and what evidence can achieve this proof.

We shall therefore look at each Criminal Code offence which can be of interest to investigators of the Branch, as well as each Bankruptcy Act offence, and try to set out what are the facts to be proven in each case, as well as the type of evidence which can accomplish this proof. Each offence shall be examined also for the requirement of mens rea.

I - CRIMINAL CODE	FACTS TO BE PROVEN	EVIDENCE
269. Every one commits theft who fraudulently and without colour of right takes or fraudulently and without colour of right converts to his use or to the use of another person anything, whether animate or inanimate with intent a) to deprive, temporarily or absolutely, the owner of it or a person who has a special property of interest in it, of the thing or of his property or interest in it; b) to pledge it or deposit it as security; c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform; or d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or restored.	1) That the accused took a thing in the possession of someone else without that person's permission, or with it, if the permission was obtained by fraud (theft by trick) or that the accused had rightful possession of a thing for a given purpose, and, without permission, "took over" the ownership of the thing. 2) That the accused acted without claim of right (bona fide belief in the right to do something. See manual, general part, mens rea), with intent to deprive, etc.... (In other words, the accused acted as if he had the ownership of the thing.)	1) (a) Evidence by owner or lawful possessor that the owner or lawful possessor of the thing never intended to relinquish possession. (b) Testimony to the effect that accused took the thing. (c) Confession. 2) (a) Intent shown by circumstances. (b) Evidence of possession after recent theft, if not considered by reasonably true explanation, can be evidence of intent. (c) Confession.

I - CRIMINAL CODE	FACTS TO BE PROVEN	EVIDENCE
276. Every one commits theft who, having received anything from any person on terms that require him to account for or pay it or the proceeds of it or a part of the proceeds to that person or another person, fraudulently fails to account for or pay it or the proceeds of it or the part of the proceeds of it accordingly.	1) That the accused has received something that does not belong to him.	1) (a) Testimony of witness to receiving. (b) Production of books (c) Confession or statement by accused.
	2) That the reception was on the understanding that accused would account for what he received.	2) (a) Production of contract or of accused's authority to receive. (b) Testimony of victim. (c) Confession.
	3) Failure on the part of the accused to account or to pay the thing owing.	3) (a) Testimony of victim. (b) Confession.
	4) Fraudulent intent; in this case, absence of any good reason which could explain the failure. N.B. If the terms of the reception are such that the owner or creditor is satisfied by the personal liability of the person receiving, a proper entry in the account of the accused is a complete defence to the charge.	4) (a) Confession. (b) Circumstances creating inference.

I - CRIMINAL CODE	FACTS TO BE PROVEN	EVIDENCE
296. Every one commits an offence who has anything in his possession knowing that it was obtained		
a) by the commission in Canada of an offence punishable by indictment;	a) (1) That the accused had something in his possession (see section 3, subsection 4 of the Criminal Code).	a) (1) (a) Testimony (b) Production of the thing as real evidence, if possible. (c) Confession.
	(2) That he knew it to be in his possession.	(2) Circumstances. Confession or Statement.
	(3) That the thing was obtained by a criminal act committed in Canada.	(3) Testimony of victim.
	(4) That accused knew that this was the case.	(4) (a) Confession (b) Circumstances. (c) If possession is recent, guilty knowledge can be presumed unless accused offers a reasonable explanation.
b) by an act or omission anywhere that, if it occurred in Canada, would have constituted an offence punishable by indictment.	b) (1) That the accused had something in his possession (see section 3, subsection 4 of the Criminal Code).	b) (1) (a) Testimony. (b) Production of the thing as real evidence, if possible. (c) Confession.
	(2) That he knew it to be in his possession.	(2) Circumstances. Confession or Statement.
	(3) That the thing was obtained anywhere by means that would be an indictable offence, if committed in Canada.	(3) Testimony of victim.
	(4) That accused knew of these means.	(4) (a) Confession. (b) Circumstances. (c) If possession is recent, guilty knowledge can be presumed unless accused offers a reasonable explanation.

I - CRIMINAL CODE	FACTS TO BE PROVEN	EVIDENCE
304. Every one commits an offence who		
a) by false pretence, whether directly or through the medium of a contract obtained by a false pretence, obtains anything in respect of which the offence of theft may be committed or causes it to be delivered to another person.	1) A false pretence: a representation of a matter of fact present or part (not future), made by words or otherwise, known to be false and made with a fraudulent intent to induce the person to whom it is made to act upon it. (See section 323 for false representation of future fact.)	1) (a) Testimony of victim. (b) Production of writing if false pretence in writing. (c) If the false pretence is a bad cheque, production of the cheque and proof that it is n.s.f. proof that a false pretence was committed unless accused satisfies the court of his good faith.
	2) Fraudulent intent.	2) (a) Confession of accused. (b) Circumstantial evidence - inference from facts. (c) Production of n.s.f. cheque constitutes presumption of fraudulent intent.
	3) Obtention: cause and effect relationship between false pretence and obtaining that the victim gave up something as an effect of the false pretence.	3) Testimony of victim.
	4) Something in respect of which the offence of theft may be committed. This would exclude real property such as land or buildings.	4) (a) Testimony of victim. (b) If the thing obtained is identifiable, production as real evidence, if possible.
b) Obtains credit by a false pretence or by fraud.	1) False pretence: see (a) or	1) See (a)
	2) Fraud: see section 323.	2) See section 323.
	3) Obtention: see (a)	3) See (a)
	4) Credit: the right to delay payment or delivery. It has been held that the section does not cover the situation where money is paid on the promise of future services.	4) (1) Testimony of victim. (2) Confession.

I - CRIMINAL CODE	FACTS TO BE PROVEN	EVIDENCE
304.		
c) Knowingly makes or causes to be made, directly or indirectly, a false statement in writing with intent that it should be relied upon, with respect to the financial condition or means or ability to pay of himself or any person, firm or corporation that he is interested in or that he acts for the purpose of procuring, in any form whatsoever, whether for his benefit or the benefit of that person, firm or corporation. 1 - The delivery of personal property. 2 - The payment of money. 3 - The making of a loan. 4 - The extension of credit. 5 - The discount of an account receivable; or 6 - The making, accepting, discounting or endorsing of a bill of exchange, cheque, draft, or promissory note.	1) Knowledge of making of false statement 2) False statement in writing. 3) Intent to have it acted upon. 4) Statement relating to the financial condition of accused or other person. 5) Purpose of statement: to procure: see sections (i) to (vi).	1) Confession, circumstantial evidence. 2) Production or description of statement in writing by testimony. Proof of falsity: confession, expert evidence testimony relating to financial condition. 3) Testimony of victim, inference from circumstances. 4) Best evidence: production of statement, testimonial evidence in absence of production. 5) Testimony of victim.
d) Knowing that a false statement in writing has been made with respect to the financial condition or means or ability to pay of himself or another person, firm or corporation that he is interested in or that he acts for, procures upon the faith of that statement, whether for his benefit or for the benefit of that person, firm or corporation anything mentioned in sub-paragraph (i) to (vi) of paragraph (c)	1) Fact that false statement made. 2) Knowledge that statement was made: see general part: privity. 3) Knowledge that statement is false. 4) Procures obtention of something mentioned at (c).	1) Production of writing; testimony if writing cannot be produced, including explanation of absence of written statement. 2) Confession; circumstances; testimony of victim. 3) Confession; circumstances; testimony of victim. 4) Testimony of victim.

I - CRIMINAL CODE	FACTS TO BE PROVEN	EVIDENCE
311.		
1) Every one who, knowing that a document is forged, a) uses, deals with, or acts upon it, or b) causes or attempts to cause any person to use, deal with, or act upon it, as if the document were genuine.	1) Knowledge of falsity of document.	1) (a) Confession. (b) Statement of accused not amounting to confession tending to show that he knew of forgery, (c) Testimony as to circumstances. (d) Scientific evidence showing accused's hand in forgery.
	2) Use of document as if it were genuine.	2) (a) Testimony. (b) Confession.
	3) Cause another person or attempt to cause another person to act upon document as if it were genuine.	3) (a) Testimony of victim or intended victim.
	4) That document is forged document, either because it is completely forged, or that it is a genuine document to which has been made a material alteration or addition or a material removal.	4) (a) Confession. (b) Testimony as to circumstances. (c) Scientific evidence.
323.		
1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the incoming of this Act defrauds the public or any person, whether ascertained or not, of any property, money or valuable security.	1) Intent to defraud: knowledge of falsehood, etc.	1) (a) Confession. (b) Circumstances leading to inference.
	2) Loss of property, money or valuable security by person or persons.	2) (a) Testimony.
	3) Deceit, falsehood or other fraudulent means.	3) (a) Testimony. (b) Confession. (c) Documents: newspaper advertising, hand bills, etc. (d) Expert evidence.
	4) Relationship between 2 and 3.	4) (a) Testimony of victim.

I - CRIMINAL CODE	FACTS TO BE PROVEN	EVIDENCE
335. Everyone who		
a) with intent to defraud his creditors	a) (1) Intent.	a) 1) (a) Circumstances established by testimony. (b) Confession of accused.
i) makes or causes to be made a gift, conveyance, assignment, sale, transfer or delivery of his property;	(2) The making of a gift, conveyance, assignment, sale, transfer or delivery of property.	2) (a) Witnesses, in particular beneficiary, assignee, etc. N.B. Such witnesses may run the risk of being considered accomplices, in which case it is helpful to have corroboration. (b) Confession of accused. (c) Documents, including registry documents, provincial licence bureau documents, in Quebec, notarial documents.
ii) removes, conceals or disposes of any of his property;	(3) Involvement of accused in "making".	3) (a) Confession of accused. (b) Witnesses. (c) Circumstances.
or	(4) Removal, concealment or disposal of property.	4) (a) Witnesses. (b) Confession of accused. (c) Expert accounting evidence. (d) Documents: inventories, etc.
	(5) Involvement of accused.	5) (a) Witnesses. (b) Confession. (c) Circumstances.
b) With intent that anyone should defraud his creditors, receives any property by means or in relation to which an offence has been committed under paragraph (a).	b) (1) Intent (knowledge of fraud or collusion with accused).	b) 1) (a) Testimony as to circumstance. (b) Confession of accused.
	(2) Receives property.	2) (a) Witnesses. (b) Documents. (c) Confession.
	(3) Property is that which has been the object of the fraud.	3) (a) Identification of property by witnesses, documents. (b) Confession.

I - CRIMINAL CODE	FACTS TO BE PROVEN	EVIDENCE
340. Every one who, with intent to defraud		
1) (a) destroys, mutilates, alters, falsifies, or makes a false entry in or (b) omits a material particular from or alters a material particular on a book, paper, writing, valuable security, or document.	1) (1) Intent (2) Destruction, mutilation, alteration, falsification, false entry or omission or alteration of material particular in book, paper, writing, valuable security or document.	1) (1) (a) Circumstances establishing intent v.g. that an alteration corresponds to a deposit in accused's private account. (b) Confession of accused. (2) (a) Witnesses to destruction, alteration or mutilation. (b) Confession. (c) Expert evidence of physical alteration. (d) Expert accounting evidence of omission or alteration of material particular.
2) Every one who with intent to defraud his creditors - is privy to an offence (under section 1)	2) (1) Existence of offence described at 340(1). (2) Intent to defraud. (3) That persons to be defrauded are creditors. (4) Privity to offence described at 340(1).	2) (1) See 1. (2) (a) Circumstances. (b) Confession of accused. (3) (a) Testimony of creditors. (b) Confession of accused. (4) (a) Testimony as to accused's knowledge of offence. (b) Confession of accused.

I - CRIMINAL CODE	FACTS TO BE PROVEN	EVIDENCE
345.		
1) Every one who, being a trader or in business (a) is indebted in an amount exceeding $1,000.00; (b) is unable to pay his creditors in full; (c) has not kept books of account that, in the ordinary course of the trade or business in which he is engaged, are necessary to exhibit or explain his transactions.	1) The accused is in business or a trader.	1) (a) Documents: incorporations, licence, etc. (b) Confessions: statement to official receiver, to police officer. (c) Witnesses: creditors, customers, etc.
	2) His debts exceed $1,000.00.	2) (a) Witnesses: creditors. (b) Confessions: proof of filing of proposal, etc.
	3) He is unable to pay his creditors in full.	3) (a) Witnesses: creditors. (b) Confession: proof of filing of proposal, etc.
	4) He has kept no books or, he has kept books so incomplete that they do not exhibit or explain his transactions.	4) (a) Witnesses: employees. (b) Confession: statement to investigators, to official receiver, or (c) Expert witnesses: accountants familiar with practice of trade or business of accused.
2) No person shall be convicted where his failure to keep books occurred at the time more than 5 years prior to the day on which he was unable to pay his creditors in full.	5) That the offence occurred 5 years preceding his insolvency.	
	I N T E N T Section 2a creates a defence of absence of mens rea which must be promoted by the accused. Such a defence can be met by counter-proof of intent to defraud. This can be done through a confession or such facts as will establish a <u>probability</u> of intent to defraud v.g. the accused kept proper books until shortly before this insolvency.	

II - BANKRUPTCY ACT	FACTS TO BE PROVEN	EVIDENCE
156. Any bankrupt who		
a) fails without reasonable cause to do any of things required of him under section 117:		
117 (a) Make discovery of and deliver all his property that is under his possession or control to the trustee or to any person authorized by the trustee to take possession of it or part thereof.	1) That accused is a bankrupt.	
	That he failed to make discovery and deliver to the trustee all his property.	Testimony of trustee or person authorized.
	That all or some of his property not delivered was under his possession or control.	Expert witnesses, confession.
	That the trustee is one appointed.	Certificate of official receiver or Court order.
	or	
	Person authorized by trustee was duly authorized.	Testimony of trustee.
117 (b) Deliver to the trustee all books, records, documents, writings and papers including, without restricting the generality of the foregoing, title papers, insurance policies and tax records and returns and copies thereof in any way relating to his property or affairs.	2) That accused is a bankrupt.	
	That he failed to deliver to the trustee books, etc.	Testimony of trustee.
	That the books, records, documents, writings and papers related to his property or affairs.	Expert evidence.
	That trustee is one appointed.	Certificate of official receiver or Court order.

II - BANKRUPTCY ACT	FACTS TO BE PROVEN	EVIDENCE
156. a) 117 (c) At such time and place as may be fixed by the official receiver attend before the official receiver or before any other official receiver delegated by the official receiver for examination under oath as to his conduct, the causes of his bankruptcy and the disposition of his property.	3) That accused is a bankrupt.	
	That he failed to attend before official receiver for examination under oath.	Testimony of official receiver.
	That the time and place of meeting was fixed by the official receiver.	Testimony of official receiver.
	That official receiver was one for bankruptcy division or was delegated by the official receiver for the bankruptcy division.	Testimony of official receiver.
117 (d) Within seven days following his bankruptcy, unless the time is extended by the official receiver, prepare and submit to the trustee in quadruplicate a statement of his affairs in the prescribed form verified by affidavit and showing the particulars of his assets and liabilities, the names and addresses of his creditors, the securities held by them respectively, the dates when the securities were respectively given and such further or other information as may be required but where the affairs of the bankrupt are so involved or complicated that he cannot himself reasonably prepare a proper statement of his affairs the official receiver may, as an expense of the administration, authorize the employment of some qualified person to assist in the preparation of the statement.	4) That accused is a bankrupt.	
	That he failed to submit in quadruplicate a statement of his affairs to trustee.	Testimony of trustee.
	Within 7 days following his bankruptcy.	See above re date of bankruptcy.
	That time was not extended by official receiver.	Testimony of official receiver.
	If time was extended, then that statement was not submitted within that specified time.	Testimony of official receiver and trustee.
	That statement was in prescribed form.	Expert evidence and testimony re what constitutes a prescribed form, i.e. that it shows assets and liabilities, creditors and securities held by them.
	That trustee is one appointed.	Certificate of official receiver or Court order.

II - BANKRUPTCY ACT	FACTS TO BE PROVEN	EVIDENCE
156. a)		
117 (e) Make or give all the assistance within his power to the trustee in making an inventory of his assets.	That accused is bankrupt.	
	That he failed to give all the assistance to the trustee in making an inventory of his assets.	Testimony of trustee.
	LIMITATION: within his powers.	Testimony of trustee, testimony, confessions.
	That trustee is one appointed.	Certificate of official receiver or Court order.
117 (f) Make disclosure to the trustee of all property disposed of within one year preceding bankruptcy or for such further antecedent period as the court may direct and how and to whom and for what consideration any part thereof was disposed of except such part as had been disposed of in the ordinary manner of trade or used for reasonable personal expenses.	That accused is bankrupt.	
	That he failed to disclose to trustee property disposed of.	Testimony of trustee.
	Property disposed of.	Testimony, evidence of books, etc., expert evidence.
	Within one year preceding bankruptcy.	See above re time of bankruptcy.
	or	
	Such further antecedent period as the Court may direct.	Court order.
	To whom and for what consideration.	Testimony, evidence of books, etc., expert evidence.
	Except such part as disposed of in the ordinary manner of trade or used for personal expenses.	Proof that disposition not in ordinary manner of trade or for reasonable personal expenses by testimony, records, expert evidence.
	That trustee is one appointed.	Certificate of official receiver or Court order.

II - BANKRUPTCY ACT	FACTS TO BE PROVEN	EVIDENCE
156. a)		
117 (g) Make disclosure to the trustee of all property disposed of by gift or settlement without adequate valuable consideration within five years preceding his bankruptcy.	That accused is bankrupt.	
	That he failed to disclose to trustee property disposed of.	Testimony of trustee.
	Property disposed of.	Testimony, confession, expert evidence (books, records, etc.)
	Within five years preceding bankruptcy.	Proof re time of bankruptcy.
	By gift or settlement without adequate valuable consideration.	Testimony, confession, expert evidence.
117 (h) Attend the first meeting of his creditors unless prevented by sickness or other sufficient cause and submit thereat to examination.	That accused is a bankrupt.	
	That he failed to attend first meeting of his creditors.	Testimony of creditors.
	That he was not sick or prevented by other sufficient cause.	Testimony of witnesses.
117 (i) When required, attend other meeting of his creditors or of inspectors or attend upon the trustee.	That accused is bankrupt.	
	That other meeting was required.	Testimony of creditors, inspectors or trustee.
	That he failed to attend.	Testimony of one(s) requiring meeting.
117 (j) Submit to such other examinations under oath with respect to his property or affairs as required.	That accused is bankrupt.	
	That examination was required.	Testimony of person requiring examination.
	That he failed to submit to examination under oath with respect to his property or affairs.	Testimony of person holding examination.

II - BANKRUPTCY ACT	FACTS TO BE PROVEN	EVIDENCE
156. a)		
117 (k) Aid to the utmost of his powers in the realization of his property and the distribution of the proceeds among his creditors.	See section 117 (e).	
117 (l) Execute such powers of attorney, conveyances, deeds and instruments as may be required.	That accused is bankrupt.	
	That execution of instrument was required.	Testimony of trustee; expert evidence.
	That he failed to execute such.	Testimony of trustee; expert evidence.
117 (m) Examine the correctness of all proofs of claims filed, if required by the trustee.	That accused is bankrupt.	
	That examination required by trustee.	Testimony of trustee.
	That he failed to examine the correctness of all proof of claim filed.	Testimony of trustee.
117 (n) In case any person has to his knowledge filed a false claim, disclose the fact immediately to the trustee.	That accused is bankrupt.	
	That he had knowledge of false claim.	Confession; testimony.
	That he failed to disclose the fact to the trustee.	Testimony of trustee.

II - BANKRUPTCY ACT	FACTS TO BE PROVEN	EVIDENCE
156. a) 117 (o) Generally do all such acts and things in relation to his property and the distribution of the proceeds amongst his creditors as may be reasonably required by the trustee or may be prescribed by the General Rules or may be directed by the Court by any special order made with reference to any particular case or made on the occasion of any special application by the trustee or any creditor or person interested.	That accused is bankrupt. That he failed to do such acts or thing in relation to his property and the distribution of the proceeds amongst his creditors. As may be reasonably required by the trustee. As may be prescribed by the General Rules. As may be directed by the Court by any special order made with reference to any particular case. or Made on the occasion of any special application by 1) the trustee, or 2) any creditors, or 3) person interested.	Testimony of trustee, testimony of other trustees, experts, etc. re reasonableness ref. General Rules. Court order. Testimony of trustee. Testimony of such creditor(s). Testimony of person interested.
117 (p) Until his application for discharge has been disposed with and the administration of the estate completed, keep the trustee advised at all times of his place of residence or address.	That accused is bankrupt. That his application for discharge has not been disposed with and that the administration of the estate is not completed. That he has failed to keep trustee advised at all times of his place of residence or address.	See above re discharge. Testimony of trustee.

II - BANKRUPTCY ACT	FACTS TO BE PROVEN	EVIDENCE
156. b) Any bankrupt who makes any fraudulent disposition of his property before or after bankruptcy.	That he is a bankrupt. That he made a fraudulent disposition of his property.	See Special Part, general evidentiary requirements. A prima facie proof of fraudulent disposition of property: testimony of witnesses. Expert Witnesses, confession. Property of section 2(o). Must prove it is his property. Confession. Expert evidence, testimony of witnesses.
c) Any bankrupt who refuses or neglects to answer fully and truthfully all proper questions put to him at any examination held pursuant to this Act.	Answering questions - That he is a bankrupt. That he was being questioned at an examination held pursuant to the Bankruptcy Act. That the questions were proper. That he refused or neglected to answer fully and truthfully such questions.	Of Bankruptcy Act. Of classes specified - Bankruptcy Act. Testimony of one holding examination (trustee, inspector, creditors) plus testimony of expert witness, witnesses that answers given were entirely truthful.

II - BANKRUPTCY ACT	FACTS TO BE PROVEN	EVIDENCE
156. d) Any bankrupt who makes a false entry or knowingly makes a material omission in a statement or accounting.	That accused is a bankrupt. That he makes a false entry or knowingly makes an omission in a statement or accounting. That such took place when adjudged bankrupt.	 Expert evidence; testimony of witnesses. e.cj. omit a creditor's name from list of creditors. Testimony of trustee. Expert evidence; testimony of trustee.
e) Any bankrupt who after or within twelve months next preceding his bankruptcy conceals, destroys, mutilates, falsifies, makes an omission in or disposes of or is privy to the concealment, destruction, mutilation, falsification, omission from or disposition of a book or document affecting or relating to his property or affairs unless he proves that he had no intent to conceal the state of his affairs.	That accused is a bankrupt after or within 12 months preceding bankruptcy. That he concealed, mutilated, falsified, omitted or disposed of books or documents related to his property or affairs or that he was privy to such. That he intended to conceal the state of his affairs - not necessary (see mens rea).	 See above re time of bankruptcy. Confession; expert evidence; testimony of witnesses.

II - BANKRUPTCY ACT	FACTS TO BE PROVEN	EVIDENCE
156. f) Any bankrupt who after or within twelve months next preceding his bankruptcy obtains any credit or any property by false representations made by him or made by some other person to his knowledge.	That accused is a bankrupt after or within 12 months preceding bankruptcy. That he obtained credit or property by false representation made by him or some other person to his knowledge. MUST PROVE FRAUD	Must prove an active fraud (i.e. a false representation and not simply the purchase of goods when he knows he is not able to pay for them): by expert evidence; testimony of witnesses. That it was false representation knowing it to be false: by proving intent. Fraud must be proved (i.e. vendor proved with goods any faith of false pretence). Limited to obtaining of credit re payment or repayment of money.

II - BANKRUPTCY ACT	FACTS TO BE PROVEN	EVIDENCE
156. g) Any bankrupt who after or within twelve months next preceding his bankruptcy fraudulently conceals or removes any property of a value of fifty dollars ($50.00) or more or any debt due to or from him.	That accused is bankrupt after or within 12 months preceding bankruptcy. That he concealed or removed property; must prove removal concealment. That property valued at $50.00 or more or That he concealed or removed any debt due to or from him.	Testimony of witnesses; expert witnesses (e.g. large discrepancy in inventory with no explanation given). Receipts; expert evidence. Must again prove concealment/removal of debt either due to or from him: expert evidence; testimony of witnesses.

II - BANKRUPTCY ACT	FACTS TO BE PROVEN	EVIDENCE
156. h) Any bankrupt who after or within twelve months next preceding his bankruptcy, pawns, pledges or disposes of any property which he has obtained on credit and has not paid for, unless in the case of a trader such pawning, pledging or disposing is in the ordinary way of trade and unless in any case he proves that he had no intent to defraud.	That accused is bankrupt after or within 12 months preceding bankruptcy. That he pawned, pledged or disposed of property. That it was obtained on credit. That it was not paid for. That he was not a trader, and that it was not in the ordinary way of trade. That he intended to defraud (see mens rea).	Testimony of witnesses; expert evidence. Testimony of vendor; expert evidence. Testimony of vendor; expert evidence. Testimony of those who can testify otherwise. Expert evidence: e.g. buying goods and then sell immediately at a loss. Up to accused to show that he had no intent to defraud. e.g. the assigning of the whole of a trader property to one creditor reserving nothing for others. e.g. not disclosing to trustee a transaction which is an offence under 156(h).

II - BANKRUPTCY ACT	FACTS TO BE PROVEN	EVIDENCE
157. An undischarged bankrupt who		
a) engages in any trade or business without disclosing to all persons with whom he enters into any business transaction that he is an undischarged bankrupt; or	a) (1) The accused is an undischarged bankrupt.	a) (1) (a) Copy of official document (see "proof of bankruptcy"). (b) Identification of accused. (c) Testimony that bankrupt is undischarged.
	(2) That he has engaged in trade or business.	(2), (3) (a) Testimony of co-transactor. (b) Testimony of witnesses to transaction and operation of trade or business. Documents can be filed in support (letters, orders, etc.).
	(3) That he has not disclosed fact (1).	
b) obtains credit for a purpose other than the supply of necessaries for himself and family to the extent of $500.00 or more from any person, without informing that person that he is an undischarged bankrupt.	b) (1) That the accused is an undischarged bankrupt.	b) (1) See above (157(a)).
	(2) That he obtained credit (N.B. credit: money or goods, with deferred payment or an extension of time for repayment. Will not apply to money or goods received on promise of future performance.)	(2) Testimony of person granting credit.
	(3) That this credit was not for "necessaries" i.e. food, lodging, clothing, medical supplies, etc.	(3) (a) Confession. (b) Circumstances (amount, personal situation of bankrupt, etc.). (c) Testimony of person granting credit. (d) Testimony of other witnesses.
	(4) That he did not disclose fact (1).	(4) Testimony of person granting credit.

II - BANKRUPTCY ACT	FACTS TO BE PROVEN	EVIDENCE
158. Any person becoming bankrupt or making a proposal who has on any previous occasion been bankrupt or made a proposal to his creditors (is guilty of an offence) if		
a) being engaged in trade or business, at any time during the two years immediately preceding his bankruptcy, has not kept and preserved proper books of account, or	a) (1) The accused is bankrupt or has made a proposal. (2) The accused was previously bankrupt. (3) The accused was engaged in trade or business. (4) That during the 2 years preceding the accused has not kept proper books. (158(2) defines what are proper books.)	a) (1), (2) (a) Copy of official documents (see "proof of bankruptcy"). (b) Identification of accused. (3) Testimony. (4) (a) Confession of accused. (b) Testimony of trustee as to absence of books. (c) Expert accounting evidence that books were not "proper"; that is, did not exhibit or explain his transactions and financial position.
b) after or within the 2 year period mentioned in paragraph (a) he conceals, destroys, mutilates, falsifies or disposes of, or is privy to the concealment, destruction, mutilation, falsification or disposition of any book or document affecting or relating to his property or affairs, unless he proves that he had no intent to conceal the state of his affairs.	b) (1) The accused is a bankrupt or has made a proposal. (2) The accused was previously bankrupt. (3) The accused was responsible for or privy to (see general part: participation). (4) 1) The concealment 2) destruction 3) mutilation 4) falsification 5) disposition of books.	b) (1), (2) See above (158(a)). (3) (a) Confession. (b) Testimony. (c) Circumstances. (4) (a) Confession. (b) Testimony of employees of accused. (c) Testimony of trustee. (d) Expert accounting evidence. (e) Expert police evidence of falsification.

II - BANKRUPTCY ACT	FACTS TO BE PROVEN	EVIDENCE
159.		
1) Where a creditor, or a person claiming to be a creditor, in any proceedings under this Act, wilfully and with intent to defraud, makes any false claim, or any proof, declaration or statement of account that is untrue in any material particular, he is guilty . . etc. . .	1) (1) That a person is or claims to be a creditor.	1) (1), (2) (a) Copy of claim, etc. (b) Identification of person making it.
	(2) That the person made a claim, proof, declaration or statement of account.	
	(3) That such claim, etc. is untrue in a material particular (an essential part).	(3) (a) Confession. (b) Testimony of debtor. (c) Documentary evidence (v.g. proof of payment of claim). (d) Expert accounting evidence of creditors' books.
	(4) That this was done with knowledge and intent to have the claim, etc. unjustly acted upon.	(4) (a) Confession. (b) Circumstances.
2) Where an inspector accepts from the bankrupt or from any person, firm or corporation on his behalf or from the trustee, any fee, commission or emolument of any kind, other than or in addition to the regular fees provided for by this Act, he is guilty . . etc. . .	2) (1) That a person is an inspector.	2) (1) (a) Testimony of trustee or other creditors. (b) Minutes of meetings of creditors.
	(2) That he has accepted a reward.	(2) (a) Testimony. (b) Confession.
	(3) That this reward is unlawful (see section 82 (11), (15) & (16)).	(3) (a) Testimony of trustee. (b) Expert accounting evidence as to amount of fees which are lawful.

II - BANKRUPTCY ACT	FACTS TO BE PROVEN	EVIDENCE
159.		
3) Where the bankrupt enters into any transaction with any person for the purpose of obtaining a benefit or advantage to which either of them would not be entitled, he is guilty . . . etc. . . .	1) That the accused is a bankrupt. 2) That he has entered into a transaction with someone. 3) That the purpose of this transaction is an unlawful benefit.	1) (a) Copy of official document (see proof of bankrupt). (b) Identification of accused. 2), 3)) (a) Confession. (b) Testimony of the person with whom the bankrupt has transacted might be held to be accomplice evidence (see manual, "Accomplice Evidence").

II - BANKRUPTCY ACT	FACTS TO BE PROVEN	EVIDENCE
160. (1) A person who,		
a) not being a licensed trustee, does any act as, or represents himself to be, a licensed trustee;	1) That a person is not a trustee. 2) That he has acted or represented himself to be a trustee.	1) Affidavit by Superintendent of Bankruptcy. 2) Testimony of witnesses.
b) being a trustee, either before providing the bond required by subsection (1) of section 8 or after providing the bond but at any time while the bond is not in force, acts as or exercises any of the powers of trustee;	1) That a person is a trustee. 2) That he has not provided the required bond or that such bond was not in force. 3) That the person acted as a trustee.	1) Affidavit by Superintendent of Bankruptcy. 2) Certificate of the official receiver. 3) Testimony of witnesses.
c) having been appointed a trustee, with intent to defraud, fails to observe or to comply with any of the provisions of this Act, or fails duly to do, observe or perform any act or duty that he may be ordered to do, observe or perform by the court pursuant to this Act;	1) That the accused has been appointed a trustee. 2) That he has defaulted on a legal duty or a court order. 3) That he intended to defraud.	1) Certificate of appointment by court. 2) (a) Testimony as to default. (b) Proof of court order when such is the case by filing copy. 3) (a) Confession. (b) Circumstances.
d) having been appointed a trustee, without reasonable excuse, fails to observe or to comply with any of the provisions of this Act, or fails duly to do, observe or perform any act or duty that he may be ordered to do, observe or perform by the court pursuant to this Act;	1), 2)) See 1 and 2, 160(c). 3) Absence of reasonable excuse.	1), 2)) See 160(c) 3) (a) Confession. (b) Circumstances.

II - BANKRUPTCY ACT	FACTS TO BE PROVEN	EVIDENCE
160. (1)		
e) having been appointed a trustee to any estate and another trustee having been appointed in his stead, does not deliver to the substituted trustee on demand all unadministered property of the estate, together with the books, records and documents of the estate and of his administration.	1) That the accused has been appointed trustee to an estate and then replaced. 2) Failure to deliver unadministered property and documents to substituted trustee on demand.	1) (a) Certificate of appointment. (b) Certificate of substitution. 2) Testimony of substituted trustee concerning 1) demand 2) failure to deliver.
f) directly or indirectly solicits or canvasses any person to make an assignment or a proposal under this Act or to petition for a receiving order;	Self-explanatory. Will not apply to bona fide advice by accountant or counsellor.	Testimony or copy of letter of solicitation.
g) being a trustee, directly or indirectly solicits proxies to vote at a meeting of creditors; or	1) That accused is a trustee. 2) That he has solicited proxies.	1) Affidavit by Superintendent. 2) (a) Testimony of creditors solicited. (b) Copy of letter of solicitation. (c) Accomplice evidence.

II - BANKRUPTCY ACT	FACTS TO BE PROVEN	EVIDENCE
160. (1) h) being a trustee, makes any arrangement under any circumstances with the bankrupt, or any solicitor, auctioneer or other person employed in connection with a bankruptcy, for any gift, remuneration, or pecuniary or other consideration or benefit whatever beyond the remuneration payable out of the estate, or accepts any such consideration or benefit from any such person, or makes any arrangement for giving up, or gives up, any part of his remuneration, either as a receiver or trustee, to the bankrupt or any solicitor, auctioneer or other person employed in connection with the bankruptcy.	1) That accused is a trustee. 2) That he has made an arrangement in return for a reward or accepted a reward over and above his lawful remuneration. 3) That he has engaged in fee splitting.	1) Affidavit by Superintendent or certificate of appointment. 2)) (a) Confession. 3)) (b) Testimony: accomplice evidence may be prevalent in such cases (see special part, accomplice evidence).
160. (2) A person who fails to comply with or contravenes any provision of section 3A is guilty . . . etc.	NOTE: The duties which must be complied with under section 3A are those dealing with production of books, records, etc., answering questions, and generally not making an investigation more difficult. In the less obvious cases, investigators will be well advised to consult with their counsel before charging anyone.	Evidence will generally be the testimony of the investigating officers.

II - BANKRUPTCY ACT	FACTS TO BE PROVEN	EVIDENCE
161. A person, except the trustee, who within thirty days after delivery to the trustee of the proof of claim mentioned in section 50, or who, in case no such proof has been delivered, removes or attempts to remove the property or any part thereof mentioned in such section out of the charge or possession of the bankrupt, the trustee or other custodian of such property, unless with the written permission of the trustee, is guilty of an offence and is liable on summary conviction to a fine not exceeding five thousand dollars, or to imprisonment for a term not exceeding two years, or to both fine and imprisonment.	1) That a person has removed or attempted to remove property in which he claims an interest from the possession of the bankrupt, trustee or guardian. 2) That this was done within 30 days of delivery to the trustee of a proof of claim; or 3) That no proof of claim was delivered; and 4) That the accused did not have the written permission of the trustee.	1) Testimony of bankrupt, trustee or guardian as to possession and removal or attempt. 2), 3), 4) (1) Testimony of trustee. (2) Production of proof of claim.

II - Collection of Evidence

In this chapter, we will study the rules applying to particular investigative procedures.

The first part will deal with witnesses, both ordinary and expert. The second part will look at problems arising with real and documentary evidence. Finally, we shall examine the question of confessions or incriminating statements by the accused.

A - Witnesses

Even in those cases where the prosecution relies almost entirely on documents (false entry, material omission, fraudulent disposal, etc...) witnesses are essential. At the very least, they will have to identify the accused. They may be called as to the circumstances of entries in books. Their testimony may be sufficient to establish the whole case.

Dealing with witnesses is not a matter connected only with the investigative process. The manner in which witnesses are interrogated may have a bearing on the trial itself. The investigator who interrogates potential witnesses should bear in mind a few rules of proper interrogation. The first rule is that the investigator should have an idea as to what he is looking for. If he is investigating a reported or a suspected offence, he should be sensitive to facts that are related to the components of the offence. He should establish in what way the witness can help him to discover the facts he needs to know. For instance, in a case where a company's books are involved, what is the actual relation of the witness to the books? Is he the person who actually made the entries, etc.? This specifically oriented questioning carries a danger: that the investigator's attitude may convey to the person being interviewed that the investigator wants certain answers, in which case the interviewee might furnish these answers out of conjecture. To counteract this risk the investigator should, like T.V.'s sergeant Friday, insist on facts. Facts can be established in court. Conjecture is not even admissible.

Another rule of investigation concerns the recording of interviews with potential witnesses. The investigator should take complete notes of the potential witnesses' statements. These notes should be transcribed and the witness, if possible, should be made to sign the transcribed statement. This procedure serves many purposes. It will help the investigator to have a written record of his case as he goes along. It will help the attorney to prepare the case for court.

It will help the witness to refresh his memory (it is perfectly proper to have the witness read his statement before he goes to testify, in fact it is highly recommended). If the witness's memory falters during his testimony, he can even be shown his signed statement while he is in the witness box. Should the witness turn hostile and contradict his statement, the written statement can be used to discredit him, and thus repair some of the damage that may have been done to the prosecution's case. Finally (and very rarely), the witness's statement on file is an additional protection against an action for malicious prosecution.

Some investigators may claim that the fact of having a written statement by the witness carries a risk: that the defence may ask for (and the court may grant) the witness's statement in order to use it for cross-examination. This, to our mind, is not a proper attitude to take concerning criminal prosecutions. Witnesses do not belong to either party; they are there for the truth and should have nothing to hide.

A final point in connection with witnesses. It may happen that one or more of the witnesses in the case will be accomplices of the accused. The investigator must be aware of the need of corroborative evidence when this happens. Even so, a dangerous situation may develop: that the accomplice will want an incentive to testify, or to put the matter more crudely, to "make a deal." This is a very delicate situation which can have truly explosive results. Should the situation occur, consultation with the Crown Attorney becomes essential. Although there is nothing objectionable in the fact that co-operation with the Crown should merit some recognition (in the form of a lighter sentence, for instance), an investigator should not hold out specific rewards as an incentive to testify. The best answer in these cases would be: "I can make no promises and I will not make any promises. It is a fact that the judge takes a person's co-operation into account when sentencing, but I do not know to what extent. If you wish, I can refer you in due time to the Crown Attorney."

Qualifications of the expert witness:

A person may become an expert either by a course of special study or by special experience. The keyword here is specialized. A pathologist has undergone a course of specialized studies that enable him to form

an opinion on the cause of a death; a policeman who has carried out burglary investigations has had specialized experience which enables him to say, as an expert, whether or not a tool is capable of being used as a housebreaking instrument. The very best type of expert is the one who has undergone a specialized course of study and who has had a long period of successful practice in his field of specialization.

It may happen that a person who is a specialist in some field is not sufficiently qualified to testify as an expert in a related field. An example of this might be found in section 345 of the criminal code which makes it an offence for an insolvent trader to fail to keep proper books. In this section (compare with section 158, Bankruptcy Act), the books are described in relation to the books ordinarily kept in the trade or business of the insolvent trader. Although an accountant is the normal person to consult about books, it might happen that an accountant, never having practised in a particular trade, might be unable to judge the propriety of the trader's books, relatively to the trade; in such cases, an accountant familiar with the usages of the trade must be found.

Before an expert can give his opinion in testimony, his qualifications (his competency) must be established to the satisfaction of the court.

Scope if expert opinion

A witness, even if he is an expert, is never asked his opinion as to the guilt or innocence of the person charged. This is what the whole trial is about and the answer to the question is up to the judge or jury. However, many cases stand or fall on expert testimony. Section 156(d) of the Bankruptcy Act, for example, making a false entry or knowingly making a material omission in a statement or accounting is a type of offence where expert testimony can be essential. When is an entry in a statement a false one? There may be instances when entries concerning inventory have to be adjusted. Is such an adjustment in accordance with sound accounting practice?

The question to be answered by the expert, although not the fundamental one of guilt or innocence, may be essential. But this question will always be specific and technical. If the offence charged is that of knowingly making a material omission, the expert can be asked if an omission is a material one; it is not up to him to answer if this omission was made knowingly. The object of expert testimony is not to substitute the witness' opinion for that of the judge, but to help the judge form an opinion on the case by completing the judge's knowledge of the facts.

A point that may arise in regard to expert evidence is that of handwriting identification. It may be essential to prove a tie-up between the accused and, for instance, a false entry. In such a case, by proceeding from a known specimen of the accused's handwriting, it is possible to prove identity, by employing a handwriting expert. In such cases, the known specimen will have to be identified by an ordinary witness, who saw the accused write. Another method of identification is the use of a witness familiar with the accused's handwriting. This person can be termed as expert in regard to one subject: the handwriting of the accused.

B - Real evidence and documents

When the prosecution or defence present a witness to the court, they are asking the court to see and hear the facts through the eyes and ears of that witness. Real evidence and documents are such evidence that the court can evaluate with its own senses. There are some

differences in the rules relating to real evidence and documents. There are also many similarities. We shall, therefore, look at each of these classes of evidence separately, and then study certain rules, such as continuity of possession, which apply to books.

a) Real evidence

Real evidence means "things in evidence" from the latin "res", thing. The basis of the desirability of real evidence is that it is often the best possible evidence of a particular fact. Let us suppose, for instance, a case of theft where the owner of the stolen goods is called upon to identify merchandise. He will describe certain characteristics of the merchandise or articles and claim that only his merchandise presents these characteristics. If the merchandise, or some of it is actually produced in court, the judge or jury can look at it and form their own opinion as to the exclusiveness of the characteristics pointed out. The rule with respect to this type of evidence is the following: the court should not have to rely on second-hand evidence when first-hand evidence is available.

This rule, however, is not absolute. Suppose that the merchandise stolen was a carload of cucumbers: it is obvious that if this evidence is held any length of time, it will be impossible to handle it, let alone identify it. The same would apply to a number of things, such as living animals, perishable items, items too bulky to be conveniently handled, etc. In these cases, the best evidence rule is subordinate to expediency.

b) Documents

Documents can be considered both a form of real evidence and a form of testimony: they are considered real evidence when the point in issue is their existence and nature, as is the case with forged documents. They are a form of testimony, when the point in issue is their contents. Thus, in a case involving a forged document, the question is whether a document which purports to be, let us say, a title to land, really is such a title. If it is not, the physical characteristics of the document will be important: who made the document or who altered it; the writing will be studied by experts; the paper will be examined.

In a case involving the failure by a bankrupt to keep proper books, the contents of documents will be in issue. A document will probably be produced as evidence that the accused is a bankrupt: this will be an official document, or a certified copy. This document is proof of facts other than its own existence and nature; it is proof that the accused made an assignment or was subject to a receiving order. The bankrupt's books will be examined and their contents will be evaluated, to see if they are proper books.

However, even if the point in issue is the contents of documents, they remain real evidence in many respects. Suppose, for example, that a document is produced which purports to be a contract binding the accused company. No evidence is adduced of where the contract was found, or of any relation between the signatory and the accused company. (This actually occured in a recent case where a document, a political tract, bearing the accused's name, was produced by the Crown. No relationship between the document and the accused was proven). This document will not have a chance to be accepted as proof of its contents. It will never pass the "real evidence" stage.

Official documents - Private documents

A distinction can be made between official documents and others. Official or "semi-official" documents are subject to different rules concerning production and evidentiary value than books seized on the premises of the accused, for instance. For our purposes we shall consider documents whose probative value the law recognizes or documents whose production is governed by special rules to be official or semi-official documents.

The probative value of these documents recognizes the fact that they are generally made with care and without intent to mislead, by neutral parties. Court records, for instance, rarely contain false information.

The special rules as to admissibility try to solve certain technical problems. Why, for instance, should a bank be deprived both of its records and of the services of its manager or accountant for long periods of time, especially as these records are rarely contested? It is to be noted that as regards both probative value and admissibility, the rules are not absolute. Official documents can be contested and officials can be summoned to testify concerning their records.

In the case of copies of official records, a reasonable notice (of at least seven days) is required. It is good practice on the part of an investigator, if his case contains evidence that will be met by the production of copies of records, to inform the prosecuting attorney of that fact, in order to give sufficient time to give notice.

A further note about bank records: search warrants may be obtained in respect to the premises of a bank but, unless the warrant specifies otherwise, the search, as regards books and records, shall be limited to the inspection and taking copies of entries.

The first class of such documents are judicial documents. Copies of judicial records and proceedings are accepted in evidence provided that they are certified by the seal or the signature of the judicial officer concerned.

Previous convictions can be proved by a copy of the indictment and conviction or summary conviction, bearing the signature of the clerk of the court or other officer who has custody of the records, and by proof of identity.

Government records can be proved by copies certified by the affidavit of an officer of the department.

Notarial acts and instruments in Quebec can be proved by a copy certified by the notary or prothonotary who has the original in his possession.

Documents of a public nature can be proved by certified copy of the person who has them in his custody. These documents would include those of the registry office, provincial records of birth and death, etc.....

Documents of financial institutions (banks, "caisses populaires" and any incorporated savings institution) can be proved by copies which are considered proof of their contents if the copy is certified as true by affidavit or testimony of the manager or accountant. Furthermore, it must be proved, in the same way, that the book or record in which the entry was made is one of the ordinary books or records of the institution, that the entry was made "in the usual and ordinary course of business" and that the book or record is in the custody of the institution.

An affidavit by the manager or accountant of a financial institution "that he has made a careful examination of the books and records ... and that he has been unable to find (an) account ..." is evidence that a person does not have an account in a financial institution.

Business records that can oridinarily be proved by testimony can be presented as documentary evidence of their contents. The omission of matter that might rea - sonably be expected to be contained in the record can lead the court to infer the non-existence, or the non occurence of the matter. For instance, if records contain entries of delivery on certain dates, the absence of such an entry can lead the court to infer that a delivery did not take place.

An affidavit certifying a copy of a record, and stating the reasons why it would not be possible or reasonably practical to produce the record, is accepted when a copy is produced. The law also allows written explanations of the form of the record instead of testimony to the same effect, provided that this explanation be supported by an affidavit.

Private documents

Private documents, for our purposes, are documents whose production and probative value are not governed by special, exceptional rules but which are subject to the ordinary rules concerning real evidence and weight of evidence. For example, if the document in question is a cash book and the question in issue is that of how much cash was on hand at a certain time, a statement in the cash book may or may not be proof of the fact in issue. A document may often be used as evidence of a matter quite different from its contents. In the example given above, if the cash book entries are contradicted by other evidence and if it is shown that the accused made the entries in the book, or was aware of them, the document can be taken as evidence of intent to defraud.

Such documents will often be produced by the prosecution after having had them in its custody. Custody can be obtained by pre-trial procedures such as warrants under the Criminal Code.

The rules concerning search, seizure and custody apply to things as well as to documents. We shall therefore study these rules in relation both to documents and real evidence.

The first question to be considered is that of obtaining possession of the document or thing.

As we have seen in the general part of the manual, the question of search and seizure is one that affects rights of property and privacy. A search and seizure is therefore an exceptional procedure and the power to carry it out must be specifically granted by the law.

The Bankruptcy Act grants certain investigative powers to "The Superintendent or any person duly authorized by him". These are set out at section 3A of the Act. They enable a person authorized by the Superintendent to apply to a Court (bankruptcy court) and with the court's approval, to enter and search wherever books, records, papers or documents that may afford evidence as to an offence in connection with a bankruptcy are held. The officer may then examine these books and make copies of them.

It is to be noted that the section is silent as regards real evidence other than books, records, papers and documents. The section apparently does not authorize seizures.

Sections 121 and 122 authorize the trustee to examine the bankrupt and any person with knowledge of the affairs of the bankrupt and to order the production of books, documents, correspondence or papers relating to the bankrupt, his dealings, or property. A person may also be required to deliver to the trustee any property of the bankrupt in his possession.

The object of this procedure is essentially one which most concerns the trustee: the realization of the assets of the bankruptcy. It is to be noted that the property produced is that of the bankrupt and that the order requiring production is not a warrant to seize.

Finally, under section 126, the court may have the bankrupt arrested and books, papers and property in his possession seized if (... 126 (c-1) there is probable cause to believe that the bankrupt is about to remove his property... or that he has concealed or is about to conceal or destroy property, books, documents or writings that might be of use to the trustee or to his creditors in the court of bankruptcy proceedings.

Again, this is to be understood as a conservatory measure and relates more to the realization of the assets rather than to the prosecution of offences. It applies to property, books, etc... in the possession of the bankrupt.

The powers above noted apply to documentary rather than real evidence. Either they do not give the right to seize evidence wherever it is found (126), or else, they require a certain amount of notice to be given (122) or yet do not grant at all the power to seize (3A)

Investigative powers under the Criminal Code are more extensive. Section 429 of the Criminal Code enables a Justice, on an information upon oath, to issue a warrant which enables a person named in the warrant or a peace officer to enter premises and to seize "anything that there is reasonable ground to believe will afford evidence with respect to the commission of an offence against" (the Criminal Code).

The person seizing the evidence must carry it before a Justice who makes an order as to its custody.

The information must specify both the ground for belief that evidence of an offence may be found at the designated premises and a fairly precise description of the things to be seized. "Evidence of a crime" is not a specific description. "Letters from A to B" is specific. "Books and accounts of ... for the period ... to ..." would probably be specific enough in most cases.

Search warrants are authority to seize both real evidence and documents, not just to examine and make copies of documents. They apply not only to possible evidence in possession of the accused, but to evidence wherever it may be found. Finally, the custody of things seized under a warrant is often granted to the officers seizing.

It might appear from the foregoing, that in certain cases, search warrants under the Criminal Code may be more practical than the powers granted to investigators by the Bankruptcy Act. The fact that search warrants are issued to search for evidence of offences under the Criminal Code should not be a bar to using them in an appropriate case. Most Bankruptcy Act offences have elements which are common to Criminal Code offences. To take just a few examples, section 156(f), Bankruptcy Act, (bankrupt obtaining credit or property by false representation...), has a direct parallel in section 304(b), Criminal Code (obtaining credit by false pretence or fraud), the offence of destroying books exists under the Bankruptcy Act 158(b) and the Criminal Code 340(a). Failure to keep books appear under both sections 345 Criminal Code and 158(a) Bankruptcy Act.

The practical effect of the similarity between Criminal Code and Bankruptcy Act offences is that this leaves a certain degree of latitude in the choice of procedure to be followed. The final choice of whether to proceed under the Criminal Code is a matter of discretion. This discretion will be exercised by the attorney in charge of the prosecution and he will base it on departmental policy, the sentence possibilities, the actual facts of the case, etc.... However, at the investigative phase, this choice may not have been made, in which

case it is always possible to proceed under the Act which appears, in a given case, to be the most convenient. Should the prosecuting attorney decide to proceed under a different Act, it is always possible to effect a change once the investigation has brought in all the facts. Indeed, he will then be in a much better position to decide whether to have the accused charged under the Bankruptcy Act or the Criminal Code.

A proper search, under a warrant, should be conducted with a due regard not only to the finding of evidence but to its production in court. By this we mean that steps should be taken, during the actual search, to prepare for the custody of the evidence. An actual case * will illustrate our point. This case is an excellent example of how not to conduct a search:

Considerable confusion arose at times in the course of the trial regarding the identification of documents as having come from the possession of some one or other of the accused. The confusion arose in this way. In August 1939 Crown officers obtained the issues of search warrants in several Provinces under which seizure was made of files of correspondence, agreements, vouchers and books of account found in the possession of one or another of the appellants. Each warrant directed that the things seized under it should be brought before the Justice of the Peace who issued the warrant, or some other Justice. Section 631 of the Criminal Code provides that when anything is seized under search warrant and brought before a Justice he may detain it, taking reasonable care to preserve it till the conclusion of the investigation, and if anyone is committed for trial he may order it further to be detained for the purpose of evidence on the trial. This procedure was entirely ignored. Instead of bringing the things seized before any Justice the Crown officers brought them to Toronto. They were kept for a time locked up in a room in a Government building, and were then taken to a room in a large office-building, to which room more than one person had access. The bundles of documents seized were opened and examined on the part of the prosecution in the search of evidence that might be used at the trial, and documents that it was thought might be so used were removed and apparently came into the custody of Crown counsel or his assistants. The room where the documents were stored is said usually to have been kept locked, although the statement was made at the trial that on at least one occasion anyone could walk in. Counsel for some of the appellants applied to counsel for the Crown for permission to examine the documents, and such permission was no doubt always granted. As a result of so many persons having had access to the documents that had been seized the police officer who made the seizures was not able in some instances

* R. v. Dominion Container Materials Limited
76 CCC at pp. 51 & 52

to say from whose possession certain of the documents had been taken when seized. At least one letter that counsel for one of the accused tendered in evidence was excluded by the trial Judge because of the inability of the police officer to say in whose possession he had seized it.

No application was made to us in respect to the search-warrants and their validity was not discussed. The conduct of the Crown officers in retaining the things seized, in their own custody instead of bringing them before a Justice of the Peace, and in bringing them from the several places where they had been seized to Toronto, and in keeping possession of them there in the manner described was vigorously attacked, and it was argued that many documents admitted in evidence were improperly admitted as not being sufficiently identified. It is impossible to justify what was done by the officers of the Crown after taking possession of the property of individual appellants under search warrant. It was not only unwarranted; it was in direct disobedience of the express direction of the warrant, and was nothing less than a high-handed trespass upon the property rights of those whose papers and documents were under seizure. It is gravely disturbing at a time when respect for the law much needs to be fostered to find it treated with contempt by officers employed to defend it and to secure obedience to it. Many years ago it was found necessary to declare the rights of a citizen to the undisturbed and private possession of his letters and papers and books of account against intrusion and trespass under colour of a search warrant, and these rights might well have been considered to be sufficiently established. There may be found in the reports of the cases of Wilkes v. Wood, Lofft 1, 98 E.R. 489, and Wilkes v. Lord Halifax (1769), 19 St. Tr. 1076 at p. 1406, some robust statements of the rights of the individual in this regard. To condone by silence the encroachment upon these rights that occurred here would not be to perform fully the duty of this Court as I conceive it.

This case illustrates the need to follow certain procedures during a search in order to be able to ensure proper custody and court identification of the evidence seized. It is imperative that these procedures be carried out before reporting back to the Justice who issued the warrant. We can break them down into three rules:

1) Each item of evidence (real or documentary) must be identified and the identification recorded so that the officer (carrying out the search) will be able to testify to the facts establishing its possession.

EXAMPLE: Copy of a letter from ABC to DEF, found on premises of the accused, Vice-president's office, right hand corner of desk. In the case of an extensive search, it may be useful to have a plan of the premises drawn up. This can be added to the brief to the prosecuting attorney, or, if it is relevant, produced as evidence.

2) Documents should not be altered or marked in any way. Other means of identification should be found, such as tags bearing information on the seizure of the document, or envelopes with the required information on them.

3) Continuity of possession must be kept. It may be necessary to prove that the evidence was safeguarded from alterations or substitution. The easiest way to make this proof is to keep the evidence in the actual custody of the least number of persons. If the whole Branch has access to the evidence, the whole Branch may have to go and testify to its custody.

Material means may be used to facilitate this proof. Evidence kept under lock when one person only has the key can be said to be in safe and continuous custody. The use of containers and envelopes, under initialled seals is an accepted method of ensuring continuity of possession.

In this respect, it may happen that requests may be made by the owner of the evidence to have his property returned. There may be excellent reasons for this request: the value of some property may diminish if it is kept too long. The property may be perishable. Whatever the reason, an investigator who has been granted custody has no right to accede to such a request. The disposition of the evidence is up to the court. There may be cases where the prosecuting attorney will feel that he can do without evidence that has been seized under a warrant. The defence may be willing to make an admission of certain facts, which will dispense the Crown of making proof. In all cases where such a request occurs, it should be referred to the Crown Attorney.

C - Confessions and incriminating statements

Confessions have long been considered a most excellent way of making proof of a person's involvement in a criminal offence. So much so, that for a long time it was necessary, in certain jurisdictions, to obtain a confession in capital cases before sentence could be carried out.

The law, which required a confession, also provided for ways to obtain one, by permitting the use of certain technical aids such as thumb-screws and racks. This, of course, is no longer the case, at least, in Canada.

The reason why a confession is such a favored way of obtaining proof of an incriminating fact is the likelihood of its truth. The rationale behind this belief in the truth of confessions is an ethical one: If a person declares facts which go against his interests, the only possible motivation for such an action are reasons of a higher order, such as remorse or fear of damnation.

However, before a confession can be admitted in evidence, proof must be made that it was induced by reasons of a higher order. As this is quite difficult to prove, the actual requirement is that the confession be free and voluntary. That is, that it was not induced by promises or threats on the part of persons in authority. The reason behind this rule is that the ethical motives which make the confession trustworthy do not obtain if it appears that the person making it did so to further his interests. Thus, if a promise is held out to a person, that he will be treated leniently if he confesses, this person may confess, not because of the truth of the matter, but in the hope of gaining an advantage. The same applies if he confesses out of fear arising from threats by persons in authority or threatening situations which the latter created.

Proof must therefore be made that the confession was free and voluntary. This is generally done by establishing that the investigating officer who obtained the confession did not use threats or promises, nor did anyone connected with persons in authority do so if the accused person was in custody.

Proof is also made that the investigating officer gave the accused a warning stating that the accused was charged with an offence, that he did not have to make a statement, but if he did, that it would be taken down in writing and could be used as evidence in court. The object of this warning is to clear up any possible misunderstanding as to threats or promises.

Another way to prove that the confession was free and voluntary is to show that it occurred spontaneously. That is, that it was volunteered by the accused. The classic example of such a confession is the case of the person showing up at a police station and declaring that he has shot someone. No questioning has been going on, he has not been in contact with persons in authority.

"Persons in authority" are those who are in a position to make credible threats and promises to the accused. This would apply to just about everyone connected with the administration of justice, including investigators. It has been held that the victim of an offence (a creditor could fall in this class) is, to a certain extent, a person in authority because he is in a position to initiate criminal proceedings.

Some confessions are presumed by the law to be free and voluntary because they occur in judicial proceedings. This will occur in cases where a witness who admits incriminating facts in a case or proceeding, is subsequently prosecuted. As a rule, his incriminating testimony can be used against him, if he has not objected to answering.

Should the witness object, because the answer tends to be incriminating, the court will oblige him to answer, but his answers cannot be used as evidence against him in criminal proceedings. There is, however, no legal bar to using the answers of a witness as a method to obtain other evidence which may be used against him, such as the location of incriminating documents, the names of witnesses, etc. Suppose, for example, that in a judicial proceeding, the witness is questioned concerning an auditors' report which he has used to obtain credit; suppose that his answer is: "I typed this auditors' report myself on my portable typewriter." Although the forgery may not be proved by his answer, if he has first objected to the question as being incriminating, his typewriter may eventually be seized in order to afford evidence that the document used was a forgery. (This, of course, will require expert evidence linking the typewriter with the forgery.)

The Bankruptcy Act provides for examination not only of the bankrupt, but of potential witnesses. Investigators should be extremely sensitive to these examinations. Answers given without objecting can be considered automatically admissible, if the person being examined is charged with an offence. In any case, these examinations are a rich source of information to help locate other evidence.

III - Preparation of the case for court

A - The Brief

A brief is a report by the investigating officer to the prosecuting attorney setting out the facts of the case and indicating what evidence can be adduced for each fact. The attorney will use the brief to prepare his case and he will have it with him when he pleads in court.

A good brief will be a clear, well written document containing:

1) - A summary of the case

Example: John Doe is an undischarged bankrupt. On July 12, July 14 and July 15, 1970, he obtained loans of $300.00, $250.00 and $600.00 from A, B, and C, without disclosing to them he was an undischarged bankrupt. On July 16, John Doe went on vacation to Florida, flying first class.

2) A list of the evidence

Example: a: witnesses

1 - A
2 - B
3 - C
4 - Ticket manager of Magic Carpet Airlines

b: documents

1 - John Doe's note to A
2 - John Doe's note to B
3 - John Doe's note to C
4 - Copy of ticket receipt, Magic Carpet Airlines

3) A summary of each witnesses' statement
Example: A will state that John Doe asked him for a loan on a note and that he did not tell A that he was an undischarged bankrupt.

4) A copy of any written statement by a witness.

5) A copy of every document that will be produced and a description of any real evidence.

The brief will also contain information that the Crown Attorney will need to know concerning the attitude of each witness. For example, if A has shown himself hostile to the investigator, this should be pointed out to the Crown Attorney, who may then decide if it is worthwhile to have A's testimony, or who may at least be prepared for a hostile performance by the witness.

The brief should also contain information that can be used to bring out any factors affecting credibility in a witness. Suppose that Mr. Brown is called as a witness for the defence in the trial of Mr. Black. Suppose that he testifies favourably for the defence by contradicting the testimony, of prosecution witnesses. The prosecution can cast light on his credibility if the attorney is in possession of certain facts which might have been discovered by the investigation. (Example: Mr. Brown is Mr. Black's brother in law, he is a convicted perjurer, etc.)

B - Testimony by investigators

It may happen quite often that investigators find themselves called as witnesses in a case. This should not be a traumatic experience, if the investigator will follow a few common sense rules.

The first of these rules is that the investigator should be familiar with the testimony he will be called upon to give. He should have reviewed his notes of the investigation before appearing in court.

The second rule concerns attitude. Although the investigator may have worked very hard on the case, he is not testifying in order to "win his case". His main object should be to tell what he knows as clearly and completely as possible without worrying about the possible consequences of his answers. An open, "nothing to hide" attitude, and a real desire to help the court arrive at the truth are essential. Should memory fail, a witness, with the permission of the court, can refresh his memory by looking at notes that he made at the time of the events that he is relating.

If a question arises whose answer is not known, the investigator can only state that he does not know. This should not be understood as an invitation to engage in conjecture.

Finally, in cross-examination, where the defence attorney attempts to bring out facts favorable to his case and to weaken the Crown's case, the same attitude should prevail. Three pitfalls, however, should be avoided. The first is the unfortunate habit people have of volunteering information. Answers, without being minimal and laconic, yes or no, should be kept strictly to the point of the question. The second is the grave risk of trying to match wits with the cross-examining lawyer. In cross-examination, the only advantage a witness can ever hold is the truth. Finally, a witness who loses his temper, loses all. If, during cross-examination, an investigator feels that he is being goaded into losing his temper, he should take the time to reflect that things are going very well for the Crown, because this is an indication that the defence is trying means of last resort.

DATE DE RETOUR