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The Office of The Official Receiver

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BANKRUPTCY

THE OFFICE

OF

THE OFFICIAL RECEIVER

AUGUST, 1970

P R E F A C E

This paper on the rôle of the official receiver is presented primarily as an aid to those newly appointed by the Governor in Council to this important position. It is not intended as a treatise on the law of bankruptcy, even in this limited area.

It is important that the official receiver know not only what are his duties and powers but also why they are given to him. He should also understand his position vis-à-vis the other players in the bankruptcy drama.

Such understanding will better enable him to fulfil the numerous obligations placed upon him. He will be better equipped to exercise his authority and make the decisions for which he is called upon in the manner contemplated by the Parliament of Canada.

This is the sole purpose of this commentary on the Office of the Official Receiver.

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CHAPTER I

Background Of The Office

101 The term "official receiver" would appear to have been borrowed from the Bankruptcy Act of England. Section 70(1) of that statute states that there will be official receivers of debtors' estates, who shall be appointed and removable by, and shall act under the general authority and directions of the Board of Trade. However, they shall also be officers of the courts to which they are respectively attached.

102 Subsection (2) of this section states that the Board of Trade with the concurrence of the Treasury may appoint more than one official receiver to a district. Subsection (3) sets out that where more than one official receiver is attached to the court, such one of them as is for the time being appointed by the court for a particular estate shall be the official receiver for the purposes of that estate. Subsection (2) also provides that the same person may be appointed to act for more than one district. Ensuing sections set out specific duties of the official receiver in relation to the debtor's conduct and also in relation to his estate.

103 There are obviously both similarities and differences between the office of official receiver in England and the same office under the Bankruptcy Act of Canada. Under the English statute it is the duty of the official receiver, pending the appointment of a trustee, to act as interim receiver of the debtor's estate (section 74(1)(a)). A situation comparable to this in the Canadian Act occurs only when a trustee appointed to act for an estate becomes incapacitated (section 6(3)).

104 Another difference is that under the Canadian Act the official receiver is not attached to any court. He is, however, by statute an officer of the court (section 4(2)).

105 It was not until the Bankruptcy Act of 1919 was amended in 1923 that the office of the official receiver came into existence in this country. Prior to that time an assignment was accomplished simply by an insolvent debtor making an assignment of all his property to persons appointed by the Governor in Council as trustees in bankruptcy. Incidentally, a debtor who made such an assignment was not a bankrupt but an "assignor". Bankrupts were only those placed into bankruptcy by a receiving order. This was also changed in 1923.

106 Subsection (2) of section 4 of the Bankruptcy Act provides that the Governor in Council shall appoint one or more official receivers in each bankruptcy division. Subsection (1) establishes bankruptcy divisions and reads as follows:

> "4(1) Each of the provinces of Canada constitutes one bankruptcy district for the purposes of this Act but the Governor in Council may divide any bankruptcy district into two or more bankruptcy divisions and name or number them."

Subsection (4) provides that in the absence or illness of the official receiver or pending the appointment of a successor when the office is vacant, the registrar shall perform the duties of the official receiver. This would be necessitated in divisions for which only one official receiver had been named.

107 When the amendment to the Bankruptcy Act providing for the office of official receiver was presented to the House of Commons on May 23rd, 1923 there was a great deal of opposition. Primarily this centred around Members who favoured abolition of the Act completely. The Member for Cape Breton South, speaking in favour, thought the responsibility of the office could be given to any court official as it would really give him "very little to do". The Member from West York on the other hand felt that a person holding this office should have an "expert knowledge in accountancy that would enable him to do the work". He went on to point out that the definition of official receiver "refers not to the real receiver but to a stop-gap". He obviously felt that the official receiver should in fact be the initial receiver of the debtor's property. To this the Minister of Justice answered: "No. He will be there for all time, even after the discharge has been granted. He will keep the records, the archives. He is a very important officer and is permanent."

108 Several pages of Hansard were taken up with a discussion of the solemnity of the office, the Members generally wishing to emphasize this point. In referring to the first meeting of creditors, the Minister of Justice states "it is necessary to fix some place where the creditors shall meet, and if the meeting is to be official and of that solemn character which it should possess, there is no better place at which it could be held than the office of the receiver."

109 From this it can be seen that the intention of Parliament in 1923 was that the official receiver play a key role in the bankruptcy process. That the office be held by persons of ability was considered essential and that the duties of the office be performed with dignity.

CHAPTER II

Jurisdiction Of The Office

201 As indicated in chapter one, the position of official receiver is of key importance in the administration of a bankrupt estate. He enters the picture at the start and it is essential that he perform all of his duties and exercise all of his powers in every estate.

202 On being approached by a debtor concerning the making of an assignment, he should give him concise statements of the correct procedure. When the assignment is presented to him either by the debtor personally, the trustee or the debtor's solicitor, he must check it carefully as to form. If it complies with the Bankruptcy Act he must file it.

203 When the assignment has been filed the official receiver must give consideration to the appointment of a trustee to administer the estate. The debtor will likely have found a licensed trustee willing to accept the assignment. If the major creditors favour this trustee or name another, the official receiver, in compliance with their wishes, will enter the name of their choice on the assignment. This constitutes the appointment of a trustee who will act until the creditors as a whole have had an opportunity to consider the appointment.

204 In the case of a receiving order by the court adjudging the debtor bankrupt, the court will, as a provision of the order, appoint a trustee to administer the estate of the bankrupt.

205 The Bankruptcy Act provides that the trustee appointed to administer the estate must provide a bond in every case except where the assets are less than five hundred dollars in value or the bankrupt is a corporation. This is the sole prerogative and responsibility of the official receiver. So also is the question of increasing or reducing the amount of the security as the administration progresses. This is a serious matter as it is necessary that the creditors be adequately protected on the one hand while on the other hand the estate should not be burdened with bond premiums in excess of what is absolutely necessary.

206 The official receiver, in every bankruptcy, must examine the bankrupt. This responsibility cannot be delegated to anyone except another official receiver. Even this delegation can only be done to expedite the overall administration of the estate. This is an extremely important function and should be conducted in an atmosphere of great

seriousness. While the Bankruptcy Rules provide a questionnaire to be used on this occasion, it should be looked upon as a bare outline - a guide to what should be a thorough cross-examination of the bankrupt.

207 The Act provides for the arrest of any bankrupt that does not appear at the appointed time for his examination by the official receiver. While it is not the duty of the official receiver to apply for the warrant for the arrest of the bankrupt in this situation, he should be sure to inform the trustee, who does have the responsibility, of the non attendance. He should encourage the trustee to follow through and see that the bankrupt is produced for examination.

208 The official receiver is to be the chairman of the first meeting of the creditors of a bankrupt estate. The Act makes provision for a delegation of this authority but it should only be exercised in cases of necessity. He should prepare himself thoroughly and as far as possible be knowledgeable as to details of the estate in question. The creditors will expect him to guide them as to their function and to provide the necessary decorum of a meeting so important to the administration from their point of view.

209 Those portions of the Bankruptcy Act that set out rules of procedure for the meeting should be brought to the attention of those present. The official receiver should be conversant with the accepted rules of order for the conduct of a meeting. It is very important, however, that the official receiver not exceed his jurisdiction. He must only make decisions that the Act and the Rules call on him to make. There will be many times that pressure will be brought on him to go beyond the authority given to him. He, on the other hand, must exercise his powers of decision judiciously and with firmness. If the Act does not supply the course of action he may apply to the court for directions in case of doubt or difficulty (Rule 55). It is essential, of course, that a complete and accurate record be kept of the meeting.

210 The Bankruptcy Act and Rules provide that a copy of all proposals by an insolvent person or a bankrupt be filed with the official receiver. There is no duty placed upon the official receiver to check this document as to form or content. It is merely a matter of accepting it and officially filing it.

211 If the proposal is not accepted by the creditors or approved by the court, the proposer is deemed to have made an assignment. Upon being informed by the trustee of such rejection or non-approval, the official receiver must issue his certificate of assignment. This has the same effect as if the debtor had filed an assignment himself.

212 The same is true when a proposal, accepted by the creditors and approved by the court, is later annulled by the court. The trustee will so inform the official receiver. He will then issue his certificate of assignment.

CHAPTER III

The Assignment In Bankruptcy

301 The Bankruptcy Act provides that an insolvent person may become a bankrupt if the official receiver accepts from him an assignment of all his property for the benefit of his creditors. The operative section of the Act is section 26.

302 Subsection (1) of section 26 reads as follows:

> "26(1) An insolvent person or, if deceased, his legal personal representative with the leave of the court, may make an assignment of all his property for the general benefit of his creditors."

Section 2 of the Act, which is the interpretation section, defines the terms used in the following:

> " 2. (j) 'insolvent person' means a person who is not bankrupt and who resides or carries on business in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (i) who is for any reason unable to meet his obligations as they generally become due, or
>
> (ii) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (iii) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;"
>
> " 2. (m) 'person' includes a partnership, an unincorporated association, a corporation, a co-operative society or organization, the successors of such partnership, corporation, society

> or organization, and the heirs, executors, administrators or other legal representative of a person, according to the law of that part of Canada which the context extends;"
>
> " 2. (b) 'assignment' means an assignment filed with the official receiver;"

While these terms would appear to be adequately defined, considerable controversy has arisen over the years as to their exact application.

Insolvent Person

303 It was argued by many that not only must a debtor qualify as an "insolvent person" in order to make an assignment, he must also own assets which he can assign. This argument was accepted by Mr. Justice Lacroix of the Superior Court of Quebec in the case of In Re Dumont vs Perras, 36 C.B.R. - 173. His reasoning was as follows:

> "L'économie de cette loi est que des débiteurs qui sont devenus insolvables et qui ne peuvent plus faire honneur à leurs obligations, peuvent utiliser honnêtement les dispositions de la Loi de faillite et céder leurs biens pour qu'il en soit disposé au bénéfice de leurs créanciers. L'article 26 de la Loi de faillite dit que: 'Une personne insolvable ou, si elle est décédée, son représentant légal personnel, avec la permission du Tribunal, peut faire une cession de tous ses biens au bénéfice général de ses créanciers.' Le paragraphe 2 du même article décrète en outre que cette cession doit être accompagnée d'une déclaration assermentée indiquant les biens du débiteur susceptibles d'être divisés entre ses créanciers."
>
> La simple lecture de ces deux articles fait bien voir qu'il doit y avoir un actif si un débiteur veut céder ses biens et non pas seulement ses dettes.[1]

The plain intention of these two subsections would seem to be that a debtor must not only have debts, but also assets, if he wishes to make an assignment.

This decision, however, does not appear to have been generally followed by the courts in that province.

304 Mr. Justice Marchand of the same court in the case of In Re Adelard Sevigny Inc., 38 C.B.R. - 95, ruled that a debtor can make an assignment even if he has no assets. This is particularly so if the assignor is salaried. The

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seizable part of his salary is an asset which may be acquired before his discharge. In arriving at this conclusion, he stated that, s'il fallait adopter l'interpretation que la requérante donne à l'art. 26(1) et (2), il pourrait arriver qu'un débiteur qui n'a que $10.00 d'actif, par exemple, ou encore qui aurait un bien meuble d'une valeur inférieure à ce qu'il en coûterait pour en disposer, rencontrerait les exigences de cet art. 26, alors que le débiteur qui recevrait un salaire mensuel de $1,000 ne pourrait pas se prévaloir de la Loi de faillite et profiter des avantages qui sont à la base de l'économie de cette loi.[2]

305 The Court of Queen's Bench of the Province of Quebec, in two decisions rendered in the early 1960's, even though he had no assets; In Re Desjardins vs Ferland, 2 C.B.R. - N.S. - 68, and Fournier vs Pinault and Roussel, 3 C.B.R. - N.S. - 103. In the former, the court said that while ideally our bankruptcy legislation is supposed to work to the mutual benefit of bona fide creditors and honest but unfortunate debtors, it could see no reason why it should be inoperative if the debtor has been so unfortunate as to lose everything. On the contrary, the judgment states section 114(k) of the Act expressly contemplates the case of the bankrupt who has no assets.

306 In a hearing before Mr. Justice Laliberté of the Superior Court of Quebec, it was ruled that a creditor cannot successfully contest an assignment on the grounds only that the sole asset of the debtor is the debtor's salary. He also ruled that the fact that a debtor has availed himself of the Lacombe Law, does not preclude him from availing himself of the benefits of the Bankruptcy Act - In Re Linteau, 26 C.B.R. - 245.

307 In 1966, Mr. Justice McDermid of the Supreme Court of Ontario ruled against an argument that an assignment should be set aside because the debtor has no assets: In Re Kergan, 9 C.B.R. - 15.

308 The above-quoted section 2(j) of the Bankruptcy Act states that for a debtor to be classed as an insolvent person, he must, among other things, have liabilities to creditors provable as claims under the Act that amount to $1,000. It has been argued that debts for necessaries cannot be included in this statutory amount.

309 In the case of Phaneuf et Lacasse vs Charbonneau - 3 C.B.R. N.S. - 212, Mr. Justice Batshaw of the Quebec Superior Court ruled that since debts for necessaries are provable in bankruptcy, they are to be calculated as part of the amount of $1,000. that must be established under section 2(j); this application to annul the assignment on these grounds must be dismissed.

310 The question of what debts may be included when considering section 2(j) was also discussed in In Re Kergan cited above. The applicant in this case contended that although there was a total indebtedness of over four thousand and two hundred dollars owing at the time of the assignment, the debtor had obligated himself to pay monthly the sum of two hundred and sixty dollars out of his salary. There was no pressure from any creditor to bring due any amount beyond the total monthly sum of about two hundred and sixty dollars. He contended, therefore, that under section 2(j), the bankrupt was not an "insolvent person" whose liabilities to creditors provable as claims under the Bankruptcy Act amounted to one thousand dollars. Consequently, it was argued the bankrupt was not qualified to make an assignment under section 26(1) of the Act.

311 Mr. Justice McDermid quoted section 83(1) of the Bankruptcy Act, whish is as follows:

> "83(1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act."

and then went on to say: "This, to the Court, was the crucial standard to be applied, and clearly indicates that all debts, present or future, to which the debtor was subject at the date of his assignment, on the 8th of September 1965, were deemed to be claims provable in bankruptcy, and as the total was forty-two hundred and three dollars at least, I find that there was ground for the assignment being accepted and the bankruptcy made effective."

312 In an application to the Superior Court of Quebec, it was ruled that a debtor who has been adjudged to pay a considerable amount for damages incurred in an automobile accident may claim the benefit of the Bankruptcy Act, Champagne vs Rivard, 34 C.B.R. - 173. In arriving at this decision, Mr. Justice Montpetit said: "Ceci étant, et même en prenant pour acquis (ce qui est douteux) que l'article 135 peut légalement être invoqué pour priver une personne insolvable de son droit de se prévaloir de l'article 26, il n'en demeure pas moins qu'en cette cause-ci, la nature de la dette du débiteur à l'endroit du requérant n'entre même pas dans les cadres de l'article 135(1) (b) de la loi et ne peut avoir aucun effet sur la cession que le débiteur a consentie."

313 The definition of "insolvent person" set out in section 2(j) states that the term means a person who is not a bankrupt, the inference being that a person who is a bankrupt could not make an assignment pursuant to section 26 of the Act. The courts have held that where an undischarged bankrupt does make an assignment, his assets will not go to the trustee of the second assignment, but to the trustee of the first assignment for the benefit of the creditors who filed proofs of claim at that time. This was stated firmly by Mr. Justice Urquhart of the Supreme Court of Ontario in the case of In Re Proulx, 27 C.B.R. - 166. Mr. Justice Smily of the same court followed the Proulx decision in 1956 in his ruling on In Re Newman, 35 C.B.R. - 235.

314 The Superior Court of Quebec held In Re Laramée, 10 C.B.R. (N.S.) - 182 that an undischarged bankrupt was not an insolvent person within the meaning of the Bankruptcy Act and consequently, did not possess the status required to permit him to make a new assignment.

Partnerships

315 By definition in section 2(m) of the Bankruptcy Act, a partnership is a "person" who can make an assignment. As this involves an association of two or more persons, the official receiver must consider this when deciding whether or not to accept an assignment by a partnership for filing. One important factor is the adequacy of the execution of the document itself.

316 The question of who must sign the assignment by a partnership was considered in a number of applications dealt with by the court in 1922 and 1923.

317 The first of these applications was In Re Squires Brothers, 3 C.B.R. - 191. In this case, one partner made an assignment on behalf of the partnership without the authorization of the other partner and, of course, without the signature of the other party on the assignment. Mr. Justice MacLean of the Court of King's Bench of Saskatchewan ruled that the assignment was invalid. It was neither an assignment by the partnership nor a personal assignment by the partner who did execute the assignment.

318 It was this latter aspect that he dealt with when he said:

> "In my opinion the assignment is invalid. In view of that it is unnecessary to deal with any of the questions raised, excepting the second question,

> which in substance is whether the assignment may be treated as the assignment of Charles E. Squires himself, and whether his assets pass to the trustee. He clearly did not intend to make a personal assignment, or he would have done so, and it is not difficult to conceive numerous instances where a partner might be ready to enter into an assignment by the firm, and yet, not be willing to make a personal assignment.
>
> It seems to me that an authorized assignment under the Bankruptcy Act must be a voluntary act of the assignor, and must show expressly and not by implication, his intention to assign. An authorized assignment cannot be construed out of a document which the party executing it intended for some other purpose, even though the execution of that document might in itself constitute an act of bankruptcy. The assignment in question does not constitute an assignment under the Act by Charles E. Squires."

This reasoning, however, has not been followed in the Province of Ontario.

319 The Registrar in Bankruptcy for Ontario dealt with a similar situation on the application of In Re Berthelvt, 3 C.B.R. - 386. In this instance, one partner signed the assignment on behalf of the partnership. The learned registrar ruled that the document did not amount to an assignment by the partnership, but was an assignment of the property of the partner who did sign. Mr. Justice Fisher of the Supreme Court of Ontario arrived at the same decision in Canada Carbon and Ribbon Company vs Rung et al, 3 C.B.R. - 423, and In Re Union Fish Company, 3 C.B.R. - 779. As did Mr. Justice Brossard of the Superior Court of Quebec in In Re Gibeau, 33 C.B.R. - 197.

320 It follows, therefore, that an assignment in the name of a partnership should be accepted for filing by the official receiver. If all partners have not signed it, there will only be an assignment of the property of those who have signed.

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Corporations

321 The corporation is a person who may make an assignment. However, for the purposes of the Bankruptcy Act, the term "corporation" has been restricted by definition. Not all corporate structures qualify under the definition contained in section 2(f) of the Act.

> "2. (f) 'corporation' includes any company incorporated or authorized to carry on business by or under an Act of the Parliament of Canada or of any of the provinces of Canada, and any incorporated company, wheresoever incorporated, that has an office in or carries on business within Canada, but does not include building societies having a capital stock, nor incorporated banks, savings banks, insurance companies, trust companies, loan companies or railway companies;"

Specifically excluded from this definition are building societies having a capital stock, insurance companies, trust companies, loan companies, and railway companies.

322 Corporations, however, are not natural persons, and can only act through their directors. It could only make an assignment if the directors decided that it should be done, and authorized the company's signing officers to execute the assignment document. This is made clear in a decision of the Court of Appeal of the Province of British Columbia in the case of In Re Pacific Coast Coal Mines Limited and Hodges, 8 C.B.R. - 102. The court rules that a board of directors of a corporation, if duly and properly constituted, has power to make an assignment in bankruptcy without first having received an authority to do so from the shareholders.

323 The converse also holds true in that an assignment may not be made by a corporation unless it has been authorized by a resolution of the directors. Such an assignment, executed and filed without the necessary authorization, will be annulled by the court. In the case of In Re Trail Building Supply Limited, 36 C.B.R. - 101, Mr. Justice Clyne of the Supreme Court of British Columbia said:

> "It is regrettable that it should be necessary at this stage of the proceedings to annul the assignment, but I think it would be extremely dangerous to hold that a resolution, such as the one before me, was sufficient to authorize the execution of

an assignment in bankruptcy. The absence of authority to execute is more than a formal defect or irregularity, which can be cured by the court; it destroys the validity of the assignment. The execution of the assignment was not the act of the company.

I do not think that the wording of the resolution authorized or contemplated an assignment in bankruptcy. As I read the document, it provided for an informal arrangement whereby Pudleiner and the Canadian Credit Men's would collect receivables, liquidate assets and distribute the proceeds to the creditors of the company but it fell short of giving Pudleiner authority to execute an assignment in bankruptcy. If it had been intended to give Prudleiner the right to take the important step of putting the company into bankruptcy, it would have been so stated in the resolution. The object of the resolution on its face appears to be to avoid an assignment in bankruptcy. Pudleiner was authorized by the company to execute documents for the purpose of enabling two persons, the Canadian Credit Men's and himself, to collect and disburse money belonging to the company. The company delegated the power of liquidating its assets and distributing the proceeds to two persons, Pudleiner and the Canadian Credit Men's. Pudleiner therefore had no power in law to make a further delegation of authority by appointing the Canadian Credit Men's as sole liquidator, which he did when he executed the assignment. Delegatus non potest delegare."

324 While there would appear to be no authority for an official receiver to refuse to file an assignment made by a corporation which complied with section 26 of the Bankruptcy Act, it would appear to be a good practice for him to request that the resolution of the directors authorizing the assignment be filed simultaneously.

325 While the definition of the term "corporation" contained in section 2(f) of the Act would appear to be clear, the courts have been called upon to interpret it in light of specific situations. The Supreme Court of Canada held in In Re Inverness Railway and Collieries Limited, 3 C.B.R. - 724, that a company, incorporated under the Nova Scotia Companies Act to take over the railway and mines of another company which had been incorporated by special act of the Nova Scotia legislature with power to operate a mine and a railway, was competent to make an assignment for creditors

under the Bankruptcy Act. This was provided that the company was not in business as a railway company when the assignment was made and its previous operations of the railway was merely as agent for the purchaser of the railway property.

326 In the case of Feeney vs Lacroix, 20 C.B.R. - 149, La Caisse Populaire had filed an assignment and a creditor applied to the court to have the assignment annulled. By statute, La Caisse Populaire was authorized as a co-operative syndicate formed for certain purposes. The Quebec Co-operative Syndicate's Act provided that "such syndicate or association shall be of the nature of a joint stock company." The Court of King's Bench of Quebec held that La Caisse Populaire was not a corporation within the definition of the Bankruptcy Act and was, therefore, not subject to the provisions of the Act to enable it to make an assignment in bankruptcy. Although under the Quebec Co-operative Syndicate's Act, it was declared to be "of the nature of a joint stock company", it was not actually incorporated or authorized to carry on business as such and, therefore, was not within the term "corporation" as defined in the Bankruptcy Act.

327 It follows, therefore, that a co-operative syndicate formed pursuant to the Quebec Co-operative Syndicate's Act is not a corporation as defined in the Bankruptcy Act.

Married Women

328 When considering just who can make an assignment, the legal status of individuals has given rise to questions. The status of married women in this regard has been brought before the court for interpretation. In Re Bartram, 11 C.B.R. - 149 was an early case before the Supreme Court of Ontario touching this matter. A married woman made an assignment in bankruptcy and her husband brought a motion to set it aside on the grounds that she did not have the capacity to make an assignment being as she was not carrying on a trade or business. In dismissing the motion, Mr. Justice Middleton reason as follows:

> "I am, however, very clearly of the opinion that a married woman, whether carrying on a trade or a business or not, may make a voluntary assignment under the provisions of the Bankruptcy Act and so obtain the benefit which the Bankruptcy Act affords to insolvent debtors. The Act enables an insolvent debtor, whose liabilities to creditors provable as debts under the Act exceed $500.00, to make a general assignment by

> which the debtor's affairs are placed in the hands of a trustee for ratable distribution among the creditors, the proceedings ultimately leading to the absolution and discharge of the debtor. 'Debtor' includes any person who, at the time any authorized assignment was made by him, was personally present in Canada, as this woman was. An 'insolvent person' includes a person, who is for any reason unable to meet his obligations as they generally become due. This woman has judgments attached against her and she could by no means meet her liabilities. The Bankruptcy Act regards the liability of a married woman as personal as well as proprietory. This appears not merely from the wording of sec. 175, but from the interpretation clause, sec. 2(w). Judgments, as I have said, have passed against this lady for more than the statutory amount and she appears to be plainly an insolvent debtor coming within the provisions of sec. 9."

329 The question was also raised before the Superior Court of Quebec, In Re Dame Eveline Léonard, 17 C.B.R. - 15, and In Re Dame Léontine Marcotte, 31 C.B.R. - 44, are two decisions in which Mr. Justice Boyer ruled that a married woman, not carrying on business, but living separate from her husband in the Province of Quebec, is not obliged to obtain authorization from her husband or the court, to make an assignment in bankruptcy.

Mentally Incompetent Persons

330 Mentally incompetent persons would appear to be precluded from making assignments through their trustees in the Province of Ontario. An early decision of Mr. Justice Fisher in In Re Buchner, 17 C.B.R. - 155, was to this effect.

In reaching this conclusion, he said that a serious question arises if an order be made authorizing an assignment under the Bankruptcy Act, because under that Act, there is no provision made for a trustee to pay out moneys for the maintenance and comfort of the lunatic and it is the policy of the court not to take a course which will prejudicially affect interests, or even the comfort, of a lunatic. Consequently, provision is usually made for his maintenance in priority to the claims of creditors. But, under the Bankruptcy Act, if an authorized assignment

be directed, the property of the debtor immediately becomes vested in the trustee, and the trustee must distribute under that Act, the property of the debtor amongst his creditors pari passu.

The courts have recognized an exception to the rule of absolute distribution in the case of after-acquired earnings. These vest in the trustee only after intervention by him and subject to alimentary exception. But no similar exception has been made in the case of property existing at the date of the bankruptcy. It may be that the law has not yet been fully declared, and in the case of a bankrupt lunatic a similar exception may be found to exist but, under the law as presently declared, the trustee in bankruptcy for a lunatic would be required to make distribution of his present assets among his creditors without any alimentary exception. This is not a satisfactory result, and as means appear to exist under The Creditors Relief Act by which the assets over and above those required for maintenance can be distributed pari passu among execution creditors, leave should not be granted to the committee to make an authorized assignment.

331 In the Province of Quebec, however, the Superior Court ruled in Marcel Reinhardt vs Dame Eveline Chevalier, 21 C.B.R. - 228, that the curator of an insolvent interdict for insanity could execute and file an assignment on behalf of the insane person.

332 The Bankruptcy Act states in section 25 that receiving orders may not be made against farmers or individuals working for wages, salary, commission or hire at a rate of compensation not exceeding twenty-five hundred dollars per year, and who does not on his own account carry on business. The Superior Court of Quebec has held, however, in In Re Louis Fine, 17 C.B.R. - 17, that a wage earner earning less than fifteen hundred dollars per annum can make an assignment for the benefit of his creditors.

Formalities of an Assignment

333 Having considered who may make an assignment, let us now consider the documents that must be presented to the official receiver when an assignment is to be filed. Subsections (2) and (3) of section 26 of the Bankruptcy Act deal with this point specifically. It may be helpful to study these subsections in reverse order.

"26(3) The assignment shall be offered to the official receiver in the locality of the debtor, and it is

inoperative until filed with such official receiver, who shall refuse to file the same unless it is in the prescribed form or to the like effect and accompanied by the sworn statement required by subsection (2).

(2) The assignment shall be accompanied by a sworn statement in the prescribed form showing the property of the debtor divisible among his creditors, the names and addresses of all his creditors and the amounts of their respective claims and the nature of each, whether secured, preferred or unsecured."

334 From subsection (3), it will be seen that the assignment must be in the prescribed form or reasonably close to it. Schedule B to the Bankruptcy Rules contains Form 29, which is the prescribed form for the assignment. The witness to the signature of the assignor must complete an affidavit in Form 30 to the effect that he saw the assignor sign the assignment, that he knows the assignor, and that the assignor is of the full age of twenty-one years. The witness is not necessary if the assignment is made by a limited company if the proper signing officers sign the assignment for the company and affix the corporate seal. If the corporate seal is not affixed, the witness is necessary as is the affidavit of execution. As mentioned in an earlier paragraph, the better practice is for the official receiver to request that the resolution of the board of directors authorizing the corporate assignment be affixed to the assignment when offered for filing.

335 As pointed out above, in the cases of In Re Squires Brothers and In Re Gibeau, an assignment by a partnership may be in the firm name, but must be signed by all the partners before it will be a valid assignment by the partnership.

336 If an error is inadvertently made in the drawing of the assignment, the court has ruled in In Re Paquette Ltd., 1 C.B.R. - 445, that it may order the correction of such formal defect. The court bases its authority on subsection (9) of section 144, which reads:

"144(9) No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court."

337 While normally, in view of the Lord's Day Act, R.S.C. 1952 c. 171, a contract made on a Sunday would be unenforceable; the Superior Court of Quebec ruled that an assignment in bankruptcy made on a Sunday would not be set aside. In Re Galipeau, 4 C.B.R. - 228 states that an assignment for creditors will not be set aside in the Province of Quebec because it was signed and delivered on a Sunday, or other non-juridical day. It would be regular in case of urgency to prevent an impending sale adverse to the interests of the creditors generally by analogy to the authorization of the commencement of legal proceedings on a non-juridical day under the Civil Code of Procedures article 119, which applies under Bankruptcy Rule 152 (now Bankruptcy Rule 4), and if not, within C.C.P. art. 119, the irregularity could be set up only by a person to whom it had caused substantial injustice because of the curative provisions of section 84 (now section 144(9)) of the Bankruptcy Act.

Sworn Statement of Affairs

338 Both subsections (2) and (3) of section 26 of the Act indicate that a sworn statement of the affairs of the debtor must accompany the assignment when it is offered to the official receiver for filing. Subsection (3) goes so far as to say that the official receiver shall refuse to file it unless it is accompanied by the sworn statement. The court has held that this subsection is obligatory, and that it will annul an assignment not filed in compliance with it.

339 Pehlke vs Tew, 19 C.B.R. - 355 is a decision of the Supreme Court of Ontario on this point. This was an action brought by the debtor to set aside an assignment in bankruptcy on the ground of forgery, and also on the ground of non-compliance with section 9 (now section 26) of the Bankruptcy Act. It was held that the assignment was in the prescribed form or to like effect, but that it was not accompanied by the sworn statement contemplated by section 9(2) (now section 26(2)) of the Bankruptcy Act, when it was accepted and filed by the official receiver. The provisions of section 9(3) (now section 26(3)) of the Bankruptcy Act are mandatory with respect to the duties of the official receiver, and he is not entitled to exercise any discretion where the assignment is not accompanied by the sworn statement.

340 In arriving at this decision, Mr. Justice McTague said: "The excuse given by Mr. Thomas, the official receiver, for not requiring the sworn statement to be filed

with the assignment, was that it was represented to him that Pehlke's affairs were in such a condition, it was impossible to then obtain such a statement. Mr. Thomas seemed to have the view that he was entitled to exercise a discretion about obtaining the sworn statement at the time of filing. With that proposition, I do not agree. Subsection (3) is quite mandatory in its language as far as the official receiver's duty is concerned." This judgment was upheld by the Ontario Court of Appeal, 20 C.B.R. - 233. Mr. Justice Urquhart commented on the point in another application regarding this estate. In In Re Alfred Pehlke, 21 C.B.R. - 159, he reasoned along the same lines as Mr. Justice McTague.

341 The Court of Queen's Bench of Quebec in the case of Dextraze vs Léger, 34 C.B.R. - 61, also ruled that an assignment under section 26 of the Bankruptcy Act must be accompanied by a sworn statement.

Place to File Assignments

342 Another aspect brought out in subsection (3) of section 26 of the Bankruptcy Act is the fact that the assignment shall be offered to the official receiver in the locality of the debtor, and that it is inoperative until filed with such official receiver. This has caused considerable difficulty and many decisions of the court have dealt with "the locality of the debtor."

343 Earlier decisions in Quebec and Nova Scotia held that an authorized assignment accepted by an official receiver of a Bankruptcy Division, other than that of the debtor's chief place of business, but in the same bankruptcy district or province, will not be set aside unless substantial prejudice is shown. However, two later cases heard in the Superior Court of Quebec in 1957 and 1958 held that subsection (3) of section 26 must be strictly complied with.

344 In Re Rivest, 36 C.B.R. - 14, is an application by a creditor for the annulment of an assignment made by a debtor in a division other than the one where he has his domicile. In granting the application, Mr. Justice Montpetit reasoned:

> "En faisant les rapprochements qui s'imposent entre les articles 4(1), 4(2), 26(3), 2(k) de la Loi de faillite et l'arrêt ministériel C.P. 1692, je suis d'opinion que la juridiction d'un séquestre officiel, pour les fins qui le concernent dans l'administration de cette loi, est territorialement limitée à la 'division' pour laquelle il est nommé et qu'il ne peut exercer ses pouvoirs, pour les fins d'acceptation d'une

cession, qu'en autant que 'la localité du débiteur' se trouve dans les limites de son territoire désigné.

Il est possible qu'en contrevent à cette limitation dans ses pouvoirs, un séquestre officiel ne pose pas nécessairement un acte qui soit de nullité absolue et que rien ne puisse couvrir. Tels sont bien d'ailleurs le sens et la portée des décisions rendues dans les causes de J.F. Camirand Limited vs Gagnon (1924), 4 C.B.R. - 344, affirmed 5 C.B.R. 518, 38 Que. K.B. 271, 3 Can. Abr. 581, et In Re Palson, 5 C.B.R. - 648, 3 Can. Abr. 305; mais là n'est point la question dont je suis saisi ici, puisque la créancière-requérante s'est opposée avec diligence à la décision du séquestre officiel et qu'il y a préjudice substantiel apparent, la grande majorité en nombre et en valeur des créanciers du débiteur étant de Montréal et des environs."[4]

345 Similarly, in Tremblay vs Tremblay et Perras, 37 C.B.R. - 41, Mr. Justice Dion, in ruling that a debtor must make an assignment in the bankruptcy division where he has resided or carried on business during the year immediately preceding, stated:

"Pour les fins de la Loi de faillite, le Gouverneur en conseil a divisé la province de Québec en plusieurs divisions de faillite. Parmi ces divisions de faillite, il y a la division numéro 7, dont le séquestre officiel a son bureau à Chicoutimi, et la division numéro 9, dont le séquestre officiel a son bureau à Roberval.

La localité de Milot où est domicilié le failli, fait partie de la division numéro 9, avec bureau du séquestre officiel à Roberval.

Seul le séquestre officiel de la division numéro 9, ayant son bureau à Roberval, a juridiction pour recevoir une cession de biens du débiteur failli, suivant les dispositions de la Loi de faillite.

La cession de biens faite devant le séquestre officiel de la division de faillite numéro 7, à Chicoutimi, est illégale, irrégulière et nulle, et le requérant conclut à ce que la cession du débiteur faite entre les mains de la division de faillite de Chicoutimi, soit déclarée irrégulière, illégale et nulle."[5]

346 In interpreting "locality of the debtor" the court must, of course, have regard to the definition contained in section 2(k) of the Act, which is as follows:

"2. (k) 'locality of the debtor' means the principal place

(i) where the debtor has carried on business during the year immediately preceding his bankruptcy,

(ii) where the debtor has resided during the year immediately preceding his bankruptcy,

(iii) in cases not coming within sub-paragraph (i) or (ii), where the greater portion of the property of such debtor is situated;"

347 The case of In Re W.C. Polson Estate, 7 C.B.R. - 77 held that in sections 2(x)(a) and (b) (now section 2(k)(i) and (ii)) defining the "locality of a debtor", the words "during the year immediately preceding" may be construed as meaning at some time within the year immediately preceding. It was held further that if the case falls within section 2(x)(c) (now section 2(k)(iii)), "the place where the greater portion of the property of such debtor is situated," the situs in law of an ordinary debt is the residence of the debtor, but the situs of specialty debt is that of the specialty or contract under seal by which the debt is secured.

348 In arriving at this decision, Mr. Justice Mellish of the Supreme Court of Nova Scotia said that the debtor had not resided or done business in any one place in Nova Scotia, or indeed in Canada, for the whole year immediately preceding the making of his authorized assignment; but at that time, he was and had been for about two months, residing at Yarmouth, Nova Scotia, where, counsel stated on the argument, although I think it does not so appear in the stated case, the debtor was also doing business during the said period. For some time during the said year, the debtor had also resided at North Sydney in the Island of Cape Breton. It is, therefore, apparent that if the word "during" in the subsection quoted above, is construed as meaning "at some time within", the authorized assignment could properly be lodged with the official receiver for either district. This is a primary and ordinary meaning of the word, and I am not at all sure that it should not be so construed. If, however, the case comes within clause (c) of the sub-section, it must be for the reason that the debtor's property in Nova Scotia was situated outside the Island of Cape Breton.

349 Mr. Holmestead, Registrar for the Province of Ontario, ruled in the case of In Re Canadian Mining and Leasing Corporation Limited, 3 C.B.R. - 58, that for the purpose of making an assignment for the benefit of creditors, a mining company incorporated in Manitoba may be said to have "resided" in Ontario and to have acquired a locality there

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within sections 2(x) and 9 (now sections 2(k) and 26) of the Bankruptcy Act, if all the directors resided in Ontario, the directors' meetings were held and the companie's office business carried on in Ontario, although the only mining properties in which the company was interested were situated in Manitoba, and its charter of incorporation required its head to be in Manitoba.

Assignment Filed After Petition Issued

350 There have been many instances of a debtor filing an assignment with the official receiver after a petition for a receiving order has been issued against him. An early case in New Brunswick, In Re Belleveau, 10 C.B.R. - 229, ruled that, as the Bankruptcy Act stated that an insolvent debtor may, at any time, prior to the making of a receiving order against him, make an assignment, the court would not annul an assignment filed between the issuance of the petition for a receiving order, and the hearing on the petition. The Act has, however, since been amended and section 26(1) does not contain the words, "at any time prior to the making of a receiving order against him." The court has assumed that Parliament deleted those words to avoid any confusion and infer that an assignment may not be filed by a debtor against whom a petition for a receiving order has been made.

351 The above-mentioned confusion arose because of the different view taken by Mr. Justice Fisher of the situation. Two cases came before the Ontario Supreme Court dealing with the question of an assignment filed by a debtor after a petition for a receiving order had been issued against him. These two cases, In Re Slavonia Steamship Agencies Limited, 3 C.B.R. - 153, and In Re Lalonde, 4 C.B.R. - 416, were both heard by Judge Fisher. In the former, he pointed out that the debtors knew a petition had been issued against them, and ruled that the assignment should not have been filed.

352 In the Lalonde case, he gave fuller reasons for judgment in order to settle the law on the matter, and in part said, "Prior to the 1923 amendments to The Bankruptcy Act, the practice adopted by the court, where a petition had been presented and an authorized assignment followed, will be found in In Re Slavonia Steamship Agencies Limited (1922), 3 C.B.R. - 153. In these decisions, the practice of making authorized assignments after the presentation of petitions was condemned. As under the 1923 amendment, the effect or operation of an assignment for the benefit of creditors is enlarged and is now co-extensive with that of a receiving order and so as to avoid a repetition of what has occurred here, the proper practice to be adopted in future should be

that where a petition for a receiving order has been filed and served, the debtor should not make an authorized assignment, but should notify the petitioning creditor, or his solicitor, that he consents to a receiving order. If, however, he takes an assignment to the official receiver, and if the official receiver has knowledge of the petition, he should decline to receive the assignment and instruct the debtor, or his agent or solicitor, to consent to a receiving order being made. This will save delay and prevent a duplication of costs, and also any possible conflict of jurisdiction that might arise between interim receivers and custodians."

353 In the case of In Re Hochelaga Fruit and Meat Market, 19 C.B.R. - 127, Mr. Justice Boyer of the Quebec Superior Court ruled that an assignment filed by a debtor after a petition for a receiving order had been issued against him must be set aside and the receiving order made. He went so far as to say that even if the petition has not been served, the debtor must consent to the receiving order instead of making the assignment.

354 Mr. Justice Smily of the Ontario Supreme Court ruled along similar lines in the more recent case of In Re Pyramid Mobile Homes Limited, 38 C.B.R. - 91. In setting aside the assignment filed by the debtor, and granting the receiving order, his lordship said:

> "The only question here, at least the main question, is whether it is proper to make an assignment and file it with the official receiver after a petition in bankruptcy has been presented. The cases are apparently all the one way on the point, namely that an assignment should not be filed or accepted by the official receiver in such circumstances.
>
> In the instant case, I believe the petition was not only filed but also served before the assignment was received. Now that being so, in my opinion it was improper for the official receiver to have received the assignment, in any event if he was aware that there had been a petition presented. If, however, the official receiver should receive an assignment, being unaware that a petition has been presented to the court, then I think the only thing to do is to set aside the assignment."

While it was not part of his judgment, Judge Smily commented that a debtor against whom a petition for a receiving order has been issued, should consent to the order rather than file an assignment. This is in line with the Hochelaga Fruit and Mean Market decision above.

Effective Date of Bankruptcy

355 Attention should be directed to the question of the statutory date of bankruptcy. Subsection (3) of section 26 states that an assignment is inoperative until filed with the official receiver in the locality of the debtor. Section 41(4) confirms this as the date of bankruptcy for the purposes of the Act, and reads as follows:

> "41(4) The bankruptcy shall be deemed to have relation back to and to commence at the time of the filing of the petition on which a receiving order is made or of the filing of an assignment with the official receiver."

Mr. Justice Grant of the Ontario Supreme Court in In Re McAulay Brothers Limited, 12 C.B.R. (N.S.) - 94, has ruled that section 41(4) not only establishes the date of bankruptcy, but the point of time that the bankruptcy is effective.

Discretion of Official Receiver

356 Before closing this chapter dealing with the question of the assignment, consideration should be given to the discretion that the official receiver may exercise in deciding whether or not to accept an assignment offered to him for filing. First of all, he must have no reason to think that the debtor is not an insolvent person. He must satisfy himself that the assignment is in proper form and properly executed and accompanied by a sworn statement of the debtor's affairs showing the property of the debtor divisible among his creditors, the names and addresses of all his creditors and the amounts of their respective claims. It must also show the nature of each claim, whether secured, preferred or unsecured. Being satisfied on these counts, the cases indicate that the official receiver has no further discretion and must file the assignment. This is qualified to some extent if the official receiver is aware that a petition for a receiving order has been issued against the debtor.

357 In an aside, after rendering judgment, Mr. Justice Smily, in the Pyramid Mobile Homes Limited case mentioned above, rationalizes this point as follows:

> "Under section 41(4) of the Act it is provided that: 'The bankruptcy shall be deemed to have relation back to and to commence at the time of the filing of the petition on which a receiving order is made'; so that when a receiving order is made, a debtor becomes a bankrupt as of the time of the filing of the petition, so at that time he is not insolvent person within the meaning of the definition and therefore within the

meaning of section 26(1). That, of course, is round-about reasoning and it is not necessary to found the judgment on such reasoning, but it does show the scheme of the Act."

358 There are two Ontario decisions that touch on the question of the discretion of the official receiver on the filing of an assignment. Mr. Justice Sedgewick, on hearing In Re J.L. Healey, 13 C.B.R. - 3, stated that he did not think the official receiver was under any duty to accept an assignment. It is necessary that the proposed assignor should, with the assignment, file a statement of his affairs; the official receiver, then, has an opportunity to examine the state of affairs and see if an assignment is one which ought not to be accepted. Mr. Justice Grant, in the McAulay case, cited above, was more precise in this 1968 decision, and ruled that the filing of the assignment with the official receiver is not a judicial act. The duties of the official receiver are administrative in that once an "insolvent person" has executed an offer for filing an assignment and otherwise complied with section 26 of the Bankruptcy Act, the official receiver has no general discretion to refuse to file the assignment.

[1] Page 7, paragraph 303.

The significance of this Act is that debtors that have become insolvent and cannot meet their obligations can legally use the provisions of the Bankruptcy Act and assign their property for disposal for the benefit of their creditors. Section 26 of the Bankruptcy Act reads as follows: "An insolvent person, or, if deceased, his legal personal representative, with the leave of the court, may make an assignment of all his property for the general benefit of his creditors."

In addition, subsection (2) of the above section stipulates that this assignment must be accompanied by a sworn statement showing the property of the debtor divisible among his creditors.

[2] Page 8, paragraph 304.

If one must accept the interpretation that the applicant gives to section 26(1) and (2), it would mean, for example, that a debtor who has assets of only $10.00, or one who would have only one item of so low of value that it would cost more than it is worth to liquidate it, would come within the terms of the said section 26, while a debtor who receives a monthly income of $1,000 would not be able to avail himself of the provisions of the Bankruptcy Act and receive the benefits that are intended.

[3] Page 9, paragraph 312.

This being the case and even granting, which is doubtful, that section 135 could be legally invoked to deprive an insolvent person of his right to avail himself of section 26, it is not so in this case. The nature of the debt vis-à-vis the debtor and the applicant does not bring it within the provision of sections 135(1)(b) of the Act, and can have no effect on the assignment to which the debtor has consented.

[4] Page 20, paragraph 344.

Making the required comparisons between sections 4(1), 4(2), 26(3), and 2(k) of the Bankruptcy Act, and the Order in Council P.C. 1692, I am of the opinion that the official receiver's jurisdiction, for the purposes

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he is concerned with in the administration of this Act, is territorially limited to the "division" for which he is appointed, and that he can only exercise his authority for the purpose of accepting an assignment inasmuch as "the locality of the debtor" is situated within his designated territory.

It is possible that in contravening this limitation to his authority, an official receiver does not necessarily perform an act that is an absolute nullity and that cannot be ratified. This is the significance and the extent of the rulings handed down in the cases of J.F. Camirand Limited v. Gagnon (1924), 4 C.B.R. - 344, affirmed 5 C.B.R. - 518, 38 Que. K.B. 271, 3 Can. Abr. 305; but this is not the question that is referred to me here, since the petitioning creditor was quick to object to a ruling by the official receiver, and since there appeared to be substantial prejudice, the great majority of the creditors, both in number and in value, being from Montreal and vicinity.

[5] Page 20, paragraph 345.

For the purposes of the Bankruptcy Act, the Governor in Council has divided the Province of Quebec into several bankruptcy divisions. Among these bankruptcy divisions, there is Division No. 7, whose official receiver office is in Chicoutimi, and Division No. 9, whose official receiver office is in Roberval.

The locality of Milot where the bankrupt resides, is part of Division No. 9, whose official receiver office is in Roberval.

Only the official receiver of Division No. 9, having his office in Roberval, has jurisdiction to receive an assignment of property from the bankrupt debtor, pursuant to the provisions of the Bankruptcy Act.

The assignment of property filed with the official receiver of the Bankruptcy Division No. 7 in Chicoutimi, is illegal, improper, and null, and the petitioner infers that the assignment filed by the debtor with the Bankruptcy Division in Chicoutimi be declared improper, illegal and null.

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CHAPTER IV

Appointment Of Trustee And Fixing Of Bond

401 The Bankruptcy Act provides that when an official receiver has filed an assignment, he shall appoint a trustee to administer the bankrupt estate:

> "26(4) Where the official receiver files the assignment, he shall appoint as trustee a licensed trustee whom he shall, as far as possible, select by reference to the wishes of the most interested creditors if ascertainable at the time; the official receiver shall complete the assignment by inserting therein as grantee the name of the trustee."

He has a duty to attempt to find a licensed trustee, or other qualified person if there is no licensed trustee in the locality of the debtor who will accept the appointment. If he is unsuccessful, he must cancel the assignment:

> " 6(5) When the debtor resides or carries on business in a locality in which there is no licensed trustee, and no licensed trustee can be found who is willing to act as trustee, the court or the official receiver may appoint a responsible person residing in the locality of the debtor to administer the estate of the debtor, and that person for this purpose has all the powers of a licensed trustee under this Act and the provisions of this Act apply to that person as if he had been duly licensed under section 5."

> "26(5) Where the official receiver is unable to find a licensed trustee who is willing to act, he shall, after giving the bankrupt seven days' notice of his intention, cancel the assignment."

For a definition of the terms "trustee" and "licensed trustee", we turn to section 2(v) of the Act:

> " 2. (v) 'trustee' or 'licensed trustee' means a person who is licensed or appointed under this Act."

402 It is to be noted that in selecting a trustee, the official receiver is to consider the wishes of the creditors as opposed to those of the bankrupt. He should, therefore, where possible, attempt to ascertain the wishes of the creditors. Having done so, he will insert the name of the trustee in the appropriate place on the assignment.

403 The question of choice of trustee for an estate has received very little judicial review. In Re Simon Holdengraber, 8 C.B.R. - 411, is a case in point heard by Chief Justice Barry of the New Brunswick court. He ruled that a trustee resident in the province involved is a preferable choice to one resident outside of the province. He pointed out, however, that it is not essential that the licensed trustee selected be a resident of the province.

404 In addition to entering the name of the trustee on the assignment, section 80 of the Bankruptcy Rules states that he must certify the appointment in Form 32, and see that the trustee gets a copy of this form. A trustee thus appointed holds the position unless the creditors, by special resolution at any meeting, appoint or substitute another licensed trustee, or his licence is cancelled by the Minister of Consumer and Corporate Affairs, or is discharged by the court.

Security Given by Trustee

405 Section 8(1) of the Bankruptcy Act states every trustee who has been appointed to administer a bankrupt estate, must give security to the satisfaction of the official receiver for an accounting of his administration and faithful performance of his duties as trustee:

> "8(1) Every trustee duly appointed shall, in addition to the security required by section 5, forthwith give security in cash or by bond of a guaranty company satisfactory to the official receiver for the due accounting of, the payment and the transfer of all property received by him as the trustee and for the due and faithful performance of his duties; the security shall be deposited with the official receiver and shall be given in favour of the creditors generally and may be enforced by any succeeding trustee or by any one of the creditors on behalf of all by direction of the court; the amount of the security may be increased or reduced by the official receiver."

Section 114 provides an exception when a bankruptcy, other than a corporation, has assets that will not realize in excess of five hundred dollars after deducting claims of secured creditors. Section 26(6) defines this type of estate as one that may be termed as a summary administration.

"26(6) Where the bankrupt is not a corporation and in the opinion of the official receiver the realizable assets of the bankrupt, after deducting the claims of secured creditors, will not exceed five hundred dollars, the provisions of the Act relating to summary administration of estates shall apply."

"114. The following provisions apply to the summary administration of estates under this Act, namely,

(b) the security to be deposited by a trustee under section 8 shall not be required unless directed by the official receiver;"

406 Bankruptcy Rule 59 provides that if the trustee has not deposited the security required by subsection (1) of section 8 of the Act within seven days of his appointment, this fact shall be reported to the Superintendent of Bankruptcy by the official receiver.

"59. If within seven days of his appointment a trustee has not deposited with the official receiver the security required by subsection (1) of section 8 of the Act, the official receiver shall immediately so report to the Superintendent."

The failure of the trustee to provide this security does not affect his capacity to act as trustee of the estate. In the case of In Re Arthur Soucier, 20 C.B.R. - 298, Mr. Justice Fairweather of the New Brunswick court held that while failure to deposit the required security with the official receiver might make the trustee subject to penalties under section 160(1)(b) of the Bankruptcy Act, the Act does not prohibit him from acting as trustee and proceedings taken by him prior to the filing of the bond are effectual. Section 160(1)(b) reads as follows:

"160(1) A person who,

(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;"

407 Section 8(1) gives the official receiver a discretion in setting the amount of security to be provided by the trustee. He is expected to use this discretion

wisely and set an amount that reflects the expected realization by the trustee from the assets that will come into his hands. In the Soucier case cited above, Judge Fairweather, in dealing with the amount set by the official receiver as the security the trustee must provide, said, "I cannot understand why the official receiver should have demanded a bond for $12,000.00, as this amount appears to me to be beyond all reason and entirely out of proportion with the prospective value of the estate. The insistence of the official receiver's demand for such an excessive amount might well have had the effect of preventing further proceedings by the trustee, and thus enabling the assignor to defraud his creditors."

408 The power to set the amount of the security and to later increase or decrease the amount is vested solely in the official receiver by section 8(1) of the Act. In the case of In Re H.L. Colle et H. Gadbois, 15 C.B.R. - 265, a Registrar in the Province of Quebec had reduced the amount of the bond and the creditors applied to the court to annul the registrar's order. Mr. Justice Boyer held that the registrar has no jurisdiction to give an order decreasing the security given by the trustee. He held further that the official receiver is the only competent officer to grant such an application upon resolution of the inspectors.

409 In another decision, In Re Herménégilde Lapierre, 14 C.B.R. - 356, Mr. Justice Boyer ruled that the inspectors of an estate had exceeded their powers in authorizing, by resolution, the trustee not to furnish the bond required by the official receiver when a subsequent judgment obliged him to do so.

410 The bond given pursuant to section 8(1) of the Act binds the bonding company for loss to the creditors of the estate as a result of the actions of the trustee during the time that he is acting as trustee. The fact that the trustee has misappropriated funds of the bankrupt estate and lost his licence, does not relieve the bonding company of its liability under the bond. The court ruled to this effect in In Re J. Albert Savignac, 21 C.B.R. - 214. This decision also held that the surety company is not obliged to reimburse the fees which were paid to a trustee who had misappropriated funds if they were earned and duly taxed.

411 Section 19(9) of the Bankruptcy Act states that the discharge of the trustee operates as a release of the security provided pursuant to subsection (1) of section 8. It is submitted that this does not mean the release of the physical bond itself, but a release of the bonding company from responsibility for the actions of the trustee after the date of his discharge. Subsection (7)

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of section 19 states that nothing in or done under authority of section 19, which is the section of the Act dealing with the discharge of the trustee, shall relieve or discharge a trustee from the results of any fraud. It follows that if the trustee is not relieved from responsibility for fraud perpetrated by him in the estate, neither is a security on a bond for the same responsibility. For this reason, the bond itself should remain in the physical possession of the official receiver even after the discharge of the trustee.

CHAPTER V

Examination Of The Bankrupt

501 When an assignment has been filed, or a receiving order issued, one of the first things that must be done is to ascertain from the bankrupt any facts in his possession relating to the bankruptcy and the administration of the estate. The Bankruptcy Act provides that this examination shall be under oath and conducted by the official receiver.

> "120(1) The official receiver shall on the attendance of the bankrupt examine the bankrupt under oath as to his conduct, the causes of his bankruptcy and the disposition of his property and shall put to him the prescribed question or questions to the like effect and such other questions as he may see fit; the official receiver shall make notes of the examination and a report of any facts or circumstances that in his opinion require special consideration or further explanation or investigation and shall forward a copy of his notes and the report to the Superintendent, to the trustee and to the court for deposit therein, and shall communicate the contents thereof to the creditors at their first meeting."

502 As soon as possible after the bankruptcy occurs, the trustee should request the official receiver to set a date for this examination. The bankrupt should be immediately informed of this date and his duty to attend. The duty to attend before the official receiver for such examination is set out in section 117(c) of the Act which reads as follows:

> "117. The bankrupt shall,
>
> (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;"

If, after being properly notified, the bankrupt does not appear for his examination, the trustee may apply to the court for a warrant to have him apprehended for this purpose.

> "124. Where the bankrupt fails to present himself for examination before the official receiver as required by paragraph (c) of section 117 or where he or any

other person is served with an appointment or summons to attend for examination and is paid or tendered the proper conduct money and witness fees as fixed by General Rules but refuses or neglects to attend as required by such appointment or summons, the court may, on the application of the trustee, by warrant cause the bankrupt or other person so in default to be apprehended and brought up for examination."

503 The seriousness with which Parliament viewed this examination is demonstrated by the fact that failure to attend is deemed to be an offence punishable by imprisonment.

"156. Any bankrupt who,

(a) fails, without reasonable cause to do any of the things required of him under section 117;

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 to imprisonment for a term not exceeding three years, and the provisions of the Criminal Code authorizing the imposition of a fine in addition to or in lieu of imprisonment do not apply."

504 In instances where the bankrupt is a corporation, the official receiver must ascertain which of its officers should be examined pursuant to section 120(1). The power to make such a choice and command the attendance of such officer or officers for examination is set out in section 118 of the Act.

"118. Where the bankrupt is a corporation, the officer executing the assignment, or such other officer or officers as the official receiver may direct, shall attend before the official receiver for examination and shall perform all the duties imposed upon a bankrupt by section 117, and, in case of failure to do so, such officer or officers are punishable as if he or they were the bankrupt."

Who are the officers of the corporation is a matter of fact determined by the Articles of Association or by-laws of the corporation. If these are not available, resort may be had to the official governmental records of the jurisdiction of incorporation.

505 If the bankrupt has been imprisoned, the Act provides that the court may order the prison authority to produce him at the time and place designated by the official receiver.

"119. Where a bankrupt is undergoing imprisonment, the court may, in order to enable the bankrupt to attend in court in bankruptcy proceedings at which his personal presence is required or to attend the first meeting of creditors or to perform the duties required of him under this Act, direct that the bankrupt be produced in the protective custody of a sheriff or other duly authorized officer at such time and place as may be designated, or it may make such other order as it deems proper and requisite in the circumstances."

The application for such an order should be launched by the trustee.

506 Section 96 of the Bankruptcy Rules sets forth the procedure to be followed by the official receiver in conducting the examination of the bankrupt required by section 120(1) of the Act.

"96(1) The official receiver shall, as part of the examination required by subsection (1) of section 120 of the Act, require the bankrupt to answer the questions set out in Form 62 or 63, whichever is applicable, or questions to the like effect and shall cause the answers to be taken down and the form shall be completed or the answers transcribed, as the case may be, in triplicate.

(2) The bankrupt shall sign three copies of Form 62 or 63, as the case may be, as completed or the answers as transcribed under subsection (1), verify the correctness thereof by oath or statutory declaration and comply with the directions of the official receiver in this respect."

Subsection (3) of Rule 96 states that a bankrupt who fails to do anything required of him by subsection (2) is guilty of contempt of court. When such a situation arises, the facts must be brought before the court, which will make an order declaring the bankrupt in contempt and prescribe the penalty.

507 There have been very few decisions of the court regarding the section 120(1) examination. Judge Ellis of the County Court of British Columbia discusses the matter from the criminal point of view in In Re Rex vs Davidson - 14 C.B.R. - 474. He states that before a debtor can be held guilty under the Criminal Code with respect to statements made in

answers to questions put under Bankruptcy Rule 109 (now Rule 96), it must be shown that the official receiver either personally, or by delegation, ordered such questions to be put to the debtor. Rule 96 does not, it seems, absolve the official receiver from doing personally what section 120 of the Bankruptcy Act says he shall do. Section 120 of the Act clearly imposes a duty upon the official receiver to conduct the examination and says how he shall do it.

508 In any event, whatever is done by the debtor under section 120(1), or under Rule 96, must be done at the instigation and at the direction of the official receiver. In the Davidson case, there was no evidence before the Court that the official receiver either personally or by delegation, ordered the questions to be put to the debtor. The charge of giving false evidence was dismissed as the evidence was not testimony he was required or authorized by law to give.

509 The judge also points out the necessity of asking the full question. For example, the accused was asked if he had any account in his own name or in that of any person on his behalf at any time during the last three years at any bank. The reply was in the affirmative, and the name of one bank was given. A person answering that question may have honestly considered that he had answered all that he was called upon. The question does not say, "disclose every and all banks that you had an account in, or at where you have done business". It is a true answer as far as it goes. In other words, the form of the question as set out in what was then Form 50, is not as clear as it might be even in proceedings under the Bankruptcy Act to say nothing of criminal proceedings.

This examination is of great importance, and should be well prepared in advance of the questioning.

CHAPTER VI

The First Meeting Of Creditors

601 Probably, the most involved duties of the official receiver are those surrounding the first meeting of creditors of the estate. The Bankruptcy Act sets out rules of procedure intended to facilitate the conduct of the meeting with justice to all. There are many situations, however, where the procedures would appear to work an injustice. Within the scope of his authority, the official receiver is expected to see that the intent of the Act is carried throughout the meeting in a manner that prejudices no one. In some bankruptcies, this requires great skill and initiative.

602 The Bankruptcy Act requires the official receiver to chair this meeting or nominate some person to act in his stead.

> "71(1) The official receiver or his nominee shall be the chairman at the first meeting of creditors and shall decide any questions or disputes arising at the meeting and from any such decision any creditor may appeal to the court."

This being the case, he should inform the trustee as soon as possible, after the appointment of the latter, of the date, place, and time of the meeting. This will enable the trustee to carry out his duty of providing adequate notice to the creditors, bankrupt and the Superintendent of Bankruptcy, of the meeting.

> "68(1) It is the duty of the trustee to inform himself of the names and addresses of the creditors and, within five days from the date of his appointment, to send by registered mail to the bankrupt, to every known creditor and to the Superintendent, a notice in the prescribed form of the first meeting of creditors, to be held on a date not later than fifteen days from the mailing thereof at the office of the official receiver in the locality of the bankrupt, but the official receiver may, when he deems it expedient, authorize the meeting to be held at the office of any other official receiver or at such place as the official receiver may fix."

603 Quite often there are instances when, due to the state of the records of the bankrupt or the very size and complexity of the estate, the first meeting of creditors cannot be held within the limits prescribed by section 68(1). The Superior Court of Quebec in In Re Thornton Davidson and Company - 1 C.B.R. - 379, ruled that under such circumstances,

the court could extend the five-day limitation for mailing the notices to a fixed date.

604 This court also held in the case of In Re Sylvio Bellehumeur, 16 C.B.R. - 256, that where the bulk of the creditors could be more conveniently served by the first meeting of creditors being held at the office of an official receiver other than the one in the locality of the bankruptcy, that it could be so convened and chaired by the outside official receiver. This would seem to be in line with the closing part of section 68(1).

605 The court has been asked to consider whether or not a meeting of creditors can be held if only one creditor files a proof of claim and attends at the appointed time. Section 72(1) of the Bankruptcy Act reads as follows:

> "72(1) A meeting is not competent to act for any purpose except the election of a chairman and the adjournment of the meeting, unless there are present or represented at least three creditors, or all the creditors when their number does not exceed three."

Mr. Justice Mellish of the Supreme Court of Nova Scotia ruled in In Re Glennie, 4 C.B.R. - 226, that under such circumstances there was a quorum. The judge reasoned that as section 42(9) (now section 75(1)), provides that a person is not entitled to vote as a creditor at any meeting of creditors unless he has proved a claim provable in bankruptcy and lodged the proof with the trustee before the time appointed for the meeting, the term "creditors" within the meaning of section 72(1) means a person entitled to vote. In this instance, he ruled that there was only one "creditor" of the estate within the meaning of subsection (6) of section 42 (now section 72(1)) at the time of the meeting in question. He was of the opinion that any creditor who proves his claim is entitled to have the administration of the estate proceeded with, even though all of the other creditors fail to make such proof, otherwise, the purposes of the Act might be defeated.

The Court of Appeal of Ontario in In Re J.H.C. Woodward, 22 C.B.R. - 90 held that although there was but one creditor of an estate, he may hold a meeting within the meaning of section 37(2) (now section 6(1)) of the Bankruptcy Act, and appoint a new trustee.

The Proof of Claim

606 Aside from supplying the evidence to the trustee that a claimant is indeed a creditor of the estate, the proof of claim establishes the right of the creditor to participate at meetings of creditors.

> "75(1) A person is not entitled to vote as a creditor at any meeting of creditors unless he has duly proved a claim provable in bankruptcy and the proof of claim has been duly lodged with the trustee before the time appointed for the meeting."

However, if there is an objection to a proof of claim and the official receiver has any doubt as to its adequacy, he will allow the creditor to vote, but note the objection on the proof. The court, or application of an interested party, would determine the validity of the claim and hence the vote.

> "74(3) Where the chairman is in doubt whether the proof of claim should be admitted or rejected he shall mark the proof as objected to and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained."

607 There have been many court applications dealing with rulings made by official receivers on the question of the adequacy of proofs of claim for voting purposes. Some of the points involved are the completion of the proof of claim itself, the adequacy of the supporting voucher, the method of taking the claimants' affidavit, who may act for a corporation, when the proof must be filed, to mention a few.

608 While the form provided in the Bankruptcy Rules may appear straightforward, there has been considerable controversy on the question of its completion. An early case in point is In Re McCoubrey and In Re Stratton and Greenshields Limited, 5 C.B.R. - 248. This is a decision of Mr. Justice Tweedie of the Supreme Court of Alberta. One aspect dealt with in this case is the use of the creditor's full name on the declaration. It was contended that the proof was bad because the deponent used his first two initials instead of his first names. It was held that the names in full, no doubt, more particularly identify the declarant and would avoid confusion as between persons of similar initials. However, no confusion was suggested in this case, and under the Rules, it is not necessary that the declarations should contain the name in full.

. . . 40

It is sufficient if the initials of the first names and the full surname be given. The official receiver should consider only if the use of initials in the particular estate before him would cause confusion. If not, he should not refuse the proof for that reason alone.

609 Another aspect dealt with by the McCoubrey case is that of the qualification of the officer who took the affidavit of the declarant. In this case, it was contended that certain declarations made outside of the Province of Alberta, but within Canada, were not made before proper officers or persons inasmuch as they were not made before any one of the persons authorized under the Alberta Evidence Act.

It was held that section 42 of the Alberta Evidence Act is not applicable. This relates only to civil proceedings in the court of that province. The declarations in question are not for use in court, but are for use by a chairman of a meeting, or a trustee for the purpose of determining who are entitled to vote, or who may be entitled to a dividend and may never be before the court. In this case, they are for use at a creditors' meeting. A creditors' meeting is not a proceeding in court, although the proceedings thereat are subject to review on appeal.

The objection to the official receiver's ruling was not sustained as the persons before whom the declarations were made were authorized to receive them.

610 It was held by Mr. Justice Panneton of the Superior Court of Quebec in In Re Saykaly - 7 C.B.R. - 570, that where the dates in the proof of claim were not added by the claimant, but by a third person after the swearing and filing of the claims, such changes are illegal, and the votes based on such claims should not be allowed. He was of the opinion that the dates are important as there are privileges which depend on them. Section 45 (now section 85) requires creditors to file their claims showing particulars of the debt and when the date of the year of the sale is omitted, the proofs of claim are not sufficient.

611 Another objection raised in the Saykaly case was one of the adequacy of the address of the creditors as shown in the proof of claim. The judge held that under Bankruptcy Rule 146 (now Rule 105), the non-compliance with any of the rules is not fatal to the proceedings, unless the court considers otherwise, and the omission of the names of the streets in the affidavit is not a serious objection.

612 The adequacy of the proof of claim was also dealt with in the Supreme Court of Ontario. In Re D.W. McIntosh Limited, 20 C.B.R. - 267, considered the filling out of the clause in the proof of claim to the effect that the creditor has not any security. Section 85(5) is pertinent and reads as follows:

> "85(5) The proof of claim shall state whether the creditor is, or is not, a secured or preferred creditor."

The clause is important because if the creditor has security, he must value it and can only vote on the excess.

> "78. For the purpose of voting, a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and he is entitled to vote only in respect of the balance, if any, due to him, after deducting the value of his security."

In this case, there were no creditors who had security, but all sorts of errors were made in the filling out of this clause. Some creditors merely left it blank and untouched; some merely filled in the name of the creditor and let the rest go; some filled in the name of the creditor and crossed out the last few words, "save and expect the following;" some filled in the name of the creditor and added the word "nil" in the blank space following the words last quoted, and in other cases, there were different combinations and variations; practically all of the clauses respecting security had some error or another in them. The provisions of section 85(5) are mandatory rather than directory.

Clause 3 in Form 50 reads as follows:

> "3. That I have not (or the said...has not), nor has any person by my (or his) order to my knowledge or belief for my (or his) use, had or received any manner of satisfaction or security whatsoever save and except the following:-- (Here give particulars of all securities held. Where the securities are on the property of the bankrupt assess the value of each and specify dates when given).

613 It was argued that if the security clause is left untouched, that is, without filling in the name of the creditor, and without striking out the words at the end, "save and except the following," it would be sufficient because the form gives it in that way and the form has statutory recognition.

The judge, however, did not agree with this contention. He reasoned that unless the name of the creditor is filled in, the clause is meaningless. The swearing to the fact of there being no security is of great importance, otherwise an unauthorized person could vote and perhaps turn the scale one way or the other.

614 It was held that a creditor, therefore, cannot leave the security clause entirely blank, but if he fills in the name of the creditor and omits to strike out the words, "save and except the following," at the end, or if he adds the words "nil" or "no exceptions", or something of that sort, after the above words of exception in each case, the form would mean that he has no security and that there is no exception and that there would be a sufficient compliance with subsection 5 of section 85.

615 An essential and very important ingredient in a proof of claim is a statement of the account of the bankrupt with the creditor. Section 85(4) reads as follows:

> "85(4) The proof of claim shall contain or refer to a statement of account showing the particulars of the claim and any counterclaim that the bankrupt may have to the knowledge of the creditor and shall specify the vouchers or other evidence, if any, by which it can be substantiated."

The necessity of this subsection being adhered to rigidly is pointed out by Mr. Justice Urquhart in the McIntosh case cited above. He ruled that the provisions of section 105(4) (now section 85(4)) in regard to proof are not merely directory, but are mandatory. He pointed out that it is enacted that the proof "shall contain or refer to a statement of account." There must be reasonable compliance with this section, otherwise the proofs must be disregarded for voting purposes. He went on to say that in determining what is reasonable compliance with the section and form, what are obviously clerical errors must be ignored.

616 The McIntosh case, in this regard, is in line with two Quebec cases, In Re Théo, Beaulieu & Co. v. Couture, 5 C.B.R. - 486, and In Re Corduroys Unlimited Inc. 4 C.B.R. (N.S.) - 250. In the latter case, Mr. Justice Hannen ruled that the official receiver is entitled to refuse to accept the vote of a creditor present if there are no vouchers in support of the proof of claim filed prior to the meeting. This is notwithstanding the fact that the vouchers are in the possession of the creditor who is present and wishes to produce them. The official receiver must refuse the claim

by virtue of section 75(1) of the Act which requires that the proof of claim must be lodged before the time appointed for the meeting. Section 85(2) provides that the claim must be in the prescribed form, and section 85(4) provides that it must contain or refer to a statement of account giving particulars of the claim and specifying the vouchers by which it can be substantiated. These requirements are repeated in simple language in Form 50. The official receiver may use discretion when the proof of claim is from a workman or a layman, but when it emanates from a trader and is against a trader, there is no excuse, and it must be in proper form.

617 In In Re McCoubrey, 5 C.B.R. - 248, the court dealt with the objection to the proofs of eight creditors that their declarations did not contain or refer to a statement of account as required by section 45(4) (now section 85(4)). It was held that as the provisions of section 45(4) (now section 85(4)), are not merely directory, but are mandatory, the proof shall contain or refer to a statement of account.

618 Mr. Justice Fisher of the Ontario Supreme Court ruled in In Re London Bridge Works Limited, 8 C.B.R. - 73, not only that the particulars of an account should appear either in the declaration proving the claim or in the account attached, but also that an invoice not signed by the Commissioner who took the declaration, is not sufficient. Mr. Justice Urquhart in the McIntosh case, stated that this latter statement by Mr. Justice Fisher was only a comment, and not a ruling of the court, that had to be followed.

619 Mr. Justice Urquhart went on to discuss the contents of the statement. He pointed out that according to the statute, if the statement contemplated by section 105(2) (now section 85(2)) is short, for example, if it is one or two promissory notes, the details can be filled in in the space set aside for that purpose in the printed form at the end of paragraph 2, but if it is of some length, then the combined effect of section 105(4) (now section 85(4)), and paragraph 2 of Form 48 (now Form 50), is that a separate document, called an account, is to be made out. This document must have four attributes: (a) it must contain particulars of the claim; (b) it must specify the vouchers, if there are any; (c) it must be annexed to the declaration; (d) it must be marked "A".

620 The court then went on to discuss the particulars of this account. It must contain the dates of the sales or advances. It is important that not only the month and day of the month, but also the year, be set forth, otherwise, stale or barred claims might be made and might be voted on (perhaps

turning the scale in favor of one party or another); also, some particulars of the items of the account must be given. If it is a running account, it is not merely sufficient to put the date of the last invoice and follow it by the words, "to account rendered", and the amount. It must be itemized so that it can be checked both by chairman of and the scrutineers at the meeting. In fact, it is the basis of the creditor's claim in the bankruptcy.

621 The next thing that follows is that the account must be annexed to the declaration. The judge found that if the account was in all other respect correct and identified, and it merely accompanied the declaration, that would be sufficient compliance with the form. He thought that "annexed" meant, in this connection, accompanying the declaration in the same parcel or envelope, or delivered with it at the same time and identified with it.

622 The contents of the statement of account was also discussed by Mr. Justice Tweedie in In Re McCoubrey, cited above. He ruled that the statement of account should clearly indicate who is debtor, and who is creditor, and give such particulars with dates as are necessary to disclose the origin or nature of the liability such as "goods sold and delivered", "money lent", "services rendered", or, if there be particular circumstances which do not come within what are generally known as the common counts, the particular circumstances giving rise to the claim as well as all payments in cash, or otherwise, for which the debtor is entitled to credit. It is not necessary that the statement should contain in detail an itemized account of the goods sold and delivered, but it is sufficient if it shows goods sold on a certain date as is the practice in statements of commercial houses in connection with their monthly statements. If the claim is for money lent, the particulars of the loan should be given; if for services rendered, the extent thereof and the period within which they are rendered; if on a bill of exchange, sufficient particulars to identify the instrument, or in special cases, sufficient particulars to acquaint the person whose duty it is to pass upon the proof with the nature of the particular transaction.

Who May File a Proof of Claim

623 Subsection (1) of section 83 of the Act sets out clearly the limitations as to debts that may be claims provable; it reads as follows:

"83(1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act."

The question of contingent or unliquidated claims is dealt with in the following subsection, which reads:

"83(2) The court shall, on the application of the trustee, determine whether any contingent claim or any unliquidated claim is a provable claim, and, if a provable claim, it shall value such claim, and such claim shall after, but not before, such valuation be deemed a proved claim to the amount of its valuation."

The duty of the trustee when he receives a contingent or unliquidated claim, is set out in section 91(1) of the Bankruptcy Rules:

"91(1) When a contingent or unliquidated claim is filed with the trustee he shall, unless he compromises the claim, apply to the court to determine whether the claim is a provable claim and, if so, to value the claim."

A creditor may file a proof of claim based on a debt not payable at the date of bankruptcy.

"83(3) A creditor may prove for a debt not payable at the date of the bankruptcy and may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of five per cent per annum computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted."

624 The courts have been asked to apply these subsections to specific types of debts and a review of these cases would be of assistance to official receivers in ruling on claims to accept for voting purposes. An early Quebec case dealing with thirty-day goods is In Re Saykaly, 7 C.B.R. - 570. The court here ruled that the fact that the goods of a creditor were sold within thirty days previous to the bankruptcy, does not prevent the filing of a claim as an ordinary creditor so long as he chooses to do so. His declaration, however, might be taken as a waiver of the right which might have accrued to him to get the goods back.

625 The Ontario case of In Re Andrew Motherwell, 4 C.B.R. - 265, deals with the question of voting rights of sureties for a debt of the bankrupt. Mr. Justice Fisher held that sureties for the bankrupt's debt who have since proof of claim by the guaranteed creditor, partly satisfied the creditor's claim are entitled, by reason of their right of subrogation, to vote in respect of the amount paid as regards matters of estate administration. This is so even though by the suretyship agreement, they had contracted away their right to rank for any dividend until the guaranteed creditor should have been paid in full and were, therefore, not in a position to claim a dividend on the portion of the proved claim to which their voting rights pertained. The judge went on to state that a creditor upon a claim for unliquidated damages arising from the bankrupt's refusal to take delivery of goods purchased, is not entitled to vote upon the claim, even where the trustee has not contested it, until a valuation has been placed upon it by the court under section 44(3) (now section 83(2)) of the Bankruptcy Act.

626 The later decision of In Re Progressive Oil and Gas Company Limited, 8 C.B.R. - 319, dealt with a similar situation. In this case, a bank filed its claim with the trustee of the debtor estate in the amount of $8,798.00 due upon a promissory note which was endorsed by seven parties. The trustee paid a small part of the bank's claim by two dividends and subsequently, the seven endorsers paid off the balance of the claim in equal shares. The endorsers who had already filed separate proofs in respect of other claims they had against the estate, filed separate proofs of claim for the amount each had paid upon the note in question.

The trustee applied to the court for directions as to the rights of the endorsers to vote upon their claims.

Mr. Justice Fisher, held that under subsection (15) of section 42 (now section 76) of the Bankruptcy Act, the seven endorsers had a right to vote. He said that as the trustee admits that he cannot dispute the liability of these endorsers on the note, or their right to acquire it by payment, any or all of the endorsers were entitled to acquire the note by payment. All of them having acquired the note by the individual payment of their respective liability, the filing of separate claims was not, in his opinion, a splitting up of their claims. He was of the opinion, however, that the number of votes to which each of these creditors was entitled must be ascertained on the aggregate amount of the respective claims filed with the trustee prior and subsequent to the payment to the bank, otherwise, there would be a multiplicity of votes caused by the splitting of the claims as computed under subsection (14) of section 42 (now section 81) of the Bankruptcy Act.

627 In Re Eastern Rubber Company, 11 C.B.R. - 210, is a Quebec case dealing with secured creditors. Here, Mr. Justice Panneton ruled that a secured creditor, under section 2(ii) (now section 2(r)) of the Bankruptcy Act, declaring in his claim to have no security, has a right to vote at the meeting of creditors as an ordinary creditor. His admission, however, is a renunciation to his security.

628 In another Quebec decision, In Re Crestol Refineries Limited, 20 C.B.R. - 441, it was held that a landlord will not be allowed to file, in his tenant's estate, a claim for unliquidated damages caused by fire until it has been fully established by the court. This claim did not result from a contract, but from a misdemeanour and as it might be contested, the official receiver could not allow such creditor to vote for the appointment of the trustee or the inspectors.

Who May Prove for a Company

629 Many proofs of claim filed by, or on behalf of, a corporation have been objected to on the ground that the declarant was not legally capable of completing the proof. Section 22 of the Bankruptcy Rules deals with this subject:

> "22. An affidavit on behalf of a corporation may be made by any officer or employee thereof who has personal knowledge of the facts who deposes to that knowledge in the affidavit."

630 In Re McCoubrey, 5 C.B.R. - 248, is an early case in point. This is an appeal to the court from rulings of the official receiver in allowing certain votes to be taken. There were two specific objections. First, that the declarant was not competent to make the declaration, and secondly, that he did not appear to have the personal knowledge to swear to the facts.

The judge reasoned as follows: The proofs in question are declarations provided for by the Act as claims may be proved in that manner and the authority to a manager, officer or employee, to prove claims in that manner is expressly given by the Rules and no further proof of authority is necessary. It is not necessary that a declarant should describe himself in express words as one of those provided for in the Rules. Is the purpose for which the declarant is engaged or authorized such as to bring him within one or other of the enumerated classes? If so, that will be sufficient.

He then asked, is a person who is an agent, an "employee" within the meaning of the Rule? In the present instance, none of the declarants make use of the word, "employee", but each states that he is the "authorized agent" or "duly authorized agent", as the case may be, using that description, no doubt, because of marginal instructions on the printed form of statutory declarations furnished to them. Prima facie they are employees. Commonly speaking, agents are appointed. They are, nonetheless, employed. An agent is an employee within the meaning of the Rule, and as such, is expressly authorized by the Rules to make the declaration. The objection cannot be sustained. The second objection is that the declarant does not, as required by Bankruptcy Rule 32, (now Rule 22), state in his declaration that he has knowledge of the facts deposed to. The proofs of four creditors, all corporations, are objected to on this ground.

The declarations are made, in one instance, by the "manager", in another by the "assistant manager", while in each of the other two, it was made by an "agent" whom I have already classed as an employee, but in none of the four declarations is it stated that the declarant "has knowledge of facts deposed to." The right of a corporation to prove its claim by the declaration of its manager, officer or employee, is conditional under Rule 32 (now Rule 22), upon the declarant stating in his declaration that he has such knowledge. The declarants not having so stated, the objection to the proofs will be sustained, and the six votes disallowed.

Time for Filing Proof of Claim

631 Section 75(1) of the Bankruptcy Act states that for voting purposes, the proof of claim must be lodged with the trustee before the time set for the meeting.

> "75(1) A person is not entitled to vote as a creditor at any meeting of creditors unless he has duly proved a claim provable in bankruptcy and the proof of claim has been duly lodged with the trustee before the time appointed for the meeting."

632 Mr. Justice Boyer of the Quebec Superior Court ruled in two cases, In Re J.A. Lacasse, 21 C.B.R. - 368, and In Re Barrie Steel Products Limited, 22 C.B.R. - 308, that the official receiver should not take into consideration the vote of any creditor whose claim was not filed with the trustee before the time appointed for the meeting. The Barrie Steel application was an appeal from a decision made at the first meeting of creditors refusing to certain creditors the right to vote on the ground that their proofs of claim

were not lodged within the time prescribed by section 94 (now section 75(1)) of the Bankruptcy Act.

In dismissing the appeal, the judge pointed out that the petitioner had argued that this ruling would constitute a hardship for the creditors who generally file their claims after the opening of the meeting, without any objection; also, that the claims having been presented before the opening of the meeting, such presentation was sufficient. His lordship stated, however, that the court has not the right of considering the creditors' convenience, but the law.

He went on to point out that section 94 is clear and formal and imperative for it reads: "A person shall not be entitled to vote as a creditor at the first ... meeting ... unless he has duly proved a debt ... and the proof has been duly lodged with the custodian ... before the time appointed for a meeting." "The time appointed for a meeting" does not necessarily mean the time at which the meeting opened.

"It may be only a question of minutes in this case, but you have to draw the line somewhere and the law is the law, whatever one may think about it, and it is not to be stretched at the court's will."

"There is no special proof of bad faith on his part; the latter claiming that he remained in his office up to 10 a.m. as under the notice as per the form provided by the Act, his office address was given and he was required to be there to receive any claims; the creditors having up till 10 a.m. to file them."

Voting

633 Whenever a vote is taken upon a motion presented at a meeting of creditors, the chairman has a duty to see that only votes cast by persons so entitled are counted. Not only must the voter have filed an acceptable proof of claim, but the Bankruptcy Act provides further limitations under certain types of motions. Sections 75, 76, 77, 78, 79 and 81 of this Act deal with this subject which was looked into to some extent in earlier paragraphs discussing proofs of claim. There are, however, judicial decisions that look more closely at individual situations. The early Manitoba case of In Re Arthur Fuel Company, 8 C.B.R. - 46, ruled that unless a claim against a bankrupt for unliquidated damages has been valued by the court, as provided in section 44(3) (now section 83(2)) of the Bankruptcy Act, it has not become a proved debt entitling the claimant to vote at a meeting of creditors.

634 In Re London Bridge Works Limited, 8 C.B.R. - 73, is an appeal from decisions of the chairman of the first meeting of creditors. In dealing with votes of creditors who had not filed a claim, the court upheld the decision of the chairman who refused to allow them. The judge pointed out that the plain meaning of section 42(9) (now section 75(1)) of the Bankruptcy Act is that no creditor is entitled to vote at the first meeting of creditors unless he has duly proved a debt provable in bankruptcy, and, the proof has been duly lodged with the trustee before the time appointed for the meeting.

635 The court ruled further that satisfactory evidence was given proving that one creditor did not have a claim against the debtor estate for as much as $25.00, and under section 42(14) (now section 81) of the Bankruptcy Act, he is not entitled to vote. Only creditors having claims of $25.00 and upwards, are entitled to vote.

Section 81 of the Bankruptcy Act reads as follows:

> "81. Subject to this Act, all questions at meetings of creditors shall be decided by resolution carried by the majority of votes, and for such prupose the votes of creditors shall be calculated as follows:
>
> (a) for every claim of or over twenty-five dollars and not exceeding two hundred dollars--one vote;
>
> (b) for every claim of over two hundred dollars and not exceeding five hundred dollars--two votes;
>
> (c) for every claim of over five hundred dollars and not exceeding one thousand dollars--three votes;
>
> (d) for every claim of one thousand dollars three votes and one additional vote for each additional one thousand dollars or fraction thereof."

636 In dealing with another objection, the court ruled that the creditor could not vote because it was found that it was indebted to the bankrupt company in a much larger sum than the bankrupt company was indebted to the creditor. The judge ruled that if there is no indebtedness, there can be no vote.

637 In Re Patricia Appliance Shops Limited, 2 C.B.R. - 466, is an Ontario application by a shareholder to reverse the decision of the official receiver whereby he would not allow the votes of shareholders of the bankrupt company at the first meeting of creditors. The court upheld that while all those notified of the meeting were to gather at the appointed place and hour, they had to be separated for voting purposes into their respective classes. The shareholders were given no right whatever to interfere in the administration of the estate. The sole power given to this body of shareholders at any meeting was as a class to "express its views or wishes", and any resolution of the shareholders passed for that purpose may have weight with the court under Rule 114 (now section 73 of the Act), in disputed matters arising during the administration of the estate. For all practical purposes, the power to pass resolutions for the guidance or control of the trustee, including the right to elect inspectors was confined to those creditors who proved claims against the insolvent of or over $25.00. A shareholder is not a creditor who can prove a claim et al, in the sense in which the word "claim" is used in the Act. A claim, capable of proof, must be for a debt and not merely for a share in the ultimate distribution of the assets (if any) available for the shareholders. Section 42(9) (now section 75(1)) limits the "right to vote" in the administration of the estate to a creditor, in the strict sense of the word, who has proved "a debt provable in bankruptcy or under an authorized assignment to be due to him from the debtor" of $25.00 or more. The appointment of inspectors is specially dealt with by a distinct section 43 (now section 82), but is mentioned in subsection (1) of section 42 (now section 68(1) and (5)), as one of the objects of the first meeting of creditors. It might be argued from this that other classes of creditors than those strictly so called are intended to be given some power in the selection of the inspectors. But, if so, how is it to be exercised? No provision has been made for calculating the number of votes to which shareholders would be entitled at any combined meeting, such as that in subsection (14) of section 42 (now section 81) for ordinary creditors. The shareholders could not possibly be entitled to outvote the other creditors. And, if shareholders could appoint inspectors at a separate meeting, how is the number to be appointed to be regulated? Rule 114 (now section 73 of the Act) makes it sufficiently clear that the shareholders can have no right to appoint inspectors or to interfere with the administration of the estate in any way whatever.

638 The Bankruptcy Act deals very specifically with the right of persons related to the bankrupt to vote on certain motions. This is dealt with by Section 79(3);

"79(3) The following persons are not entitled to vote on the appointment of a trustee or inspectors, namely:

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(a) the father, mother, son, daughter, sister, brother, uncle or aunt by blood or marriage, wife or husband of the bankrupt;

(b) where the bankrupt is a corporation, any officer, director or employee thereof;

(c) where the bankrupt is a corporation any wholly owned subsidiary corporation or any officer, director or employee thereof."

639 Applications have been made to the court in Quebec against rulings of the official receiver involving the right of related persons to vote. One such application is In Re Capital Trust Corporation Limited, 24 C.B.R. - 115. In this case, a creditor wanted to vote; the creditor being the daughter of the deceased bankrupt. In refusing to allow the vote, Mr. Justice Boyer said that it is the spirit of the law to be against a vote being granted in such a case, as it would give the creditor a right which he did not have while the debtor was living, and her death should not be held to give such a right.

Another application of a similar nature In Re Joseph Martineau, 7 C.B.R. - 107, held that the wife of the bankrupt cannot vote on a claim for wages and that her claim cannot be taken into consideration until all of the creditors have been paid in full.

A similar position was taken by the Supreme Court of Ontario in In Re Frederick C. Chambers, 18 C.B.R. - 149.

640 Dealing with the right of secured creditors to vote, the court in In Re Morris Tattlebaum, 10 C.B.R. - 207, held that a chairman of a creditors' meeting who allows secured creditors to vote without having valued their security and does not permit creditors to examine claims and proxies of other creditors, acts illegally. A secured creditor must value his security before he can vote, and if he votes without doing so, his vote will be disallowed.

This decision follows section 78 of the Bankruptcy Act, which reads as follows:

"78. For the purpose of voting, a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and he is entitled to vote only in respect of the balance, if any, due to him, after deducting the value of his security."

Proxies

641 The Bankruptcy Act provides for the voting of creditors by proxy, but does place some limitations on the use of these proxies on certain motions and by certain persons.

"75(2) A creditor may vote either in person or by proxy.

(3) A proxy is not invalid merely because it is in the form of a letter, telegram or cable.

(4) A debtor may not be appointed a proxy to vote at any meeting of his creditors.

(5) A corporation may vote by an authorized agent at meetings of creditors."

"79(1) Where the trustee is a creditor or a proxy for a creditor, he may vote as a creditor at any meeting of creditors.

(2) The vote of the trustee or of his partner, clerk, solicitor, or solicitor's clerk, either as creditor or as proxy for a creditor, shall not be reckoned in the majority required for passing any resolution affecting the remuneration or conduct of the trustee."

642 Some quite complex problems present themselves to the official receiver when he is called upon to determine whether a vote may be exercised by a proxy presented to him.

643 The Ontario case of In Re Andrew Motherwell of Canada Limited, 4 C.B.R. - 265, dealt with many aspects of voting by proxy. The judge stated that on such applications, the court will decline to receive evidence of confirmation communicated to the trustee subsequent to the meeting of creditors. A proxy to vote at a creditors' meeting must stand or fall as of the date of the voting. He held, however, that a proxy until revoked empowered the holder thereof to vote at all meetings. In dealing with limited proxies, he stated that the holder of a proxy given for one purpose can not exceed or alter the powers given to him by the terms of the proxy and use it for another purpose.

644 In Re McCoubrey, 5 C.B.R. -248, referred to in an earlier discussion, also dealt with the exercise of proxies at meetings of creditors. One objection to the ruling of the official receiver was that he allowed proxies that were improperly executed inasmuch as having been executed on

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behalf of corporations: (a) they had not affixed to them the seal of the corporation, and (b) there was nothing to indicate that the person affixing the name of the corporation had authority to do so.

The judge pointed out that there is nothing in the Bankruptcy Act or Rules requiring a proxy to be under seal. If a seal is necessary, it must be by reason of special provision in some one or other of the various special or general Acts under which companies are incorporated, or the by-laws or articles of association regulating them. The formal requirements under various Acts and regulations vary greatly. They mostly negate the necessity of affixing to a contract or commercial paper, such as bills of exchange, the corporate seal. Unless it is expressly required by the Act under which the company is incorporated, or by the by-laws or articles of association governing it, it would seem, as a general rule, that a seal is necessary for a corporation only when it is necessary for an individual. If it is required in the manner indicated, the burden of establishing the necessity of it is upon the person alleging it. There was nothing before the chairman nor the court to indicate that any of the corporations on behalf of which the agents purported to vote must appoint or engage their agents under the seal of the corporation, and in the absence of proof to that effect, the chairman insofar as the absence of a seal is concerned, was justified in allowing the person named in the proxy to vote. The objection was not sustained.

645 The court then considered the authority of the persons signing proxies on behalf of several corporate creditors to do so. There were nine such proxies. One, that of Watson Manufacturing Company Limited, was signed by L.B. Brown, without anything in the proxy to indicate who he or she was, or that she was acting on behalf of the company. The person in question proved the claim and therein described herself as the authorized agent. What she then purported to do was to appoint some other person to act generally on behalf of the company to delegate her authority. The proxy was held to be bad, and the vote cast thereunder in favour of the trustee disallowed. The remaining eight proxies each purported to be signed by the company, its name having been affixed by means of a rubber stamp. The name of the person affixing the signature was subscribed immediately underneath. One described himself as "Atty."; one as "Credit Manager"; one as "Director"; two as "Secretary-Treasurer", while three did not describe themselves at all, but in the proof of claim, each described himself as authorized agent.

Is a person designated in a proxy so executed "an authorized agent", within the meaning of section 42 (now Rule 22)? The method of appointing or employing an agent,

where his authority to act is not implied, is generally determined by by-laws or articles of association, and he is properly appointed or engaged only where their provisions are complied with. The contention of the appellant who objected to the proxies virtually was that the person named in the proxy had to establish conclusively that he had been properly authorized. This would mean that the chairman of the meeting would be required to examine into the powers of a corporation to appoint or employ an agent, the procedure as provided by articles of association or by-laws, to be followed in making such appointments and the regularity of the proceedings as disclosed by the minutes of the meeting. To require such strict proof would lead to confusion and, in many instances, deprive a creditor corporation of its right in sharing in the administration of a bankrupt estate which can be done only by means of the voting power. A chairman would never know when the agent was authorized. What the chairman would require is evidence of the agent's authority which was the signed proxy itself. It is not for him to enquire into the authority of the person who affixes the signature of the corporation to it. The Bankruptcy Act, under which the proceedings were taken, requires but slight evidence of the authorization. The necessity of a seal, as already indicated, has been dispensed with. No formalities, other than those as to form, provided by the Rules, are laid down as a prerequisite to the validity of the document. A proxy, however, "Shall not be invalid merely because it is in the form of a letter, telegram or cable." The chairman may accept the authority in any one of the forms just mentioned without further proof.

646 The court In Re James C. Carrie, 17 C.B.R. - 152, ruled that the claim of certain corporations should not have been allowed by the official receiver to be voted at the first meeting of creditors, as there were no proxies deposited as required by the Act.

647 In Re Britannia Canning Company Limited, 19 C.B.R. - 250, was an appeal from a number of decisions made by the official receiver at the first meeting of creditors. In this case, two nominees for the position of trustee received the same number of votes and the official receiver cast the tie-breaking vote. Two of the objections were in regard to the proxies involved. The judge ruled in this case, that in the case of a corporation, a proxy must be filed before and not after the taking of a vote. This reversed the official receiver, who had accepted the filing of a proxy by the holder after the latter had voted.

648 The use of proxies at the first meeting of creditors is another of the subjects dealt with in In Re D.W. McIntosh, 20 C.B.R. - 267. In deciding on this applica-

tion, the court held firstly that a proxy is not invalid by reason that it is in the form of a letter, a telegram or a cable, and it may be informal. This is in line with section 75(3) of the Bankruptcy Act. Secondly, it held that in the case of a limited company, the proxy need not be under seal, but an individual cannot give a proxy for a limited company by signing merely as an individual. The proxy must be signed in the limited company's name by a manager, officer, or employee. In the case of a partnership, the court ruled that the proxy must be given by a member of the partnership, and not by an accountant employed by the partnership, unless authority to give the proxy is shown.

If the instrument of proxy is given by other than the creditor himself, the authority to give it should be proved in some way satisfactory to the chairman at the meeting at which the proxy is voted.

649 The ability of a trust company to exercise proxies was challenged in In Re Ditchburn Boats and Aircraft (1936) Limited, 19 C.B.R. - 216. This is an appeal from the ruling of the official receiver allowing proxies to be voted by one Holmes, the general manager of a trust company on a vote taken for the appointment of a trustee. The proxies so voted had been filed by various creditors in favour of the trust company.

650 The court was satisfied, on the facts, that the general manager had authority from his trust company to act on behalf of the company whenever the company was named as attorney or proxy in any instrument. The result is that if there was no other consideration, the exercise of the proxies by the general manager would be quite proper. However, section 99 (now section 75(5)) of the Bankruptcy Act does not authorize a trust company to vote proxies at a creditors' meeting, even giving to the section its broadest meaning. This section gives a corporation coming within the definition of such by the Act, a right to vote as a creditor only.

651 The judge was also of the opinion that the legal maxim "delegatus non potest delegare" applied in this case, and that a trust company, by its very nature, is prevented from acting as a proxy for creditors generally. Also, if the trust company is to delegate, the instrument creating it as agent must expressly give it power to delegate its duties further. In this case, the proxy forms were in the usual form and merely appointed the trust company to be proxy and there was nothing else to the effect that certain officers could act as agents for the trust company in voting same.

652 A further aspect with far-reaching implications that was considered by the judge was the consideration of the

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definition of the word "corporation". Section 75(5) of the Bankruptcy Act gives a corporation the right to vote at all meetings of creditors by an authorized agent. By the definition contained in section 2(f) of the Act:

> "2. (f) 'corporation' includes any company incorporated or authorized to carry on business by or under an Act of the Parliament of Canada or of any of the provinces of Canada, and any incorporated company, wheresoever incorporated, that has an office in or carries on business within Canada, but does not include building societies having a capital stock, nor incorporated banks, savings banks, insurance companies, trust companies, loan companies or railway companies;"

it will be noticed that trust companies are specifically excluded. Section 75(5), therefore, cannot be considered as giving any right or authority to a trust company.

653 In Re Corduroys Unlimited Inc., 4 C.B.R. (N.S.) - 250, is an appeal from decisions of the official receiver as chairman at the first meeting of creditors. The official receiver had accepted the votes of creditors absent from the meeting who had given proxies to a person who was likewise absent from the meeting, but was represented by a so-called, substitute proxy, although the original proxy contained no powers of substitution. Mr. Justice Hannen of the Quebec Superior Court held that a person who is appointed a proxy cannot appoint another person to act for him when the instrument creating the proxy does not provide the powers of substitution.

654 When a person receives a proxy in blank from a creditor, there is a tacit authority to complete the proxy whether the creditor is present or not at the meeting. The creditor is thus validly voting by proxy as permitted by section 75(2) of the Act, and the trustee is permitted under section 79(1) of the Act to insert his own name and to vote as proxy for a creditor. A proxy need not be lodged with the trustee before the time appointed for the meeting. It may be handed to the chairman at any time during the meeting; the fact that the proxy form is usually contained in the proof of claim having no bearing whatsoever. In the General Rules, separate forms for proxies are contained under Forms 48 and 49 while the proof of claim is Form 50, and there is no requirement that they be combined.

655 As there is nothing in the Bankruptcy Act which would prevent a proxy being appointed with powers of substitution, the question falls to be decided by provincial law. The law respecting mandate as contained in the Civil Code of the Province

of Quebec, provides for substitution and such powers may be granted in that province to proxies; but the author correctly says that the original proxy must give the right of substitution, failing which, the right does not exist: C.C. art. 17 11.

656 Now the form of proxy here - which is in the form contained in the General Rules, which form part of the law and are to be judicially noticed, Form 49 - contains no power of substitution; if it had, then the proxy named therein could substitute another for himself. Some forms in the French language, specifically include the words: "Avec pouvoir de substitution;" and when those words are used, although they constitute an addition to the form in the Rules, it is not such an alteration as to vitiate the document.

657 The law does not specifically say that the proxy must be "duly lodged with the trustee before the time appointed for the meeting". On the contrary, there is no reason why the proxy may not be handed to the chairman at any time during the meeting. It is true that the form of proxy is written at the foot of the claim form, but this is certainly not de rigueur; this is not the way these two forms appear in the Rules, where actually the two forms of general proxy are contained first under Forms 48 and 49 followed by proof of claim as Form 50.

Discretion and Duties of the Chairman

658 The Bankruptcy Act sets out specific duties and powers vested in the official receiver relative to the first meeting of the creditors of a bankrupt estate. Section 71 deals with the setting up of the meeting:

> "71(1) The official receiver or his nominee shall be the chairman at the first meeting of creditors and shall decide any questions or disputes arising at the meeting and from any such decision any creditor may appeal to the court.
>
> (3) The chairman of any meeting of creditors shall, in the case of a tie, have a second or casting vote.
>
> (4) The chairman shall cause minutes of the proceedings at the meeting to be drawn up and entered in a book kept for that purpose, and the minutes shall be signed by him or by the chairman of the next ensuing meeting."

Section 72(3) empowers the chairman to adjourn a meeting if the creditors consent:

> "72(3) The chairman of any meeting may with the consent of the meeting adjourn the meeting from time to time."

659 Section 74 sets out guidelines for the chairman to follow in assessing proofs of claim from the standpoint of voting at the meeting.

> "74(1) The chairman of the meeting has power to admit or reject a proof of claim for the purpose of voting but his decision is subject to appeal to the court.
>
> (2) Notwithstanding anything in this Act, the chairman may, for the purpose of voting, accept telegraphic or cable communication as proof of the claim of a creditor who is resident out of Canada.
>
> (3) Where the chairman is in doubt whether the proof of claim should be admitted or rejected he shall mark the proof as objected to and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained."

660 In a number of decisions handed down by the courts, the judges have set out their interpretation of the Bankruptcy Act insofar as it deals with the position of the official receiver as chairman of the first meeting of creditors. Mr. Justice Tweedie in In Re McCoubrey, 5 C.B.R. - 248, points out that if the provisions of the statute and the rules are mandatory, it is the duty of the chairman of the meeting of creditors to require strict compliance with them. If they are merely directory, he is entitled to exercise his discretion concerning them, and if there are reasonable grounds for his exercising such discretion in the manner in which he does, his discretion will not be interfered with. He also points out that this is a commercial Act, the administration of which, in the first instance, is largely in the hands of businessmen and technical objections should not be given effect to beyond what is necessary for the interpretation of the Act according to the true meaning and intent thereof, and to avoid an injustice.

661 Dealing with a similar matter, Mr. Justice Fisher in In Re London Bridge Works Limited, 8 C.B.R. - 73, ruled that the chairman of a meeting of creditors is entitled to exercise his own discretion as to what proofs of claim he should admit or reject for the purpose of voting. It is only when he entertains an honest doubt whether the proof of a creditor

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should be admitted or rejected, that he is called upon to mark the proof objected to, and allow the creditor to vote. He said also that it is only in cases where the provisions of the Bankruptcy Act have not been strictly complied with, that the court will interfere on an appeal from the chairman's decision.

662 In both In Re Cléophas Gerbeau, 5 C.B.R. - 338, and In Re Maritime Eduction Limited, 10 C.B.R. - 425, the court held that the official receiver had no power to pass upon the merits of the claims, his duties being to examine them to see if they were made out according to the formalities required by law. In the latter case, the judge pointed out that the official receiver, or his nominee, is the chairman of the first meeting of creditors; he decides any questions arising in connection with the appointment of the trustee by the creditors, and from any such decision, any creditor may appeal to the court. After counsel had adduced evidence and cross-examined witnesses in support of their respective allegations and objections, new counsel appearing for the first time for the trustee, raised the point that before bringing its objection to the merits of Mr. Clayton-Kennedy's claim by way of appeal to the court, the Hydro-Carbon Company should have first presented the same objections as are now raised here before the chairman of the meeting at which the trustee was elected, and that the chairman should have been asked to pass upon them. The court was of the opinion that the appellant company could not have done that. The merits of a claim in dispute is something that the chairman or official receiver has no jurisdiction to determine. And, if that official had no jurisdiction to determine the merits of a claim in the first instance when it was voted on, it is difficult to see where he gets his jurisdiction to decide the matter when it is brought before him the second time on appeal.

663 The chairman has power to admit or reject a proof for the purpose of voting, but his decision is subject to appeal to the court. If the chairman is in doubt whether the proof of a creditor should be admitted or rejected, he must mark the proof objected to and allow the creditor to vote, subject to the vote being declared invalid in the event of the objection being sustained. The creditor having voted, who is to investigate the objection, and say whether it is sustainable or not? Certainly not the official receiver, for after the first meeting, he is functus officio; his power is spent. He has no power to pass upon the merits of a creditor's claim. He cannot, call another meeting, reconsider his decision, reverse himself and declare a different result. That the merits and form of a proof of claim, on which the votes by which the trustee is elected are founded, are most intimately connected with the appointment of the trustee would seem to be clear beyond dispute and that, therefore, the chairman's decision upon the allowance or rejection of a proof of claim is and ought to be appealable to the court. It is a matter of substance, and in no other way can it be brought before the court.

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This reasoning was followed in Ontario in In Re Britannia Canning Company Limited, 19 C.B.R. - 250.

664 Mr. Justice Urquhart in the D.W. McIntosh Limited case, cited above, held that for the chairman of the first meeting of creditors to take the votes of all parties filing claims, allow the scrutineers to go over the claims and make objections, and after hearing the objections, allow or reject each vote as the case might be, was the proper way to conduct such a meeting.

665 In In Re Saykaly, 7 C.B.R. - 570, Mr. Justice Panneton held that on an appeal from the ruling of the official receiver at the first meeting of creditors as to votes allowed or rejected, only the procès-verbal of the meeting must be considered when looking at the objection itself and the decisions of the chairman.

CHAPTER VII

Proposals

701 It is not uncommon in the commercial world for a business, though solvent on paper, to be in a position of not having sufficient liquid assets to meet its current obligations. The reasons for this are numerous, ranging from poor management to misfortune beyond the control of the enterprise concerned. For this firm to be put out of business by means of the bankruptcy process could well be in the interest of neither debtor nor creditors.

702 Part III of the Bankruptcy Act provides a procedure whereby a person in the circumstances outlined above may make a proposal to his creditors. These proposals basically ask the creditors to either extend the time for payment of the proposer's debts or accept a lesser amount in full settlement. There are many reasons for accepting a proposal. The two that are most obvious are, first, that the creditors will receive more than if bankruptcy is entered into and, secondly, the insolvent business is kept alive as a customer for the future.

703 In many cases the benefits to the creditors are not immediately obvious. It is often necessary for the debtor to secure concessions from secured creditors and guarantees from third parties as to the carrying out of the terms of the proposals. Prior negotiations with major creditors are often necessary before the terms of the proposal are finally drafted and lodged with a trustee. The necessity for careful planning is brought about by the fact that refusal of the proposal by the creditors brings about automatic bankruptcy.

704 The responsibility of the official receiver in the proposal procedure centres around his obligation to receive a copy of the proposal for filing and to chair the meeting of creditors called to consider the proposal. In instances where the proposal is not accepted by the creditors or approved by the court, the official receiver must issue a certificate of assignment which has the same effect as an assignment filed by the debtor.

705 Section 27 of the Bankruptcy Act states that a proposal may be made by an insolvent person or a bankrupt. These two terms are defined in the interpretation section of the Act as follows:

> "2. (c) 'bankrupt' means a person who has made an assignment or against whom a receiving order has been made or the legal status of such a person;"

"2. (j) 'insolvent person' means a person who is not bankrupt and who resides or carries on business in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(i) who is for any reason unable to meet his obligations as they generally become due, or

(ii) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(iii) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;"

706 The procedure for commencing a proposal is set out in further subsections of section 27. These require the proposal to be lodged with a licensed trustee. Where the proposal is lodged by a bankrupt it must be lodged with the trustee of his eatate. In addition to the proposal itself a bankrupt must also lodge with his trustee a copy of the statement of affairs referred to in section 117. A person who is not a bankrupt will lodge with his trustee a statement showing his financial position at the time of the proposal. This financial statement shall be verified by an affidavit of the debtor as to its correctness.

707 Before the trustee of a bankrupt estate may take any action on a proposal lodged with him by the bankrupt, the proposal must be approved by the inspectors of the estate (section 27(3)). This duty of the inspectors may not be taken lightly and their refusal to approve a proposal may not flow from personal malice toward the debtor. This was emphasized in a judgment of the Superior Court of Quebec in In Re Henry, 28 C.B.R. - 101. In ordering the trustee to send out the usual notices under the provisions of the Bankruptcy Act to the creditors respecting the offer of compromise by the debtor, Mr. Justice Boyer expressed the view that the inspectors had not given sufficient consideration to the offer. He was of the opinion that the compromise offer, if carried out, was in the interests of the creditors.

708 The courts do not favour the practice of inspectors extracting consideration from bankrupts for approval of their

proposal. In Laferté vs. Peladeau, 11 C.B.R. - 89 the Superior Court of Quebec ruled that the consideration of a note is illegal and against public policy if the note is given by a debtor to an inspector in full settlement of his claim for the purpose of having a composition accepted by the inspectors. The same court held in In Re Hobart, 13 C.B.R. - 56 that a secret agreement made by a debtor with the inspectors for the full payment of their claims for the purpose of obtaining their consent to a composition, to the prejudice of other creditors, is fraudulent and must be annulled. A similar view was taken by the Quebec Court in Glense v. Ste-Marie, 26 C.B.R. - 125 which held that a promissory note given by a debtor to one of his creditors to induce him to vote in favour of a compromise of forty cents on the dollar is a fraudulent preference and an action brought on such a note should be dismissed.

709 The Bankruptcy Act also states in subsection (4) of section 27 that no proposal or any security or guarantee tendered therewith may be withdrawn pending the decision of the creditors and the court.

710 One significant difference between a proposal of a debtor and an assignment or receiving order is that the property of the debtor does not vest in the trustee. In the case of a proposal lodged by a bankrupt, the Bankruptcy Act states as follows:

> "34(9) The approval by the court of a proposal made after bankruptcy operates to annul the bankruptcy and to revest in the debtor, or in such other person as the court may approve, all the right, title and interest of the trustee in the property of the debtor, unless the terms of the proposal otherwise provide."

711 In the case of Dinovitzer v. Weiss, 37 C.B.R. - 160, Mr. Justice Collins deals with this aspect very thoroughly. He points out that a proposal constitutes an offer made by a person to his creditors which they are free to accept or reject. If it is accepted, it becomes binding upon them in accordance with its terms when it is approved by the court. The filing of a proposal, he points out, does not vest the property of an insolvent person in the trustee. Section 40 of the Bankruptcy Act deprives a creditor with a claim provable in bankruptcy from having any remedy against a debtor upon the filing of a proposal but it does not prevent a debtor from exercising or continuing to exercise such rights as he has against his debtors in the ordinary way. He goes on to say that the fact that a plaintiff, while his action is pending, makes a proposal to his creditors, does not deprive him of the capacity to continue with his action. It is only

a bankrupt who is deprived by section 41(5) of the Act of this capacity. Although section 38(1) makes other provisions of the Act applicable, mutatis mutandis, to proposals, it does so only "in so far as they are applicable" and these words exclude the operation of section 41(5). Section 38(1) reads as follows:

> "38(1) All the provisions of this Act, in so far as they are applicable, apply mutatis mutandis to proposals."

712 In another Ontario case, In Re W. Hanna & Co. Ltd., 2 C.B.R. (N.S.) - 40, the court ruled in a manner that would indicate that subsections (2) and (3) of section 42 are not applicable to proposals made by an insolvent person. In this case the debtor paid to the sheriff about $7,000.00 to be applied on certain executions. A proposal was made by the debtor before the moneys were distributed by the sheriff under the Creditors' Relief Act. The proposal offered thirty cents on the dollar to creditors but the assets were not vested in the trustee. The trustee under the proposal applied to the court for a declaration as to the person or persons entitled to the funds in the hands of the sheriff. The court held that it had no jurisdiction to determine this question. A trustee under a proposal by an insolvent person has no right to ask the court to determine an issue as to the ownership of property between the debtor and a creditor. Subsections (2) and (3) of section 42 read as follows:

> "42(2) Where an assignment or a receiving order has been made, the sheriff or other officer of any court or any other person having seized property of the bankrupt under execution or attachment or any other process shall, upon receiving a copy of the assignment or of the receiving order certified by the trustee as a true copy thereof, forthwith deliver to the trustee all the property of the bankrupt in his hands.
>
> (3) Where the sheriff has sold the property of the bankrupt or any part thereof, he shall deliver to the trustee the money so realized by him less his fees and the costs referred to in subsection (2) of section 41."

713 Once a proposal has been lodged with a trustee the responsibility for the procedures that follow leading to its acceptance or rejection rest on his shoulders. One of the first steps he should take is to file the proposal with the official receiver. This is particularly important when the proposal is lodged by an insolvent person as it fixes the date of the proposal for all purposes of the Act. The authority for filing a copy of the proposal with the official receiver is found in subsection (1) of section 35, which reads as follows:

"35(1) Where an insolvent person makes a proposal, the trustee shall file a copy thereof with the official receiver and the time of the filing of the proposal shall constitute the time of the determination of the claims of the creditors and for all other purposes of this Act."

This is supplemented by section 82A of the Bankruptcy Rules to provide for the filing of the proposal of a bankrupt with the official receiver.

"82A Where a trustee has received a proposal from a bankrupt, he shall file a copy thereof with the official receiver."

Also section 57 of the Bankruptcy Rules requires the trustee to send a notice of the proposal to the registrar.

714 As soon as is conveniently possible after accepting a proposal from a debtor, the trustee must convene a meeting of the creditors to consider it. As the official receiver is to chair the meeting he should supply the trustee with a date for the meeting which will be at least ten days following the sending of the notice of the meeting to the creditors and the Superintendent of Bankruptcy.

715 In view of the provisions of subsection (1) of section 38 of the Act which states that the provisions of the Bankruptcy Act, insofar as they are applicable, apply mutatis mutandis to proposals, it might appear that the publishing requirement of section 68(3) has ruled however in In Re Turgeon, 2 C.B.R. (N.S.) - 27, that the duties of the trustee under a proposal were governed by section 28 of the Act and the provisions of section 68(3) and (4), requiring publication in the case of a bankruptcy, were not made applicable by virtue of section 38(1).

716 Between the time when the proposal is lodged with the trustee and the date of the meeting of creditors to consider it, subsection (5) of section 27 of the Act requires the trustee to make such an appraisal and investigation of the affairs and property of the debtor as to enable him to estimate with reasonable accuracy the financial situation of the debtor. He must also ascertain the cause of the debtor's financial difficulty and report the results of his findings to the meeting of creditors.

717 It has been deemed desirable that the meeting of the creditors to consider a proposal be chaired by the official receiver. As indicated above, he should, therefore, supply the trustee with the date, time and place of this meeting as soon as possible after being notified of the proposal. The conduct of the meeting is very similar to that of the first meeting of creditors pursuant to a bankruptcy.

There are some essential differences such as those relating to voting which will be discussed.

718 As in a meeting of creditors, pursuant to a bankruptcy, a creditor who has proved his claim may attend and vote in person or he may authorize some other person to vote as his proxy. Section 30 of the Act, however, also provides a further alternative. It reads as follows:

> "30. Any creditor who has proved his claim may assent to or dissent from the proposal by a letter to that effect addressed by registered mail to the trustee prior to the meeting and any assent or dissent if received by the trustee at or prior to the meeting has effect as if the creditor had been present and had voted at the meeting."

The letter referred to in this section is called a voting letter. Section 28(1)(f) requires the trustee to send a form voting letter to every known creditor and to the Superintendent. The form to be used by the trustee is number 37 of Schedule B to the Bankruptcy Rules. While this is the form of voting letter to be sent by the trustee, section 30 does not indicate that this form must be used by the creditor when making use of the provisions of that section.

719 The main purpose of the meeting, of course, is to provide the opportunity for the creditors to accept or reject the proposal. Section 31(1) of the Act provides that the creditors may by special resolutions resolved to accept the proposal as made or as altered or modified at the meeting or any adjournment thereof.

720 The term "special resolution" is defined in the Act as follows:

> "2. (t) 'special resolution' means a resolution decided by a majority in number and three-fourths in value of the creditors with proven claims present, personally or by proxy, at a meeting of creditors and voting on the resolution;"

From this it will be observed that where a special resolution is necessary the method of calculating votes as set out in section 81 of the Act is not used. This point is emphasized by the Superior Court of Quebec in In Re Jobin - 10 C.B.R. - 185 and by the Supreme Court of Ontario in In Re Windsor Home Furniture Company Limited - 34 C.B.R. - 53.

721 In the Windsor Home Furniture case Mr. Justice Smily pointed out that the interpretation of "special resolution" had been changed to make it clear that what was

required was a vote of a majority in number (counting by heads) and three-fourths in value of the creditors present and voting on the resolution. In his reasoning the learned judge said "In enacting the present provisions and adopting the present wording, the legislature is to be assumed to have had knowledge of the interpretation placed upon previous provisions and wording by the court, and in restoring the words "in number" it may very well have wished to clear up any doubt as to whether the previous dropping of the words had the significance referred to by Orde, J. in In Re Bluebird Fashion Shops Limited, 2 C.B.R. - 36. It may be noted also in passing that the present wording changing "a majority of all the creditors and holding three-fourths in value of the creditors' including the dropping of the word "all" referred to in itallics by Mr. Justice Urquhart in In Re Steckley - 24 C.B.R. - 186, the legislature intended to clear up the difficulty he apparently found and to make it clear that the words "three-fourths in value of the creditors" as well as the words "a majority in number" are governed by the words following, namely "present ..... at the meeting of creditors".

It is important to keep the provisions of section 30 in mind regarding voting by letter.

722 It will be noted that the Bankruptcy Rules provide Form 38 which sets out the resolution for acceptance of the proposal and requires that it be signed by all creditors voting on the resolution. There is no doubt but that this form should be used at the meeting of creditors and the official receiver should see that all voting creditors sign it. It was held however by the King's Bench Court of New Brunswick in In Re McIntyre, 2 C.B.R. - 396 that the acceptance of the proposal by the creditors could be approved by the court even though this form was not signed. If it was clear to the court that the requisite number of creditors with claims of sufficient value have assented to a proposal the court could overlook the irregularity where no substantial injustice is caused thereby by virtue of subsection (9) of section 144 of the Act.

723 There are restrictions in the Act on the voting for the acceptance of a proposal. Section 31(3) provides that a creditor who is related to the debtor may vote against but not for the acceptance of the proposal. Subsection (4) of section 31 states that the trustee, as a creditor, may not vote on the proposal.

724 There are, of course, other matters relative to the proposal that may be dealt with at the meeting and call for a vote of the creditors. These are resolved by ordinary resolution. An example is set out in section 29 of the Act providing for further investigation and examination.

"29. Where the creditors by ordinary resolution at the meeting at which a proposal is being considered so require, the meeting shall be adjourned to such time and place as may be fixed by the chairman,

(a) to enable a further appraisal and investigation of the affairs and property of the debtor to be made, or

(b) for the examination under oath of the debtor or of such other person as may be believed to have knowledge of the affairs or property of the debtor, and the testimony of the debtor or such other person, if transcribed, shall be placed before the adjourned meeting or may be read in court upon the application for the approval of the proposal."

Section 32 provides that the creditors may include with the consent of the debtor such provisions or terms in the proposal with respect to the supervision of the affairs of the debtor as they deem advisable. These decisions would be arrived at by ordinary resolution.

There is provision in section 32A for the creditors to appoint one or more, but not exceeding five, inspectors of the estate of the debtor. These would be appointed by ordinary resolution.

725 Section 31(1) and section 32 of the Act provides for the altering and modification of a proposal by the creditors with the consent of the debtor. The problem created when this is done relates to those creditors voting by letter pursuant to section 30. Generally, changes made by the creditors are to the benefit of the creditors generally so the voting letters could be counted. However, the court has held in In Re Allen Theatres Limited, 3 C.B.R. - 147 that where the proposal sent to the creditors when calling the meeting is entirely different from that submitted and voted upon, the absent creditors should not be bound by the new terms of which they had no notice. In these circumstances the better practice would appear to be to adjourn the meeting and instruct the trustee to circulate the amended proposal with new voting letters.

726 A proposal that has been accepted by the creditors at a duly constituted meeting must be submitted by the trustee to the court for its approval at the earliest possible date. The procedure to be followed in such an application is set out in section 33 of the Act which reads as follows:

"33. Upon acceptance of the proposal by the creditors, the trustee shall apply to the court forthwith for its approval and shall send notice of the hearing of the

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application by registered mail, not less than fourteen days before the date of the hearing, to the debtor, to every creditor who has proved his claim and to the Superintendent; and the trustee, not less than three days before the date of the hearing, shall file in the prescribed form a report to the court on the proposal and shall forward a copy to the Superintendent not less than ten days before the date of the hearing."

727 Generally speaking if the procedure leading up to the acceptance of the proposal by the creditors and the motion to the court have been correct, it will be approved. Subsection (8) of section 34 gives the court the authority, however, to either approve or refuse to approve the proposal. This authority is subject to subsection (4) of the same section which reads as follows:

"34(4) No proposal shall be approved by the court that does not provide for the payment in priority to other claims of all claims directed to be so paid in the distribution of the property of a debtor, and for the payment of all proper fees and expenses of the trustee on and incidental to the proceedings arising out of the proposal or in the bankruptcy."

728 In In Re Prud'homme, 14 C.B.R. - 380, the court held that although a debtor has committed a bankruptcy offence in poorly keeping his books, the court may exercise its discretion in confirming a composition if it is advantageous to the creditors.

729 There are circumstances, however, under which the court will refuse to approve the proposal. The court in In Re Gareau - 2 C.B.R. - 265 ruled that notwithstanding the approval by the statutory majority of creditors of the debtor's proposal composition and the favourable report of the trustee thereon, the onus is upon the debtor on the submission of the proposal to the court to show that the proposal is reasonable and calculated to benefit the general body of creditors. Approval is properly refused where no substantial security is offered for the deferred payments and the cash payment under the composition would, in effect, be nothing more than a transfer for distribution in payment of preferred claims of the fund accumulated in the hands of the trustee in carrying on the business under the direction of the inspectors since the making of the assignment for the creditors.

The court went on to point out that the controlling power of the court to reject a composition proposal is intended to protect creditors against their own recklessness in voting for its approval; to prevent a majority of creditors from dealing recklessly, not only with their own property, but with that of the minority and to enforce a more careful and moral conduct on the part of debtors.

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730 Another instance of the court withholding its approval was In Re The Man With The Axe Limited, 2 C.B.R. (N.S.) - 8. Here the majority of the creditors favoured a proposal which would give them thirty cents on the dollar since it appeared that in bankruptcy they would only obtain between three cents and ten cents on the dollar. The approval of the proposal was opposed in court by a minority of creditors who proved that the conduct of the debtor deserved condemnation. The debtor had failed to disclose all its assets, had traded knowing itself to be insolvent, had paid salaries to persons who performed no work, and was guilty of a substantial preferential payment and had produced a false financial statement. It was held that the proposal was not in the public interest and therefore, pursuant to section 34(3) and in the exercise of the court's discretion, the proposal should be refused. It was the duty of the court to take into consideration not only the wishes and interests of the creditors (majority and minority creditors) but also the conduct of the bankrupt, the interest of the public and future creditors, in other words the requirements of commercial morality.

731 In the 1966-67 session, Parliament provided an automatic procedure to be followed when the creditors refused to accept a proposal by an insolvent person. It provided that in such a situation the trustee must, if a quorum exists, call a meeting of the creditors present at the time, which meeting would be considered to be a first meeting of creditors under the bankruptcy deemed to be in existence in the refusal of the proposal. These provisions are found in section 32B(1) of the Act which reads as follows:

> "32B(1) Where the creditors refuse to accept a proposal by an insolvent person a copy of which has been filed with the official receiver as required by section 35, the debtor shall be deemed to have made an assignment on the day the proposal was so filed; and the trustee shall either
>
> (a) forthwith call a meeting of the creditors present at that time, which meeting shall be deemed to be a meeting called under section 68; or
>
> (b) if no quorum exists for the purposes of paragraph (a), call a meeting under section 68 as soon as practicable;
>
> and at either meeting the creditors may, by ordinary resolution, notwithstanding subsection (1) of section 6, appoint or substitute another licensed trustee for the trustee appointed under the proposal or affirm the appointment of that trustee."

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732 If there is a dispute as to the value of a claim that voted against the proposal and the matter is brought before the court, the official receiver should not issue his certificate of assignment and the trustee should not call the meeting of creditors, as set out in section 32B, until the matter of the disputed vote is determined by the court. This principle is set out in a decision of the Court of Queen's Bench of Quebec in National Bowling Centres Ltd. et al v. Brunswick of Canada - 11 C.B.R. (N.S.) - 219. In this decision the court said that in order that section 32B of the Bankruptcy Act should apply, it is necessary that the proposal should have been finally rejected. As long as an appeal is brought by a claimant to determine whether it is a creditor authorized to vote at the meeting called to consider the proposal and, if the answer is affirmative, for what amount, has not been decided, the proposal cannot be considered as being rejected. In the interval such an appeal has the effect of suspending subsequent proceedings.

733 Subsection (2) of section 32B provides that where the creditors refuse to accept the proposal described in subsection (1), the trustee shall forthwith file a report thereof in the prescribed form with the official receiver and the Superintendent. The official receiver shall thereupon issue a certificate of assignment. This certificate has the same effect for the purposes of the Bankruptcy Act as an assignment filed pursuant to section 26. The form to be used for this certificate is Form 40A of Schedule B to the Bankruptcy Rules. The report by the trustee is to follow Form 39A.

734 The situation becomes a bit more complicated if the proposal that was turned down by the creditors was made subsequent to the filing of a petition for a receiving order but prior to the hearing on the petition. Section 32B states that on refusal of the proposal the debtor is deemed to have made an assignment on the date the proposal was filed with the official receiver. As indicated above, the section also provides for the first meeting of creditors under the deemed bankruptcy to be held at once. The problems that arise are, first, what precedence will an order on the hearing of the petition for a receiving order take in relation to the deemed assignment and, secondly, if the receiving order takes precedence over the deemed assignment what is the effect of the section 32B meeting of creditors?

735 This problem was discussed in In Re Lingen Trailer and Manufacturing Company Limited - 13 C.B.R. (N.S.) - 197. On behalf of the creditors it was agreed that if the deemed assignment was allowed to stand the date of bankruptcy would be the date of the filing of the proposal rather than the earlier date of the issuance of the petition for a receiving order (section 41(4)). With this the judge agreed and ordered the deemed assignment set aside and a receiving order made.

736 The first meeting of creditors having been held pursuant to section 32B, at which meeting the trustee was confirmed and inspectors appointed, the judge further ordered that such appointments be confirmed.

737 In the instance where the creditors have accepted the proposal but the court has refused to approve it, subsection (11) of section 34 of the Bankruptcy Act again provides that the trustee will so notify the official receiver and the Superintendent. The official receiver will thereupon issue a certificate of assignment in the prescribed form, which has the same effect for the purpose of the Bankruptcy Act as an assignment filed pursuant to section 26. The report of the trustee in this case is to be in Form 42A and the certificate of the official receiver in Form 42B.

738 Subsection (10) of section 34 of the Bankruptcy Act has provisions somewhat similar to section 32B(1) but with a few basic differences. It sets out that where the proposal is not approved by the court the debtor will be deemed to have made an assignment on the day that the proposal was filed. It goes on to provide that the trustee shall forthwith call a meeting of the creditors under section 68.

One important feature of this subsection is that it provides for the appointment of a trustee other than the trustee under the proposal by the creditors at the meeting by ordering resolution, subsection (1) of section 6 of the Bankruptcy Act notwithstanding.

739 If the debtor does not live up to the terms of the proposal that has been accepted by the creditors and approved by the court, the Act provides that it may be annulled. Section 36(1) of the Bankruptcy Act reads as follows:

> "36(1) Where default is made in the performance of any provision in a proposal, or where it appears to the court that the proposal cannot continue without injustice or undue delay or that the approval of the court was obtained by fraud, the court may, on application thereto, with such notice as the court may direct to the debtor, and, if applicable to the trustee, and to the creditors, annul the proposal."

740 On an order being made by the court annulling a proposal, subsection (6) of section 36 provides as follows:

> "36(6) Where an order annulling the proposal described in subsection (5) has been made, the trustee shall forthwith file a report thereof in the prescribed form with the official receiver and the Superintendent; and the official receiver shall thereupon issue a certificate of assignment in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed pursuant to section 26."

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The certificate of assignment issued by the official receiver shall be in Form 43A of the Bankruptcy Rules.

741 Section 84A(1) of the Bankruptcy Rules provides that when the official receiver issues a certificate of assignment pursuant to section 32B, 34 or 36 of the Act, he shall forthwith mail it to the trustee acting in re the proposal, by registered mail, a copy of the certificate, and file in court an original copy of the said certificate. Subsection (2) of section 84A provides that the trustee shall, upon receipt of a copy of the certificate, serve upon the bankrupt a copy thereof bearing the endorsement of the official receiver.

742 Parliament in the 1966-67 amendments to the Bankruptcy Act provided that an assignment made subsequent to a proposal shall relate back to the date of filing the proposal. This is set out in section 36A of the Act which reads as follows:

> "36A Where an insolvent person in respect of whom a copy of a proposal has been filed under section 35 makes an assignment at any time before the court has approved the proposal so filed, the date of the assignment shall be deemed to be the date on which a copy of the proposal was so filed."